COURT OF APPEALS DECISION DATED AND FILED

July 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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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. 2017AP1752-CR

Cir. Ct. No. 2015CF001332

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOVAN T. MULL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Jovan T. Mull appeals from a judgment of conviction for one count of first-degree reckless injury by use of a dangerous weapon, as a party to a crime, contrary to WIS. STAT. §§ 940.23(1)(a), 939.63(1)(b), and 939.05 (2015-16).[1] Mull also appeals from an order denying his postconviction motion seeking plea withdrawal. Mull asserts that he is entitled to a hearing on his postconviction motion for reasons discussed below. We reject his arguments and affirm.

BACKGROUND

¶2 The criminal complaint charged Mull and his co-defendant, Vachune M. Hubbard, with one count of armed robbery and one count of first-degree reckless injury by use of a dangerous weapon, both as a party to a crime.[2] The complaint alleged that a man and a woman were sitting in a car expecting someone to exit a home and give them forty dollars they were owed. Mull and Hubbard approached the couple, got into the back seat, and told them to pull the car into an alley. The complaint continues:

> When [the woman] asked why they needed to pull into an alley to get the $40, Defendant Mull (who[m the man] later identified) struck her in the face and demanded their vehicle. [The woman] tried to grab the keys out of the ignition but was unable to do so, and so she jumped out of the vehicle and tried to run. Defendant Mull chased her and fired one shot from a long barreled gun which struck her in the right side of her chest.

The complaint indicated that the woman was seriously injured.

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[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Both men were also charged in the same complaint with operating a motor vehicle without the owner's consent. The facts concerning those charges are not relevant to this appeal.

¶3 According to the complaint, the male victim identified Mull and Hubbard in photo lineups. The complaint said that when Hubbard was arrested, he "denied being part of the robbery and shooting but stated that Mull told him (Hubbard) about the shooting after it happened." Hubbard told the police that Mull told him the woman in the car "'got slick so I popped her.'"

¶4 The case remained in a trial posture for more than a year. One week before the trial was scheduled to begin, a jury found Mull guilty of first-degree reckless homicide in an unrelated case. On the day of the scheduled jury trial in this case, Mull initially refused to come to the courtroom but appeared by videoconference. He told the trial court that he wanted to work out a plea deal in light of his other conviction. The trial court encouraged him to come to the courtroom so he could meet with his trial counsel and discuss a new offer the State had made. Mull agreed and the case was called again later that day.

¶5 The State told the trial court the terms of the plea offer. The trial court spoke with Mull about the offer. Mull said that he understood the offer but wanted to talk with his family before accepting it. The trial court said it would continue the case until the next morning.

¶6 The next day, April 19, 2016, the trial court asked the State to recite the negotiations. The State explained that "[p]ursuant to [its] letter of April 17," Mull had agreed to plead guilty to count two—the charge of first-degree reckless injury—and the armed robbery and vehicle charges would be dismissed and read in. In addition, several other crimes would not be charged.

¶7 Trial counsel agreed with the State's recitation of the plea agreement. The trial court then discussed the agreement with Mull. It explained the ramifications of having crimes dismissed but read in. It reviewed the

maximum penalties and asked Mull for his plea to "first-degree reckless injury while armed, as a party to a crime." Mull answered: "Guilty."

¶8 Next, the trial court referred to the guilty plea questionnaire and waiver-of-rights form. The trial court asked Mull if he understood the form and Mull answered: "Most of it." When he was asked to explain, Mull said: "I just didn't understand the charges, but you know, it's not really a big deal." The trial court disagreed, emphasizing that it was important. The trial court then went through each of Mull's constitutional rights with him. The trial court also talked with Mull about what the State had to prove, stating: "[The victims] both ran away from the car, and you chased her down and you fired your shotgun and you hit her in the chest. So you recklessly caused great bodily harm to her under circumstances which showed utter disregard for human life." The trial court asked Mull about those facts during this exchange:

> THE COURT: … So do you understand what they have to prove?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And is that all true?
>
> THE DEFENDANT: No.
>
> THE COURT: What's not true about it?
>
> THE DEFENDANT: It's—It's not true, Your Honor, but I'm pleading guilty.
>
> THE COURT: Well, no. You got to tell me if it's true or not. You can't plead guilty unless you tell me it's true. If it's not true, you ought to have a trial, very honestly.
>
> THE DEFENDANT: It's not—It's not true, but I'm—I'm scared to go to trial, Your Honor. So I'll take the—
>
> THE COURT: Well, then I can't accept your plea, and I've got to set this for a trial. You got to admit that you shot [her]. That's the only thing you got to admit and that you

> shot her and caused great bodily harm to her under circumstances which showed utter disregard for human life.
>
> The armed robbery portion you don't have to admit to. I'm going to consider it as true. We haven't talked about the other read-ins yet, but the one thing you're pleading guilty to is shooting [the female victim]. Are you prepared to admit that?
>
> THE DEFENDANT: I mean, I'm not. If I ever did anything, I said I did it; but I—I'm just pleading guilty because, Your Honor, I don't feel like—
>
> THE COURT: Well, then what we're going to do is we're going to set the matter for trial. I can't take the guilty plea for you. I'm sorry.

¶9 The trial court then asked the parties if they had considered allowing Mull to enter a no-contest plea or an ***Alford*** plea. *See* ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970) (plea used when the defendant maintains his or her innocence but accepts the consequences of the charged offense). The State said it would not object to a no-contest plea but would object to an ***Alford*** plea. The trial court asked trial counsel whether he had discussed a no-contest plea with Mull, which led trial counsel to have an off-the-record discussion with Mull.

¶10 Trial counsel told the trial court that he had explained the difference between an ***Alford*** plea and a no-contest plea to Mull, and the trial court reiterated the differences. The trial court asked Mull what he wanted to do. When Mull indicated that he would plead guilty but again raised questions about his options, the trial court said that it would continue the case to the afternoon, allowing Mull time to discuss his options with trial counsel.

¶11 That afternoon, trial counsel said that he and Mull had discussed the difference between an ***Alford*** plea and a no-contest plea, as well as the concept of being party to a crime. Trial counsel said that he emphasized to Mull that under

party-to-a-crime liability, "[it] technically could have been Mr. Hubbard who shot her, but because the whole act and everything else was started by my client and Mr. Hubbard, the co-defendant, that's what spawns and from that comes the party to a crime."[3]

¶12 The trial court, trial counsel, and Mull then had this exchange:

> THE COURT: He's under the impression because the complaint says he's the one who shot her that if he is going to plead guilty, he has to say he shot her. If he wants to enter a no-contest plea, he can. I will not take an ***Alford*** plea. What is he going to do?
>
> [TRIAL COUNSEL]: I explained the difference between a no-contest and guilty plea, and I said I will leave it up to him to decide after I left over the lunch hour.
>
> THE COURT: What are you going to do, Mr. Mull?
>
> DEFENDANT MULL: Plead guilty, Your Honor.
>
> THE COURT: You are going to admit that you shot [the female victim]?
>
> DEFENDANT MULL: Yes.
>
> THE COURT: Did you really shoot her?
>
> DEFENDANT MULL: Yes, Your Honor. Yes, I did.

(Italics, bolding, and two hyphens added.) The trial court continued the plea colloquy, accepted Mull's guilty plea, and found him guilty. He was later sentenced to eight years of initial confinement and five years of extended supervision.

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[3] It appears this is the first time during the plea hearings that the defense implied that Mull was present for the crime, but that Hubbard was the person who fired the gun at the female victim.

¶13 Represented by postconviction counsel, Mull filed a postconviction motion seeking to withdraw his guilty plea on two bases: (1) the trial court committed a ***Bangert*** violation by failing to adequately explain party-to-a-crime liability during the plea colloquy; and (2) his plea was not intelligent, knowing, and voluntary because "he was led to believe that an admission to shooting [the woman] was legally required to take advantage of the proffered plea."[4] *See* ***State v. Bangert***, 131 Wis. 2d 246, 255, 389 N.W.2d 12 (1986) (explaining that a defendant can seek plea withdrawal by arguing "that the colloquy conducted by the trial court at the plea hearing was constitutionally insufficient to ascertain [the defendant's] understanding of the nature of the charge and [the defendant's] knowledge of which constitutional rights he was waiving").

¶14 The State opposed the motion. In doing so, it emphasized that Mull could properly be guilty as a party to a crime as the shooter. *See* ***State v. Calvin L. Brown (Calvin Brown)***, 2012 WI App 139, ¶1, 345 Wis. 2d 333, 824 N.W.2d 916 ("Party to a crime liability includes situations in which the defendant directly commits the crime."); WIS. STAT. § 939.05(2)(a) (party to a crime includes one who "[d]irectly commits the crime.").[5] With respect to Mull's decision to admit

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[4] Mull did not allege ineffective assistance of trial counsel. Instead, he alleged that the trial court's statements led to his confusion about his plea.

[5] WISCONSIN STAT. § 939.05 provides in relevant part:

> **Parties to crime.** **(1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
>
> **(2)** A person is concerned in the commission of the crime if the person:

(continued)

he was the shooter, the State speculated that Mull may have chosen to do so because he *was* the shooter and because one of his victims and his co-defendant identified him as the shooter. The State added: "A separate, and quite independent reason that [Mull] might have gone that route rather than trying to blame his co-defendant was that his plea agreement *required that he take full responsibility for the conduct described in the criminal complaint* (which describes him as the shooter)." The State provided copies of plea offer letters dated March 26, 2015, and April 17, 2016. Both letters included this language:

> **This offer is contingent upon all of the following:**
>
> 1. That the State has defendant's complete criminal record;
>
> 2. That no additional criminal charges are filed prior to sentencing;
>
> 3. That defendant makes all court appearances, *and accepts responsibility at both plea and sentencing, for the criminal conduct attributed to him in the criminal complaint.*

(Emphasis added.)

¶15 In his reply brief, Mull disagreed that the plea agreement required him to admit he was the shooter. He argued that the plea agreement discussed in court did not require that admission. Mull also asserted that when the State said, in response to the trial court's question, that it would agree to allow Mull to plead

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> **(a)** Directly commits the crime; or
>
> **(b)** Intentionally aids and abets the commission of it; or
>
> **(c)** Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it[.]

no contest, the State was "demanding something less than 'full responsibility' for being the shooter."

¶16 The trial court denied the motion in a written order. It observed that it had given Mull the option of pleading guilty or no contest and that Mull chose to plead guilty. It also agreed with the State that Mull's plea agreement "required him to admit to the specific conduct alleged in the criminal complaint." This appeal follows.

DISCUSSION

¶17 Mull argues that he is entitled to an evidentiary hearing concerning his ***Bangert*** claim. Under Wisconsin case law:

> When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in "manifest injustice." One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea.

State v. James E. Brown (Brown), 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (internal citation omitted). A defendant can challenge the knowing, intelligent, and voluntary nature of his or her plea by demonstrating a plea colloquy defect and alleging that he or she did not understand the information that should have been provided at the plea hearing. ***Id.***, ¶¶2, 39-40 (discussing ***Bangert*** claims). In order to be granted an evidentiary hearing, a postconviction motion that concerns an alleged deficiency in the plea colloquy "must (1) make a prima facie showing of a violation of WIS. STAT. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript; and (2) allege that the defendant did not know or understand the information that should have been provided at the plea hearing." ***Brown***, 239 Wis. 2d 594, ¶39.

"Whether [a defendant] has pointed to deficiencies in the plea colloquy that establish a violation of ... § 971.08 or other mandatory duties at a plea hearing is a question of law we review de novo." ***Brown***, 239 Wis. 2d 594, ¶21.

¶18 Mull alleges that two defects in the plea colloquy satisfy the first prong of the test discussed in ***Bangert*** and ***Brown***: (1) the trial court failed to properly advise Mull about the elements of party-to-a-crime liability; and (2) the trial court "erroneously advised [Mull] that he could only be found guilty of the offense if he admitted to shooting" the woman.[6] As to the second prong of the test, he alleges that the following statement in his postconviction motion was a sufficient allegation that he did not know or understand certain information: "Mull was in fact confused as to what the State would have to prove in order to find him guilty at trial, notwithstanding his attorney's advice on that point."

¶19 We begin our analysis with Mull's first allegation about the plea colloquy: that the trial court failed to adequately explain party-to-a-crime liability. The State argues that "[a]lthough Mull was charged as a party to a crime, an explanation of party-to-a-crime liability would have been superfluous because the complaint alleged that Mull directly committed the shooting." The State's argument is based on ***Calvin Brown***, where we held that a plea colloquy at which

[6] In his postconviction motion, Mull presented this second argument as part of his ***Bangert*** claim and also as part of a claim brought pursuant to ***State v. Hoppe***, 2009 WI 41, ¶59, 317 Wis. 2d 161, 765 N.W.2d 794 (describing a plea challenge where the defendant's claim is that "certain information resulted from problems extrinsic to the plea colloquy"). *See also* ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). The postconviction motion asserted: "Even assuming, arguendo, the Court's colloquy was sufficient, the Court nevertheless caused legally cognizable confusion to Mr. Mull that resulted in a faulty guilty plea." On appeal, Mull presents his concerns about the trial court's discussions with Mull as part of his ***Bangert*** claim, and he has not pursued a separate claim pursuant to ***Bentley*** or ***Hoppe***.

the trial court fails to explain party-to-a-crime liability is not defective if the defendant admits to directly committing the act. *See* ***id.***, 345 Wis. 2d 333, ¶1.

¶20 Mull urges us not to apply ***Calvin Brown***'s reasoning here, stating:

> Mr. Mull's claim is distinguishable because Mr. Mull's resistance to admitting he was the actual shooter is evidenced in the record and was a material issue that came close to undermining the entire plea process. While the criminal complaint takes the side of witnesses who identified him as the actual shooter, Mr. Mull obviously contested that evidence via his resistance, at the plea hearing, to ratifying their account.

¶21 We are not persuaded by Mull's arguments against the application of ***Calvin Brown***'s reasoning to this case. When Mull first told the trial court that the facts in the complaint were "not true," he did not indicate whether he was claiming that he was not involved at all, did not participate in the robbery, was not the shooter, or something else. Ultimately, at the continued plea hearing, Mull told the trial court that he personally shot the female victim, and he has never explicitly disavowed that admission. Thus, he pled guilty as a party to a crime because he "[d]irectly" committed the crime. *See* WIS. STAT. § 939.05(2)(a). We also note that both Mull and trial counsel told the trial court that it could rely on the allegations in the complaint to find a factual basis for the plea, and neither trial counsel nor postconviction counsel ever presented an alternate set of facts for the trial court's consideration. Under these circumstances, where the elements of direct liability for first-degree reckless injury were explained and Mull admitted the facts demonstrating his direct liability, "it was not necessary in this circumstance for the trial court to additionally explain the concept of party-to-a-crime liability." *See* ***Calvin Brown***, 345 Wis. 2d 333, ¶13 (hyphens added).

¶22 Mull's second complaint about the plea colloquy is related to his ultimate admission that he was the shooter. Mull's postconviction motion argued that the trial court erroneously "led Mr. Mull to believe that his conviction required proof he was in fact the shooter, which is legally incorrect." He asserted that the trial court "caused legally cognizable confusion to Mr. Mull that resulted in a faulty guilty plea." He explained:

> In this case, the Court wrongly communicated to Mr. Mull that the only way he could enter a valid plea was by admitting to shooting [the female victim]—an allegation which Mr. Mull contests. This refusal to admit that he shot [the victim] caused the plea hearing to be briefly adjourned. The Court was clear that if Mr. Mull was going to plead, he needed to admit—or at the very least not contest—that he shot [the victim]. The Court specifically asked Mr. Mull to admit to shooting [the victim] as a prerequisite for taking his plea.

(Record citations omitted.) On appeal, Mull expands on this argument, stating:

> While Mr. Mull ultimately did make an admission to being the principal actor, this admission was quite plainly a reaction to the [trial] court's problematic plea colloquy, which erroneously led Mr. Mull to believe that he could only plead guilty as the principal actor. Mr. Mull was never told that, under the party to a crime legal theory, other ways of accepting responsibility for the crime consistent with his position were available. By communicating that there is only one way of being found guilty—as a direct actor—the court's commentary misadvised Mr. Mull as to what the State would have to prove at a trial and what he was required to admit in order to be found guilty. This renders his plea not knowing, intelligent and voluntary.

(Record citations omitted.)

¶23 There are several problems with Mull's analysis. First, it is not clear if Mull is suggesting that he *falsely* admitted he was the shooter in response to the trial court's colloquy. He has not explicitly retracted his admission, although his

postconviction motion stated that he "contests" the allegation that he was the shooter. We reject any suggestion that the trial court's colloquy induced Mull to lie. Indeed, the trial court's comments made clear that it wanted Mull to tell the truth.

¶24 Further, implicit in Mull's argument is his assumption that he was not required to plead guilty as the direct actor who shot the female victim. The State disagrees, asserting that the plea agreement required Mull's admission. The parties present lengthy arguments concerning whether the plea agreement required Mull to admit he was the shooter and whether the agreement changed when the State told the trial court it would agree to a no-contest plea. They also debate whether the trial court made findings of facts about the plea agreement in its final order. We conclude that it is unnecessary to decide those issues in order to address Mull's argument because, after a careful review of the plea hearing transcripts, we are not persuaded that the trial court "led Mr. Mull to believe he could only plead guilty" by admitting he was the shooter.

¶25 WISCONSIN STAT. § 971.08, as well as ***Bangert*** and its progeny, outline a trial court's obligations at a plea hearing. *See, e.g.*, ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794. One of those obligations is to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." *See* § 971.08(1)(b); *see also* ***Hoppe***, 317 Wis. 2d 161, ¶18 (court must "'[a]scertain personally whether a factual basis exists to support the plea'") (citation omitted); ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836 ("[I]t is one of a [trial] court's duties to determine '[t]hat the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.'") (citations omitted; second set of brackets in ***Thomas***).

¶26 In this case, the trial court began the plea colloquy with Mull by discussing the maximum penalties and the rights Mull was giving up. The trial court then referred to the complaint—the only summation of facts provided by the parties to support the conviction—and reviewed the key facts with Mull as they related to the elements of first-degree reckless injury: that the defendant caused great bodily harm to the victim by criminally reckless conduct that showed "utter disregard for human life." *See* WIS. STAT. § 940.23(1)(a); *see also* WIS JI—CRIMINAL 1250 (2015). The trial court asked Mull whether those facts were true, and Mull answered in the negative, without explaining what he contested.

¶27 The trial court followed up with Mull, asking him what was not true. Mull did not respond by indicating Hubbard was the shooter. Instead, Mull simply reiterated that the facts were "not true" and said that he wanted to plead guilty anyway. The trial court told Mull: "You can't plead guilty unless you tell me it's true." We do not read the trial court's statements as refusing to allow Mull to admit to being guilty as one who intentionally aided or abetted someone else or as one who was party to a conspiracy—the other ways a person can be guilty as a party to a crime. *See* WIS. STAT. § 939.05(2)(b) & (c). Indeed, neither Mull nor his trial counsel had ever outlined a version of the crime that would support such liability. The trial court was attempting to determine if there was a factual basis to support the guilty plea.

¶28 Recognizing that Mull did not want to plead guilty, the trial court asked whether a no-contest or ***Alford*** plea might be appropriate. It continued the hearing so that Mull and his trial counsel could explore Mull's options. When they returned and trial counsel told the trial court that he had explained party-to-a-crime liability to Mull, the trial court observed that it appeared Mull was "under the impression because the complaint says he's the one who shot her that if he is

going to plead guilty, he has to say he shot her." The trial court did not signal that it agreed with Mull's impression, and it implicitly contradicted Mull's impression when it again said that it would allow Mull to plead no contest.[7] At that point, Mull indicated that he wanted to plead guilty, and he explicitly admitted he was the shooter.

¶29 Having carefully reviewed the transcripts, we are not persuaded that the trial court's plea colloquy concerning the factual basis for the plea was improper or erroneous. Mull's postconviction motion did not demonstrate "a prima facie showing of a violation of WIS. STAT. § 971.08(1) or other court-mandated duties" and, therefore, he has not met the first prong of the ***Bangert/Brown*** analysis and was not entitled to an evidentiary hearing on his postconviction motion. *See* ***Brown***, 293 Wis. 2d 594, ¶¶39-40. Accordingly, we need not address whether the second prong of the ***Bangert/Brown*** analysis was satisfied. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground."). We affirm both the judgment and the order denying Mull's postconviction motion.

By the Court.—Judgment and order affirmed.

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

[7] In its order denying Mull's postconviction motion, the trial court reiterated this point, stating: "When the plea hearing recommenced, the court specifically gave the defendant an opportunity to enter a no[-]contest plea rather than a guilty plea so he would not have to admit that he shot [the female victim]."