COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1502-CR **Cir. Ct. No. 2004CF542**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN A. GLEITER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Brian A. Gleiter appeals from a judgment convicting him of first-degree sexual assault of a child and from an order denying his postconviction motion to withdraw his guilty plea. We conclude that the circuit court did not erroneously exercise its discretion when it declined to permit

Gleiter to withdraw his guilty plea based on his claim that he did not understand the sexual contact element of first-degree sexual assault of a child,[1] and we affirm.

¶2 The original information charged Gleiter with repeated sexual assault of the same child contrary to WIS. STAT. § 948.025 (2003-04).[2] Gleiter completed a plea questionnaire/waiver of rights form to which the jury instruction for that charge was attached. The jury instruction defined sexual contact as used in the statute.

¶3 At the plea hearing, the parties recited in their agreement that Gleiter would plead guilty to one charge of repeated sexual assault of the same child with several other child sexual assault charges to be read in. During the plea colloquy, the circuit court directed Gleiter's attention to the elements of the crime as set forth in the jury instruction attached to the plea questionnaire. Gleiter stated that counsel read the questionnaire to him and acknowledged that his guilty plea would be "to each one of the elements or parts of the definition." The parties then discovered that the jury instruction appended to the plea questionnaire pertained to a situation where the victim was under sixteen years, when the crime in this case involved a victim under thirteen years of age, a more serious felony. The court

[1] WISCONSIN STAT. § 948.02(1) (2003-04) provides that "[w]hoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." Sexual contact is defined "[i]ntentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." Section 948.01(5)(a). Sexual contact is an element of first-degree sexual assault. ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

and the parties clarified that Gleiter knew the child victim was ten years old or younger.

¶4 The next dispute at the plea colloquy arose with regard to the number of instances Gleiter sexually assaulted the child. Gleiter contended that one assault occurred; the State contended that more than one assault occurred. Thereafter, the State agreed to amend the charge to one count of first-degree sexual assault of a child. Gleiter and counsel then conferred and completed a new plea questionnaire to which an elements sheet was attached. However, the elements sheet referred to, but did not define, sexual contact. The plea hearing resumed, and Gleiter was informed that the elements of the crime were that he had sexual contact with a child who was under the age of thirteen. Gleiter stated that he understood these elements and the colloquy proceeded. The court concluded that Gleiter's plea was voluntarily, knowingly and intelligently entered, and the court sentenced Gleiter to thirty-five years (fifteen years of initial confinement and twenty years of extended supervision).

¶5 Postconviction, Gleiter moved the circuit court to withdraw his guilty plea because the circuit court did not explain the meaning of sexual contact, and Gleiter did not know that the State would have to prove that his intentional sexual touching of the child had to be to sexually arouse or gratify himself, or to sexually degrade or humiliate the child. Gleiter claimed that he believed that any intentional sexual touching was a crime, no matter his purpose in doing so.

¶6 At the hearing on Gleiter's postconviction motion, Gleiter's trial counsel testified that he used the pattern jury instruction to advise Gleiter of the elements of the original sexual assault charge, including sexual contact. Counsel testified that the definition of sexual contact is identical for both the original and

the amended sexual assault charges in this case. The second plea questionnaire relating to the amended charge did not have the jury instruction attached to it and did not define sexual contact.

¶7 Gleiter testified at the postconviction motion hearing that he did not understand that the sexual touching had to be for purposes of sexual arousal, gratification, degradation or humiliation. Gleiter believed at the time he entered his guilty plea that any intentional touching of a child's intimate part was a crime. Gleiter conceded that he briefly scanned the jury instruction attached to the original plea questionnaire, but he did not read it thoroughly. Gleiter conceded that the sexual contact definition was in the jury instruction he read. Gleiter contended that he touched the child's intimate parts because he wanted the child to stop hanging around him and bothering him, not for sexual gratification or humiliation.

¶8 The circuit court reviewed the transcript of the plea hearing and found that Gleiter was highly educated in comparison to other defendants usually before the court. The court found that Gleiter acknowledged that the elements, including a definition of sexual contact, were set forth in the jury instruction appended to the original plea questionnaire and that he reviewed the instruction with counsel. Additionally, it was this instruction that prompted Gleiter to object to pleading guilty to repeated sexual assault of the same child. Moreover, the presentence investigation report included a reference to Gleiter's claim that he was sexually abused as a child and he used the phrase "sexual contact" to describe what happened to him. The court found that Gleiter could not have had any intent other than sexual gratification/arousal or humiliation for placing his hand inside the victim's pants and fondling his genitals. The court found that Gleiter "knew full well what sexual contact meant" and that his claim to the contrary was

"nonsense, absolute nonsense" and not credible. The court denied the plea withdrawal motion.

¶9 As a preliminary matter, we address the State's contention that Gleiter did not establish a *prima facie* violation of WIS. STAT. § 971.08(1)(a) and the plea-taking requirements of ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Under ***Bangert***, a plea must be knowingly, voluntarily and intelligently entered. ***Id.*** at 274. Knowledge of the elements of the offense is required for a knowing, voluntary and intelligent plea. ***State v. Lackershire***, 2005 WI App 265, ¶ 7, ___ Wis. 2d ___, 707 N.W.2d 891, *review granted*, 2006 WI 23, ___ Wis. 2d ___, 712 N.W.2d 34 (2005AP1189-CR).

¶10 We conclude that Gleiter made a *prima facie* case for a violation of the plea-taking requirements. The transcript of the plea hearing reveals that the circuit court did not elaborate on the sexual contact element when discussing Gleiter's plea to the amended charge. Gleiter met his initial burden to show that his plea was accepted without complying with the plea-taking requirements. *See* ***State v. Giebel***, 198 Wis. 2d 207, 213, 541 N.W.2d 815 (Ct. App. 1995) (citation omitted). The burden then shifted to the State to show by clear and convincing evidence that Gleiter's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time the court accepted the plea. *See* ***id.*** at 213-14 (citation omitted). The entire record may be used to demonstrate by clear and convincing evidence that the defendant knew and understood the elements of the crime. ***Id.*** at 214.

¶11 A defendant seeking to withdraw a guilty plea after sentencing must show, by clear and convincing evidence, that a manifest injustice would result if the motion to withdraw is denied. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548

N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. ***Giebel***, 198 Wis. 2d at 212. A circuit court's decision on a motion seeking plea withdrawal is discretionary. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988).

¶12 On appeal, Gleiter argues that he did not accurately understand the term "sexual contact" when he pled guilty. The circuit court did not find this claim credible. Credibility determinations are for the circuit court to make as the fact finder at the postconviction motion hearing. *See* ***Lackershire***, 2005 WI App 265, ¶12. Gleiter had before him the sexual contact definition in the jury instruction appended to the first plea questionnaire, and he read the instruction thoroughly enough to object to pleading guilty to repeated sexual assault of the same child. Counsel testified that he reviewed the elements with Gleiter using the pattern jury instruction for repeated sexual assault of the same child. The sexual contact element of that crime, WIS. STAT. § 948.025(1), and first-degree sexual assault of a child, § 948.02(1), are the same. Gleiter understood the concept of sexual contact, having experienced the same as a child victim of sexual abuse.

¶13 The circuit court did not misuse its discretion in denying Gleiter's plea withdrawal motion. Gleiter did not show that his plea was not entered knowingly, voluntarily and intelligently. In the absence of such a manifest injustice, the court did not err in denying Gleiter's motion.

By the Court.—Judgment and order affirmed.

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