COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP890-CR **Cir. Ct. No. 2005CF17**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL A. LAMBERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Crawford County: GEORGE S. CURRY, Judge. *Reversed and cause remanded*.

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 BRIDGE, J. Carl Lambert appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. Following a plea agreement, Lambert pled guilty to two offenses. He argues that as to one of them, first-degree recklessly endangering safety, he did not enter his

plea knowingly, intelligently, and voluntarily, and should therefore be allowed to withdraw it. We conclude that the record establishes that although the circuit court articulated the elements of the offense during the plea colloquy with Lambert, it did not ascertain whether Lambert understood them. We therefore reverse the judgment and order of the circuit court as to this offense and remand the matter for further proceedings.

BACKGROUND

¶2 Lambert was charged with, among other things, one count of endangering safety by use of a dangerous weapon in violation of WIS. STAT. § 941.20(2)(a) (2007-08)[1] and one count of first-degree recklessly endangering safety in violation of WIS. STAT. § 941.30(1).[2] A plea agreement was reached and Lambert ultimately pled guilty to these charges. Following a plea hearing, the circuit court accepted Lambert's plea and sentenced him to six years of initial confinement and six and one-half years of extended supervision for the first-degree recklessly endangering safety offense.[3]

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[1] WISCONSIN STAT. § 941.20(2)(a) states, "Whoever does any of the following is guilty of a Class G felony:

(a) [i]ntentionally discharges a firearm into a vehicle or building under circumstances in which he or she should realize there might be a human being present therein…."

All references to the Wisconsin statutes are to the 2007-08 version unless otherwise noted.

[2] WISCONSIN STAT. § 941.30(1) states, "**First-degree recklessly endangering safety**. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class F felony."

[3] The court also sentenced Lambert to four years of initial confinement and four years of extended supervision for the endangering safety offense by use of a dangerous weapon.

¶3 Subsequent to his sentencing, Lambert filed a postconviction motion seeking to withdraw his plea to the recklessly endangering safety charge. He alleged that the court did not fully explain the elements of first-degree recklessly endangering safety because the court did not define "criminally reckless conduct." Lambert also alleged that his plea to the first-degree recklessly endangering safety charge was not knowingly, intelligently, and voluntarily entered because the court failed to accurately inform him of the maximum penalty he faced, and that he was not otherwise aware of it. The circuit court denied the motion following a hearing. Lambert appeals. His appeal is limited to a challenge to his plea to first-degree recklessly endangering safety; no challenge is made to the validity of his plea to the other charge.

STANDARD OF REVIEW

¶4 When a guilty plea is not knowing, intelligent and voluntary, a defendant is entitled to withdraw it as a matter of right because such a plea violates fundamental due process rights. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906**.** Whether a defendant's plea was knowing, intelligent and voluntary presents a question of constitutional fact. ***Id.*** We review the circuit court's findings of historical and evidentiary facts and accept them unless they are clearly erroneous. ***Id.*** We determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. ***Id.***

DISCUSSION

¶5 Lambert contends that he did not fully understand the elements of the crime of first-degree recklessly endangering safety, and thus seeks to withdraw his guilty plea to that crime on the basis that it was not knowingly, intelligently,

and voluntarily entered. For a plea to be knowing, intelligent, and voluntary, a defendant must fully understand the charges against him or her. ***Brown***, 293 Wis. 2d 594, ¶29. *See also* WIS. STAT. § 971.08(1)(a) (setting out the circuit court's duties when conducting a plea colloquy).[4] Although circuit courts are "not expected to explain every element of every charge in every case" when ascertaining whether a defendant understands the charges against him or her, courts are expected to establish in each case that the defendant understands every element of the charges to which he or she pleads. ***Id.***, ¶58.

¶6 In fulfilling this obligation, the court "must 'do more than merely record the defendant's affirmation of understanding.'" ***Id.*** (citing ***State v. Bangert***, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986)). Perfunctory questioning of the defendant by the court and perfunctory affirmative responses by the defendant that he or she understands the nature of the offense, "without an *affirmative showing* that the nature of the crime has been communicated to him [or her] or that the defendant has at some point expressed his knowledge of the nature of the charge," is insufficient. ***Id.*** (citing ***Bangert***, 131 Wis. 2d at 268-69 (emphasis added)).

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[4] WISCONSIN STAT. § 971.08 states in relevant part:

> **Pleas of guilty and no contest; withdrawal thereof.** (1) Before the court accepts a plea of guilty or no contest, it shall …
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

¶7 When a defendant challenges a plea, the defendant bears the initial burden of making a prima facie showing that his or her plea was accepted without the court's conformance with WIS. STAT. § 971.08 or other mandatory duties. ***Bangert***, 131 Wis. 2d at 274. The defendant must also allege that he or she did not know or understand the information that should have been provided at the plea hearing. ***Id.*** The burden then shifts to the State to prove by clear and convincing evidence that, notwithstanding deficiencies at the plea hearing, the defendant in fact possessed the constitutionally required understanding and knowledge necessary for him or her to enter a voluntary and intelligent plea. ***Id.*** at 274-75.

¶8 It is undisputed that Lambert met his initial burden. The State therefore had the burden to prove that Lambert knowingly, intelligently, and voluntarily entered his plea. To meet this burden, the State could rely on the totality of the evidence, including the testimony of Lambert and defense counsel, the plea questionnaire and waiver of rights form, and transcripts of prior hearings. *See* ***Brown***, 293 Wis. 2d 594, ¶40.

¶9 Before Lambert entered his plea to first-degree recklessly endangering safety, the circuit court engaged in a colloquy to ascertain whether Lambert was doing so knowingly, intelligently, and voluntarily. Referring to the plea questionnaire and waiver of rights form, the court asked Lambert whether his was the signature on the back of the form and whether he could read defense counsel's handwriting on the form. Lambert answered yes to both questions. On the form, defense counsel had written that the maximum penalty Lambert faced was twenty-two years' imprisonment and/or a fine. Counsel had also written elements of the offense on the form, which were largely illegible.

¶10 In response to a question by the court, defense counsel stated "I went over the elements with him." Although the State characterizes this exchange as counsel's testifying that he "explained" the elements of the criminal charge to his client, we disagree that the only reasonable inference from the term "going over" the elements is that they were explained; it is equally reasonable to infer that the elements of the offense were merely recited. The record reveals nothing further regarding what "[going] over the elements" entailed.

¶11 The court then informed Lambert of the elements of the offense to which he was pleading guilty. The exchange between Lambert and the court was as follows:

> THE COURT: Okay. For first-degree recklessly endangering safety, if you had not pled guilty, the State would have had to prove to a jury beyond a reasonable doubt each element of the crime. The first element is that you endangered the safety of another human being. Second, you endangered the safety of another human being by criminally reckless conduct. Third, the circumstances of your conduct showed utter disregard for human life.
>
> Do you understand if I accept your plea of guilty on that charge which is Count 5, State will not have to prove those things to a jury beyond a reasonable doubt?
>
> DEFENDANT: Yes.
>
> THE COURT: What?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay.

Although the court asked Lambert if he understood that the State would not have to prove the elements beyond a reasonable doubt if he pled guilty to the charge, the court did not inquire as to whether Lambert understood the elements of the crime.

¶12 At the postconviction hearing, Lambert testified as follows:

> Q. Now at the time of the Preliminary Hearing you did know that you were pleading guilty to some crimes, correct?
>
> A. Right.
>
> Q. Do you know how many?
>
> A. Two.
>
> Q. And do you know what those crimes were?
>
> A. Endangerment, safety, first-degree, and reckless use of a firearm.
>
> Q. Do you recall talking with your attorney about what those crimes were?
>
> A. No.
>
> Q. You don't remember him going over with you now your pleading to these crimes and this is what they are?
>
> A. Well, he told me what I was pleading to but he didn't get specific on what the crimes were.
>
> Q. Okay. Did you know what the State would have to prove if you had a trial on those crimes?
>
> A. No, I didn't.

Lambert's attorney also testified, but his testimony focused on the nature of his conversations with his client about the length of the sentence Lambert might receive. The record contains no reference to any conversations counsel had with Lambert regarding the elements of the offense or whether Lambert understood the nature of the crime charged.

¶13 The State argues that the plea waiver document, defense counsel's reference to going over the offense and the plea colloquy together adequately apprised Lambert of the elements of the criminal violation with which he was

charged. We disagree. Viewed in its entirety, the record demonstrates that Lambert was provided with a recitation of the elements in various contexts, but it does not reflect an affirmative showing, as required by ***Brown***, that Lambert had a full understanding of the charges against him at the time he entered his plea.

¶14 Although Lambert's primary argument is that the circuit court failed to define *one* of the essential elements of the offense of first-degree recklessly endangering safety, we conclude that the record establishes that the court failed to ascertain whether Lambert understood *any* of the elements of the offense. Because the State has failed to present affirmative evidence that proves clearly and convincingly that Lambert understood the elements of the offense of first-degree recklessly endangering safety, we conclude the State has not met its burden of proving that Lambert's plea was knowingly, intelligently, and voluntarily made. Lambert is therefore entitled to withdraw his plea to the first-degree recklessly endangering safety offense.[5]

¶15 Relying on ***State v. Briggs***, 218 Wis. 2d 61, 73-74, 579 N.W.2d 783 (Ct. App. 1998), in a footnote to his brief-in-chief, Lambert claims that because his case was resolved according to a plea agreement, he is entitled to withdraw his guilty pleas for both charges even though he has challenged only one charge on appeal. Lambert raises this argument for the first time on appeal. The State does not provide a substantive response. The parties are free to argue the issue on

[5] Because this reason for permitting Lambert to withdraw his plea to the crime of first-degree recklessly endangering safety is dispositive, we do not reach his remaining argument that he should be permitted to withdraw the plea because he was misinformed about the maximum sentence to which he was exposed. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

remand so that the circuit court may exercise its discretion in the matter as is required by ***Briggs***.

CONCLUSION

¶16 For the reasons discussed above, Lambert is entitled to withdraw his plea to the recklessly endangering safety offense. Accordingly, the judgment and order of the circuit court are reversed and remanded for further proceedings consistent with this opinion.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.