COURT OF APPEALS
DECISION
DATED AND FILED

August 6, 2013

Diane M. Fremgen
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. 2012AP1721-CR

Cir. Ct. No. 2009CF2809

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VIDAL D. MASON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and RICHARD J. SANKOVITZ, Judges. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Vidal D. Mason, *pro se*, appeals a judgment entered upon his no-contest plea to felony murder. He also appeals a postconviction order denying his motion to withdraw his plea to the charge. He

argues that the plea colloquy was defective and that his trial counsel was ineffective. We reject his arguments and affirm.

¶2 Mason and his cousin, Ronald Xavier Reed, attempted to rob a check-cashing store in June 2009, but a security guard shot each of them, killing Reed. The State charged Mason with felony murder. *See* WIS. STAT. § 940.03 (2009-10).[1] Mason pled no contest to the charge. After sentencing, Mason filed a *pro se* postconviction motion seeking to withdraw his plea. The circuit court denied the motion without a hearing, and he appeals.[2]

¶3 A defendant seeking to withdraw a plea of guilty or no contest after sentencing must establish that plea withdrawal is required to correct a manifest injustice. *See* ***State v. Cain***, 2012 WI 68, ¶25, 342 Wis. 2d 1, 816 N.W.2d 177. "[T]he defendant must show 'a serious flaw in the fundamental integrity of the plea.'" ***Id.*** (citations and one set of quotation marks omitted).

¶4 We begin by examining the claim that Mason should be permitted to withdraw his no-contest plea because the circuit court did not fulfill its duties during the plea hearing. A claim for plea withdrawal bottomed on an alleged defect in the plea colloquy is governed by ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See* ***State v. Howell***, 2007 WI 75, ¶¶26-27, 301 Wis. 2d 350, 734 N.W.2d 48. A defendant moving for plea withdrawal pursuant to ***Bangert***

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The Honorable Jeffrey A. Conen presided over the plea hearing. The Honorable Kevin E. Martens presided at sentencing and entered the judgment of conviction in this matter. The Honorable Richard J. Sankovitz presided over the postconviction proceedings and entered the order denying postconviction relief.

must both: (1) make a *prima facie* showing that the plea colloquy was defective because the circuit court violated WIS. STAT. § 971.08 or other court-mandated duties; and (2) allege that the defendant lacked knowledge or understanding of the information that should have been provided at the plea hearing. *See* ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. If the defendant makes the necessary showings, the circuit court must hold an evidentiary hearing at which the burden is on the State to establish by clear and convincing evidence that the defendant entered his or her plea knowingly, intelligently, and voluntarily. ***Id.***, ¶40. We consider *de novo* the sufficiency of the plea colloquy and the need for an evidentiary hearing. *See* ***State v. Hoppe***, 2009 WI 41, ¶17, 317 Wis. 2d 161, 765 N.W.2d 794.

¶5 Mason contends that he is entitled to a hearing on his claim for plea withdrawal because, he says, the circuit court "failed to inform [him] of the nature of the felony murder charge" and failed to ensure that he understood the elements of that crime. We disagree.

¶6 To convict a defendant of felony murder, the State must prove the elements of a predicate felony that the defendant committed or attempted to commit, and the victim's resultant death. *See* ***State v. Krawczyk***, 2003 WI App 6, ¶26, 259 Wis. 2d 843, 657 N.W.2d 77; WIS. STAT. § 940.03. Armed robbery in violation of WIS. STAT. § 943.32(2) is one of the felonies that may support a felony murder conviction. *See* § 940.03.

¶7 Mason is, of course, correct that the circuit court's duties during the plea colloquy include the obligation, imposed by WIS. STAT. § 971.08(1)(a), to establish that the defendant understands "the nature of the crime with which he is charged." *See* ***Brown***, 293 Wis. 2d 594, ¶35. To establish the defendant's

understanding, the circuit court may "summarize the elements of the offense[] on the record, or ask defense counsel to summarize the elements of the offense[], or refer to a prior court proceeding at which the elements were reviewed, or refer to a document signed by the defendant that includes the elements." ***Id.***, ¶56. These methods are not exhaustive. *See* ***id.***, ¶49. Moreover, the "circuit court may use [a] completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties." ***Hoppe***, 317 Wis. 2d 161, ¶30. Such use may include "'incorporat[ing] into the plea colloquy the information contained in the plea questionnaire, relying substantially on that questionnaire to establish the defendant's understanding.'" ***Id.*** (one set of brackets added, footnote and one set of brackets omitted). The circuit court in this case fulfilled its obligation to establish Mason's understanding of felony murder.

¶8 The circuit court advised Mason:

> [y]ou have been charged with felony murder, the underlying crime of attempt armed robbery.... The charge of felony murder reads that: On or about Wednesday, June 3rd of the year 2009, at 3906 North 76th Street in the City and County of Milwaukee, State of Wisconsin, that you did cause the death of Ronald Xavier Reed while attempting to commit the crime of armed robbery as a party to a crime. Do you understand the charge?"

Mason replied: "yes, your honor."

¶9 The record contains a signed plea questionnaire and waiver of rights form, along with a signed addendum. Mason told the circuit court that he had signed the plea questionnaire and addendum, and he assured the circuit court that he had discussed the documents with his trial counsel and had no questions about them. On the plea questionnaire, Mason acknowledged that he understood the

elements of the charge, and the form contains a checkmark reflecting that the elements are on a sheet attached to the form.

¶10 Attached to the plea questionnaire is a copy of WIS JI—CRIMINAL 1031, titled "Felony Murder: Underlying Crime Attempted—§ 940.03." Mason's signature appears on the instruction next to the portion of the text that describes the elements of the crime. The instruction correctly describes the elements of felony murder, reflecting that the State must prove: (1) the defendant attempted to commit a crime; and (2) the death of the victim was caused by the attempt to commit that crime. *See* WIS JI—CRIMINAL 1031. The instruction further explains that, to satisfy the first element of felony murder, the State must prove that the defendant attempted to commit a predicate crime. *See* ***id.***

¶11 A copy of WIS JI—CRIMINAL 582 EXAMPLE, the Wisconsin pattern jury instruction for attempted armed robbery, is also in the record.[3] Mason's signature again appears on the instruction next to the description of the elements of the crime.

¶12 The circuit court questioned Mason about his understanding of the elements that the State must prove to obtain a conviction. Mason confirmed that he had reviewed the elements of felony murder and attempted armed robbery, that he understood the elements of each crime, and that he had no questions about them. Thus, the record shows that the circuit court fulfilled its obligation to establish Mason's understanding of the charge to which he pled no contest.

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[3] WISCONSIN JI—CRIMINAL 582 EXAMPLE "uses armed robbery as an example to illustrate how the elements of the crime attempted would be integrated with the general pattern instruction for attempts." *See* WIS JI—CRIMINAL 582 EXAMPLE, comment.

¶13 Mason argues, however, that the colloquy regarding the elements was inadequate in light of the totality of the plea hearing. He contends that his "insistence on a plea of 'no contest' instead of a simple plea of guilty" demonstrates his "lingering confusion as to the murder aspect of the charge." In his view, the circuit court therefore should have taken additional steps to determine the source of Mason's "confusion." We are not persuaded.

¶14 The circuit court questioned Mason's trial counsel near the outset of the plea hearing as to why Mason wished to enter a plea of no contest rather than a plea of guilty.[4] His trial counsel responded: "[Mason] agrees that the facts in this complaint support the charge.... He's just electing to plead no contest to the charge. He's not denying that the State has enough facts in this complaint ... that would convict him of felony murder." Trial counsel then explained that the victim "is [Mason's] cousin, so I think that's a part of it as to why he would prefer to say no contest rather than [] guilty." Mason did not offer any correction to his trial counsel's explanations. Moreover, Mason admitted in his postconviction motion that his trial counsel reviewed the elements with him, that he expressed "dismay" about the charge of felony murder, and that he "repeatedly questioned counsel as to the validity of such a charge." The record thus fails to support the claim that Mason's decision to plead no contest instead of guilty flowed from any misunderstanding about the nature of felony murder.

[4] The circuit court is not obligated to accept a plea of no contest. *See* WIS. STAT. § 971.06(1)(c). Because such a plea cannot be used against the defendant in a collateral action, the decision to accept a no-contest plea rests in the circuit court's discretion. *See* ***State v. Suick***, 195 Wis. 175, 177, 217 N.W. 743 (1928).

¶15 Further, the rule is well established that when a defendant pleads no contest, the circuit court does not have any heightened obligations to assess the defendant's understanding of the charge. To the contrary, '"the fact that [the defendant] entered a no contest plea rather than a plea of guilty has no bearing on the court's responsibilities under [WIS. STAT.] § 971.08(1).'" ***State v. Black***, 2001 WI 31, ¶15 n.3, 242 Wis. 2d 126, 624 N.W.2d 363 (citation and brackets omitted). In sum, Mason fails to show any defect in the plea proceeding, and his claim for relief pursuant to ***Bangert*** must fail.

¶16 We turn to the allegation that plea withdrawal is warranted because Mason received ineffective assistance from his trial counsel. A claim that a plea is infirm for reasons extrinsic to the plea colloquy invokes the authority of ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *See* ***Howell***, 301 Wis. 2d 350, ¶¶2, 74. A ***Nelson/Bentley*** motion for plea withdrawal "must meet a higher standard for pleading than a ***Bangert*** motion." ***Howell***, 301 Wis. 2d 350, ¶75. To secure a hearing, the defendant "must allege sufficient, nonconclusory facts ... that, if true, would entitle him to relief." *See* ***id.***, ¶76. If, however, the defendant does not allege sufficient facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.***, ¶75. Moreover, "an evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts." ***Id.***, ¶77, n.51.

¶17 Because Mason rests claims for plea withdrawal on allegations that he received ineffective assistance from his trial counsel, he cannot prevail on those

claims unless he shows that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, Mason must show that trial counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, Mason "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If Mason fails to satisfy one component of the analysis, we need not address the other. *See* ***Strickland***, 466 U.S. at 697.

¶18 Mason first alleges that his trial counsel was ineffective for failing to ensure his understanding that "by pleading no contest, vers[u]s guilty, he remained 'responsible/guilty' for the death of Reed." Mason suggests that trial counsel "le[]d him to believe that he would be innocent in the murder of Reed." The record conclusively shows that Mason is not entitled to any relief based on this allegation. The circuit court explained to Mason that he faced a charge that he "cause[d] the death of Ronald Xavier Reed while attempting to commit the crime of armed robbery as party to a crime," and Mason said that he understood the charge. The circuit court asked Mason: "do you understand that if I accept your plea of no contest I will be finding you guilty?" Mason replied: "yes, your honor."

¶19 Moreover, the plea questionnaire that Mason signed reflects his intent to plead no contest to the charge of felony murder, and Mason declared on the form: "I understand that if the judge accepts my plea the judge will find me guilty of the crime[] to which I am pleading." Additionally, directly above

Mason's handwritten signature are the words: "I am asking the court to accept my plea and find me guilty."

¶20 Thus, the record shows that Mason did, in fact, understand when he entered his no-contest plea that the circuit court would find him guilty of the charge he faced—causing the death of Reed while attempting to commit armed robbery—if the court accepted the plea. The information provided at the plea hearing, imparted by the circuit court and confirmed on the plea questionnaire, filled any gaps in the explanation that trial counsel gave to Mason before the hearing began, and the record thus overrides any claimed uncertainty Mason may have had about the effect of his plea stemming from counsel's alleged actions or inactions. *See* ***Bentley***, 201 Wis. 2d at 319.

¶21 Mason also claims that his trial counsel was ineffective for failing to ensure that he understood the elements of felony murder, but he admits that his trial counsel explained the elements and reviewed the jury instructions with him. Because he fails to identify any deficiency in the steps his trial counsel took to ensure his understanding, his allegation is merely a conclusory assertion. To be sure, Mason contends that "he did not, and still do[es] not, understand how he could possibly be guilty of Reed[']s murder when it was [the security guard] who" shot Reed. As the circuit court explained in denying Mason's postconviction motion, however, Mason's assertions are merely professions of "disbelief that a person can be blamed for murder when someone else pulls the trigger." The assertions Mason offers do not reflect any misunderstanding of the charge he faced or any deficiency in his lawyer's explanation of the elements of the offense of felony murder as it is defined in Wisconsin.

¶22 Mason last contends that his trial counsel was ineffective for failing to argue that Wisconsin's felony murder statute is unconstitutional. In his view, Wisconsin improperly adheres to a minority position imposing liability on a defendant "when the lethal act is committed by a person other than the felon or his accomplices." He acknowledges, however, "that he has been unable to locate any Wisconsin authorities which support[] his position."

¶23 Wisconsin law provides that a person may be convicted of "felony murder when a co-felon is killed by the intended felony victim." *See* ***State v. Oimen***, 184 Wis. 2d 423, 435, 516 N.W.2d 399 (1994). The defendant in ***Oimen*** argued, much as Mason does here, that other states do not take the same approach, but the supreme court concluded that the "policy determination is one for the legislature to make." *See* ***id.*** at 443-44. Further, the ***Oimen*** court considered a challenge to the constitutionality of the felony murder statute and concluded that "the Wisconsin felony murder statute is not unconstitutional." ***Id.*** at 446.

¶24 Mason's trial counsel was not ineffective by foregoing an effort to change the law governing felony murder in this state. *See* ***State v. Beauchamp***, 2010 WI App 42, ¶18, 324 Wis. 2d 162, 781 N.W.2d 254 (stating that trial counsel has "no ***Strickland*** responsibility to either seek a change in Wisconsin law or lay a fact-predicate to try to precipitate that change"). To the contrary, the rule is well-established that ineffective assistance of counsel cases are '"limited to situations where the law or duty is clear.'" *See* ***id.*** (citation omitted). For all of the foregoing reasons, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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