COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP672-CR **Cir. Ct. No. 2001CF122**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR E. HOLM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Forest County: ROBERT A. KENNEDY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Victor Holm, pro se, appeals a judgment entered upon his guilty plea convicting him of first-degree intentional homicide as party to a crime. Holm also appeals the order denying his motion for postconviction relief. Holm raises numerous challenges to his guilty plea. He additionally claims (1) the

State engaged in prosecutorial misconduct; (2) the circuit court erred by denying his pretrial motion to suppress statements; and (3) he was denied the effective assistance of appellate counsel. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Holm with first-degree intentional homicide as party to a crime, arising from the shooting death of Lance Leonard. The circuit court denied Holm's pre-trial motion to suppress statements he made to law enforcement officers. After two days of jury trial testimony, the parties entered into a plea agreement. In exchange for Holm's guilty plea to the crime charged, the State agreed to take no position with respect to Holm's eligibility for release to extended supervision. Holm was convicted upon his guilty plea, and the court imposed a sentence of life in prison without eligibility for release to extended supervision. Following a ***Machner***[1] hearing, the court denied Holm's postconviction motion for plea withdrawal, and this appeal follows.

DISCUSSION

A. Motion for Plea Withdrawal

¶3 Holm argues that the circuit court erred by denying his motion to withdraw his guilty plea based upon claims of ineffective assistance of trial counsel. Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. ***State v.***

[1] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Spears, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A motion that is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Holm has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

1. Ineffective Assistance of Counsel

¶4 Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In order to prove ineffective assistance, Holm must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶5 To prove prejudice, Holm must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). This claim presents a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. The circuit court's factual findings will not be disturbed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial, however, are questions of law that we review independently. ***Id.***

¶6 Although Holm raises various claims of ineffective assistance of counsel, only three of these claims were raised in the trial court. Specifically, Holm argued that counsel was ineffective for (1) allegedly misinforming Holm

about the availability of a coercion defense; (2) failing to properly explain party to a crime liability; and (3) failing to object to the State's alleged breach of the plea agreement.[2] We are not persuaded.

¶7 Holm contends that his counsel informed him he could not raise a coercion defense at trial because counsel had failed to give the State pretrial notification of Holm's intent to do so. Holm therefore alleges that his inability to raise coercion as a defense caused him to forego trial and plead guilty. At the ***Machner*** hearing, however, trial counsel denied telling Holm that they had to abandon the coercion defense because counsel failed to provide pretrial notice of the defense. Counsel testified that although he was fully prepared to make a good faith effort in presenting this defense, he anticipated the State would object to a coercion defense based on an argument that the coercing party was a co-conspirator. The circuit court made an express finding that trial counsel was more credible than Holm. This court must be sensitive to the trial court's assessment of credibility, and we will uphold that factual determination unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305. The trial court's assessment is supported by the record, and we will not disturb it.

[2] For the first time on appeal, Holm raises a number of conclusory allegations of ineffective assistance of trial counsel. Specifically, Holm claims trial counsel: (1) had a potential conflict of interest; (2) was unprepared for the preliminary hearing; (3) reserved his opening statement; (4) failed to challenge Holm's competency to stand trial; (5) failed to raise an NGI defense; (6) stipulated to the State's motion in limine; (7) failed to negotiate a plea agreement prior to trial; and (8) failed to submit a jury instruction on intoxication. Holm has waived these claims of ineffective assistance of trial counsel by failing to first raise them in the trial court. By failing to include these issues in his postconviction motion, Holm deprived the trial court of an opportunity to decide whether to address the issues at the ***Machner*** hearing or determine that the record conclusively demonstrated that Holm was not entitled to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Moreover, a valid guilty plea waives all non-jurisdictional defects and defenses. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

¶8 Holm also argues counsel was ineffective for failing to properly explain the consequences of pleading guilty to first-degree intentional homicide as party to a crime. Specifically, Holm claims that trial counsel told him if Holm pled guilty, the sentencing court could not sentence him as if he had been the "trigger man." As noted below, *infra* ¶12, the record demonstrates that both trial counsel and the trial court informed Holm of the consequences of pleading guilty as party to a crime. Even if Holm mistakenly believed that the sentencing court could not make a finding that he was the "trigger man," such a belief did not prejudice Holm as the sentencing court indicated it was irrelevant to the sentence imposed. In denying Holm's postconviction motion, the court reiterated: "[A]s I said at the time of sentencing, [Holm] did so many acts aiding and abetting the crime, helping dig the grave, so on and so forth, I don't remember all of them, but he was involved up to his eyeballs, whether he was the trigger man or not."

¶9 Holm argues trial counsel was ineffective for failing to challenge the State's breach of the plea agreement. At the plea hearing, the prosecutor delineated the terms of the agreement:

> Judge, basically the agreement was that there would be presentence investigation completed. At the sentencing, I can present any evidence I deem appropriate to provide the sentencing court with information. I will remain silent and take no position with respect to extended supervision release and the defendant must testify truthfully against any co-defendant or co-conspirators in the homicide of Mr. Leonard.

Holm does not challenge the accuracy of the terms of the agreement as stated by the prosecutor but, rather, claims the agreement required the prosecutor to affirmatively inform the sentencing judge that Holm had complied with the agreement by truthfully testifying against his co-conspirators. The agreement, however, by its stated terms, did not require the prosecutor to inform the

sentencing court of Holm's cooperation with the State. In any event, at sentencing, the State recited the terms of the agreement and never claimed Holm breached the agreement, thus implying that Holm had testified against his co-conspirators. Because we conclude the State did not breach the plea agreement, Holm can show neither deficient performance nor prejudice necessary to establish ineffective assistance of his trial counsel.

2. Factual Basis for Plea, Understanding of Party to a Crime

¶10 For the first time on appeal, Holm also contends the trial court lacked a factual basis for accepting his guilty plea and the court failed to read him the jury instruction for party to a crime until after the court accepted his guilty plea. Generally, this court declines to decide issues raised for the first time on appeal. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). Nevertheless, addressing these arguments on their merits, they fail.

¶11 In order to determine whether a defendant committed a charged crime, the circuit court must establish a factual basis that the defendant committed the charged crime. WIS. STAT. § 971.08(1)(b).[3] When a trial court finds sufficient factual basis to support a guilty plea, we will not upset that finding "unless it is contrary to the great weight and clear preponderance of the evidence." ***State v. Higgs***, 230 Wis. 2d 1, 11, 601 N.W.2d 653 (Ct. App. 1999). At the plea hearing, defense counsel indicated: "I believe that there is a sufficient factual basis. There is a basis for contesting the charges, but I also believe that if this matter goes to be determined by the jury, that there is a substantial likelihood that my client would

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

be found guilty." When asked whether Holm disagreed with his counsel's comments, Holm replied, "No." Holm did not deny his involvement with the homicide nor dispute that the killing was intentional. Based on the preliminary hearing testimony and the two days of trial testimony, the court properly determined there was a sufficient factual basis for Holm's plea. We discern no error.

¶12 With respect to Holm's claim that he did not understand the "party to a crime" designation, both the court and defense counsel explained that party to a crime subjected Holm to possible life in prison without the possibility of release to extended supervision regardless of whether he was the "trigger man." During the plea colloquy, the court acknowledged that the concept of party to a crime often confuses people and explained to Holm: "[U]nder Wisconsin law, a party to a crime is guilty of the crime and the consequences and penalties, the maximums anyway, are the same [regardless] whether you actually committed it or whether you were a party to committing it." After confirming Holm's understanding of this concept, the court further informed Holm:

> Now, when we get into the sentencing phase, the court, meaning the judge, has some options. One of them is mandatory life imprisonment without the possibility of parole. Others are life imprisonment but with the possibility of parole at different periods of years and so that would have to come from the bench. Decisions would be made before sentencing, or during sentencing rather, as to what would be done. So it's not clear at this point what your actual chance of getting out of prison would be.

Holm acknowledged that he understood. After the conclusion of the plea hearing, the court read the party to a crime instruction to Holm to again confirm he understood it. Holm indicated his trial counsel explained party to a crime prior to the plea hearing and his counsel's explanation was consistent with the instructions

the court read. Thus, the record does not support Holm's claim that he did not understand the party to a crime designation.

¶13 Based upon the foregoing, we conclude the trial court properly denied Holm's postconviction motion for plea withdrawal.

B. Prosecutorial Misconduct

¶14 Holm argues the State engaged in misconduct by knowingly presenting what he claims is perjured testimony of Beth Mrazik. Specifically, Holm challenges discrepancies between dates recited in Mrazik's trial testimony as compared to her statements to police. Holm waived this issue by failing to first present it to the trial court. He further waived the issue by ultimately pleading guilty. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53 (valid guilty plea waives all non-jurisdictional defects and defenses). In any event, the prosecutor questioned Mrazik about discrepancies between her police statement and subsequent trial testimony, and Mrazik indicated she had been confused. "Mere discrepancies in the testimony that are most likely attributed to defects of memory or mistake are no basis for rejecting a witness's testimony entirely." ***State v. Robinson***, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988).

C. Pretrial Motion to Suppress Statements

¶15 Holm contends the trial court erred by denying his pretrial motion to suppress statements he alleges were obtained in violation of ***Edwards v. Arizona***,

451 U.S. 477 (1981).[4] In reviewing an order allowing statements into evidence, this court upholds the trial court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). However, the application of constitutional principles to the facts as found is a question of law this court decides independently. *See* ***State v. Patricia A. P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995). In ***Edwards***, the United States Supreme Court held that if a suspect requests counsel at any time during the interview, the suspect is not subject to further questioning until a lawyer has been made available or the suspect reinitiates conversation. *See* ***Davis v. United States***, 512 U.S. 452, 458 (1994).

¶16 In his pretrial suppression motion, Holm alleged that sometime during the interrogation, he stated "about time for a lawyer." He thus argued that the police were prohibited from taking any statement from him after this unequivocal invocation of his right to counsel. After a hearing on Holm's motion, the trial court determined that the police had not violated ***Edwards***. Holm testified at the hearing that he spoke with the police captain "[u]ntil he started accusing me of being the trigger man and murderer, all that. Then I asked for an attorney." The prosecutor followed with: "Then the next day you decided you better cut yourself a deal, correct?" Holm confirmed that he submitted a request to speak with the district attorney and an officer. The record supports the conclusion that all questioning ceased after Holm requested an attorney and did not begin again

[4] In his brief, this argument is found under a heading entitled "Was Warrantless Arrest Illegal." Despite this caption, Holm provides no legal argument to support this claim. Rather, this section of Holm's brief addresses whether his statements to police were obtained in violation of ***Edwards v. Arizona***, 451 U.S. 477 (1981). This court declines to address issues raised on appeal that are inadequately briefed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

until Holm re-initiated conversation. Because Holm voluntarily re-initiated conversation with the police, the trial court properly concluded there was no ***Edwards*** violation necessitating suppression of Holm's statements.

D. Ineffective Assistance of Appellate Counsel

¶17 Finally, Holm contends he was denied effective assistance of appellate counsel because he "was left to try and bring [his] own direct appeal … without the aide of counsel." We are not persuaded. After representing Holm at postconviction proceedings, counsel informed Holm that he determined there were no meritorious issues for appeal. After being informed of his options pursuant to ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-07, 516 N.W.2d 362 (1994), Holm moved to discharge counsel and proceed pro se. By order dated March 8, 2004, this court granted Holm's motion to discharge counsel, indicating:

> We will allow Holm to discharge [counsel]. The documents filed by [counsel] along with [Holm's] motion to withdraw establish that Holm is fully aware of his duties as a pro se appellant and that he appreciates the difficulty of the task he has undertaken. Holm's motion establishes that he is competent to represent himself.

¶18 Because Holm was informed of his options, warned of the difficulties and disadvantages of proceeding pro se and, nevertheless, chose to discharge counsel and pursue his appeal pro se, he has no claim for ineffective appellate counsel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.