COURT OF APPEALS DECISION DATED AND FILED

October 18, 2005

Cornelia G. Clark
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. 2004AP2993-CR

Cir. Ct. No. 2000CF2402

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MONTRELL D. MCDADE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Montrell McDade appeals from a judgment convicting him of one count of first-degree reckless homicide and from an order denying his postconviction motion to withdraw his no-contest plea and motion to

modify sentence. Because we conclude that the circuit court properly exercised discretion in denying both motions, we affirm.

¶2 Late in the evening of May 4, 2000, seventeen-month-old Asanti Flanagan arrived by ambulance at Children's Hospital in Milwaukee. She was unconscious and unresponsive, although breathing. She was admitted to the hospital's pediatric ICU, with the determination that she had suffered a brain injury. She was pronounced dead before noon on May 5, 2000.

¶3 Medical personnel reported that Asanti had suffered a skull fracture, cerebral edema, bilateral retinal hemorrhages, and bruising around her neck and chest. Dr. Mary Mainland performed an autopsy on Asanti and reported observing twenty to twenty-five injuries to the inside of Asanti's scalp. Dr. Mainland also observed depressed fractures on the left side of her skull, multiple contusions and hematomas and hemorrhage to her right optic nerve. It was Dr. Mainland's opinion that these injuries resulted from ten individual blows. Dr. Mainland stated that the shape and location of the depressed fractures were consistent with Asanti's head striking a wall and edge of a table. The optic nerve damage was consistent with Asanti being severely shaken. Dr. Mainland stated that all of the injuries she described were inflicted no more than forty-eight hours before Asanti's death.

¶4 Police interviewed Asanti's mother, Rhea Flanagan, who had accompanied her daughter in the ambulance. Rhea informed police that she lived with her daughter and boyfriend, McDade. Rhea indicated that she worked as a bank teller from 8 a.m. until 6 p.m. and that McDade performed childcare for her daughter during the day. McDade worked a third shift job from 10 p.m. until 6 a.m.

¶5 Rhea told police that Asanti was fine on May 3, 2000, and was asleep when Rhea left for work on the morning of May 4, 2000. Rhea reported that McDade, sounding shaken, upset and worried, called her at work on May 4th around 12:30 p.m. to report that Asanti had fallen from the couch. When Rhea arrived at home around 6:00 p.m., Asanti was sleeping on the couch. McDade went into a bedroom, slept for a few hours and then left for work by 8:20 p.m. At 8:30 p.m., Rhea picked Asanti up to carry her to her bedroom. When Asanti had no physical reaction to being picked up, Rhea became concerned and tried to wake her. Unable to wake her, Rhea called 9-1-1.

¶6 Police subsequently interviewed McDade three times. During his initial interview, McDade did not admit striking Asanti; instead, McDade stated that he had no idea how Asanti could have received the injuries that were described by the doctors at the hospital. At McDade's second interview, conducted on May 6, 2000, one day after Asanti died, he admitted to shaking Asanti but claimed that he had not realized he was causing her any injury. Finally, on May 7, 2000, McDade admitted that he threw Asanti onto a bed and that her head hit the wall. He also admitted to pushing her down three times while he was sitting in a chair in the apartment when Asanti had walked over "just trying to play." He stated that each time he pushed her away, she hit her head on the floor. He also admitted grabbing her by the neck and shaking her to stop her from crying. He told police that he then threw her on the bed and she hit her head on the bedroom wall. Later, as she tried to walk out of the bedroom, McDade "jerked her up," Asanti fell backwards, and she banged her head on the corner of the wall. McDade told police that he picked her up by the arm but she lost her balance and hit her head on the same corner again. McDade reported that he then picked her

up again and moved her to the couch where she laid down and went to sleep. McDade stated that the next thing he knew, Rhea came home.

¶7 McDade entered a no-contest plea to the charge of first-degree reckless homicide. The circuit court accepted his plea and subsequently sentenced him to fifty-five years of imprisonment, consisting of thirty-five years of initial confinement followed by twenty years of extended supervision.

¶8 McDade moved the court for leave to withdraw his no-contest plea and for sentence modification. McDade's postconviction motion contended that the circuit court failed to determine that McDade understood the nature of the charge before accepting his no-contest plea and that McDade entered his plea based upon a mistaken view of the facts. He also argued that the sentence imposed was unduly harsh. The circuit court denied the motion without a hearing. McDade appeals.

Motion to Withdraw No-Contest Plea

¶9 This court reviews a circuit court's denial of a motion to withdraw a no-contest plea under an erroneous exercise of discretion standard. We will find an erroneous exercise of discretion if the record shows that the trial court failed to exercise discretion, the facts fail to support the trial court's decision, or the trial court applied the wrong legal standard. ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363.

¶10 A defendant seeking to withdraw a guilty or no-contest plea after sentencing bears "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "A manifest

injustice occurs when a defendant makes a plea involuntarily or without knowledge of the charge or potential punishment if convicted." ***State v. Merten***, 2003 WI App 171, ¶6, 266 Wis. 2d 588, 668 N.W.2d 750. "A defendant's understanding of the nature of the charge must 'include an awareness of the essential elements of the crime.'" ***State v. Lange***, 2003 WI App 2, ¶17, 259 Wis. 2d 774, 656 N.W.2d 480 (citation omitted).

¶11 If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. ***Id***.

¶12 McDade contends that the circuit court did not sufficiently determine that he understood the nature of the offense. The record contradicts McDade's contention. Understanding the nature of the charge can be accomplished in any of three ways:

> First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions, or from the applicable statute. Second, the trial judge may ask defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing. Third, the trial judge may expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing.

State v. Bangert, 131 Wis. 2d 246, 268, 389 N.W.2d 12 (1986) (citations omitted).

¶13 At the plea hearing, the circuit court established that McDade had filed a guilty plea questionnaire and waiver of rights form. The form listed each of the three elements of first-degree reckless homicide. McDade acknowledged at

the hearing that he had read the form, discussed it with his attorney and that he understood the elements of the charge. We conclude that the record amply meets the requirements of ***Bangert***.

¶14 We turn next to McDade's contention that his plea was not intelligently entered because he was told that the injuries that killed Asanti occurred forty-eight hours before her autopsy rather than forty-eight hours before her death and persons other than McDade had access to Asanti during that crucial time period. These assertions, even if accepted as true, warrant no relief. McDade's admission to conduct causing Asanti's death are unaffected by these assertions. Further, nothing in the record or in McDade's motion suggest who might have had access to Asanti other than McDade and Rhea. The motion does not assert that unnamed individuals caused Asanti's injuries or were responsible in any way for her death. Accordingly, his alleged mistaken understanding does not support the inference that his no-contest plea was not voluntarily or intelligently entered.

Motion to Modify Sentence

¶15 McDade contends that the sentence imposed was unduly harsh or excessive. We disagree.

¶16 When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶17 The offense that McDade committed was horrific and gruesome. He systematically brutalized a toddler over the course of a day because she came to him "just trying to play" and cried when he hit, pushed and shook her. He failed to seek medical attention even though he knew he had hurt her. Upon being relieved of his childcare responsibility, he took a nap and then left for work. We conclude that the court's imposition of a fifty-five-year sentence was not disproportionate or unreasonable in view of McDade's callous and ultimately lethal abuse of a toddler whom he claimed to love and who reportedly loved him. We hold that the sentence imposed was both "right and proper under the circumstances." *See* ***Ocanas***, 70 Wis. 2d at 185.

By the Court.—Judgment and order affirmed.

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