COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1139-CR **Cir. Ct. No. 2007CF1027**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. DAUER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: RALPH M. RAMIREZ and ROBERT G. MAWDSLEY, Judges. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Christopher J. Dauer appeals from a judgment convicting him of second-degree recklessly endangering safety, false

imprisonment and second-degree sexual assault. He also appeals from an order denying his motion for postconviction relief by which he sought to withdraw his plea on the basis that the plea questionnaire stated the elements for first-, rather than second-, degree reckless endangerment, such that he pled to one additional element and that counsel rendered ineffective assistance for having misadvised him. We conclude Dauer understood the elements sufficiently to enter a valid plea and was not prejudiced by the surplus information. We affirm.

¶2 High on crack cocaine and armed with a knife, Dauer bound and gagged his girlfriend with duct tape and sexually assaulted her over the next four hours, threatening to "go after" her two children if she said anything. Pursuant to a negotiated plea agreement, Dauer pled no-contest to second-degree sexual assault as a repeater, second-degree recklessly endangering safety and false imprisonment. Two additional second-degree sexual assault charges, also as a repeater, were dismissed and read in. The court imposed a thirty-year sentence, twenty years' initial confinement followed by ten years' extended supervision.

¶3 Dauer filed a motion for postconviction relief seeking to withdraw his pleas. He claimed his plea to second-degree recklessly endangering safety was not knowing, intelligent or voluntary because he was incorrectly advised as to the elements of the offense and that his counsel, Attorney Bridget Boyle, was ineffective for failing to correctly advise him.[1] Boyle conceded at the hearing on the motion that she advised Dauer of the elements of first-degree recklessly

[1] Dauer claimed his plea to the second-degree sexual assault count also was not knowing, intelligent or voluntary because he did not know the State had to prove that the sexual contact was with the intent to cause bodily harm or for the purpose of sexually degrading/humiliating the victim or sexually arousing/gratifying himself. He abandons that claim on appeal.

endangering safety. Second-degree recklessly endangering safety has two elements, while first-degree has the same two identical elements plus an additional one. *See* WIS JI—CRIMINAL 1345 and 1347. Dauer testified that had he known second-degree recklessly endangering safety had only two elements he "would have had to give [entering a plea] some thought." The court denied the motion because Dauer knew the essential elements of the offense and was not prejudiced by knowledge of an extra element. Dauer appeals.

¶4 A defendant who seeks to withdraw a no-contest plea after sentencing must prove by clear and convincing evidence that plea withdrawal is necessary to avert a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A defendant can meet this burden by showing that he or she did not knowingly, intelligently and voluntarily enter the plea, ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891, or was denied the effective assistance of counsel. ***State v. Rock***, 92 Wis. 2d 554, 558, 285 N.W.2d 739 (1979). Whether a plea was knowingly and intelligently entered presents a question of constitutional fact. ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997). We will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous. ***Id.*** We review constitutional issues independently of the circuit court's determination. ***State v. Harvey***, 139 Wis. 2d 353, 382, 407 N.W.2d 235 (1987).

¶5 The defendant has a two-part initial burden to make a prima facie case. ***State v. Jipson***, 2003 WI App 222, ¶7, 267 Wis. 2d 467, 671 N.W.2d 18. First, he or she must show that the court accepted the plea without conforming to

WIS. STAT. § 971.08 (2007-08)[2] or other mandatory procedures. ***Jipson***, 267 Wis. 2d 467, ¶7. Second, the defendant must merely allege that he or she did not know or understand the information that should have been provided at the plea hearing. ***Id.*** If the defendant satisfies this test, the burden then shifts to the State to show clearly and convincingly that, despite any shortcomings at the plea hearing, the defendant's plea nonetheless was knowingly, voluntarily and intelligently made. ***Id.*** The State may use the entire record or examine the defendant or defendant's counsel to shed light on the defendant's understanding or knowledge of information necessary to the entry of a voluntary and intelligent plea. ***State v. Bangert***, 131 Wis. 2d 246, 275, 389 N.W.2d 12 (1986).

¶6 Dauer argues that Boyle advised him that there were three elements to the reckless endangerment charge to which he was pleading when, in fact, there are two. He points out that the attachment to the plea questionnaire recited the three elements of first-degree reckless endangerment and that, rather than itself reviewing the elements with him at the plea hearing, the court asked only whether Boyle had "talk[ed] to [him] about [them]." Dauer also contends he was otherwise unaware that second-degree reckless endangerment has only two elements. We agree that Dauer established a prima facie case. Accordingly, the burden shifts to the State to show that despite the errors Dauer's plea nonetheless was knowingly, voluntarily and intelligently made. We conclude it was.

¶7 Second-degree recklessly endangering safety has two elements: (1) the defendant endangered the safety of another human being and (2) the defendant endangered the safety of another by criminally reckless conduct.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

WIS JI—CRIMINAL 1347. First-degree recklessly endangering safety has the same two elements plus an additional one: "The circumstances of the defendant's conduct showed utter disregard for human life." WIS JI—CRIMINAL 1345 (footnote omitted). Dauer contends that being advised of the "utter disregard" element is fatal to his plea.

¶8 As noted, the elements portion of the "court form" attached to the plea questionnaire recites the three elements of first-degree recklessly endangering safety. Dauer confirmed that he and Boyle discussed the elements, that he initialed the elements portion of the form when Boyle explained them to him, that he reviewed the police reports and complaint and that he committed the offenses as described. Boyle stated at the plea hearing that she spent about an hour and a half, the day before, explaining everything to Dauer and testified at the motion hearing that she went over with him the language of the charge itself.

¶9 Dauer's claim is unpersuasive. He conceded that the State could have proved all three elements. Necessarily, then, he also acknowledged that it could prove the two that make up the offense with which he was charged. The record satisfies us that Dauer's no-contest plea to second-degree reckless endangerment was knowingly, intelligently and voluntarily entered.

¶10 Dauer also contends that plea withdrawal is warranted on grounds of ineffective assistance of counsel occasioned by Boyle's incorrect recitation of the elements of second-degree reckless endangerment. A claim of ineffective assistance of counsel presents a mixed question of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them unless the findings are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

Whether counsel's conduct violated the defendant's constitutional right to effective assistance of counsel ultimately is a legal determination which this court decides de novo. ***Id.***

¶11 The test for ineffective assistance of counsel requires that the defendant show both that counsel's performance was deficient and that the deficient performance prejudiced him or her. ***Strickland***, 466 U.S. at 687. A defendant proves deficient performance by establishing that counsel's errors were "so serious that counsel was not functioning as the 'counsel'" the Sixth Amendment guarantees. ***Id.*** The defendant must overcome a strong presumption that counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant must allege facts to establish "a reasonable probability that, but for the counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted). Further, the defendant must affirmatively prove prejudice. ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). We need not address both prongs if the defendant fails to sufficiently establish one of them. ***Strickland***, 466 U.S. at 697.

¶12 Dauer has not affirmatively proved prejudice. The plea agreement reduced his prison exposure by ninety-two years. He confirmed at the motion hearing that he understood that all five original charges would be reinstated upon plea withdrawal, that the State would not be required to offer the same, or any, plea bargain and that he risked a longer sentence if he went to trial. We are hard-pressed to accept that, had Boyle correctly informed him that second-degree reckless endangerment has but two elements, he would have insisted on going to trial. Indeed, the most Dauer offered as to whether his plea decision would have

been different was that he "would have had to give it some thought." A showing of prejudice requires more than speculation. ***Wirts***, 176 Wis. 2d at 187.

¶13 We do agree that an error was made in regard to explaining the correct elements of the offense, and we urge greater care both by the court taking the plea and by defense counsel. At bottom, however, Dauer's argument seems to be that the mistake matters not because of its substance but because two is different than three. He does not claim that he was confused about the potential penalty if he did not plead, or what the State would have to prove vis-à-vis the two relevant elements. We conclude that plea withdrawal is not required or warranted.

By the Court.—Judgment and order affirmed.

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