COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2497-CR **Cir. Ct. No. 2003CF2228**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MILTON WAYNE TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Milton Taylor appeals a judgment of conviction and an order denying his postconviction motion. The dispositive issue is whether the State proved by clear and convincing evidence that Taylor understood the elements of the charge. We affirm.

¶2 Taylor pled guilty to one count of second-degree sexual assault of a child. The charge was based on an allegation of "sexual contact," rather than sexual intercourse. *See* WIS. STAT. § 948.02(2) (2003-04).[1] Taylor filed a postconviction motion seeking to withdraw his plea. The ground was that the circuit court did not comply with duties mandated by statute and case law, in that the court failed to advise Taylor of the elements of the crime, including the definition of "sexual contact" that requires the conduct to have been for the purpose of the actor's sexual gratification or to sexually degrade or humiliate the victim. *See* WIS. STAT. § 948.01(5)(a). Taylor further alleged that he was not otherwise aware of this definition. The court held an evidentiary hearing at which it heard testimony by Taylor's trial counsel and Taylor. The court denied the motion.

¶3 On appeal, the parties first discuss whether the plea colloquy failed to sufficiently address the elements of the offense, as required by ***State v. Bangert***, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986). We assume, without deciding, that the plea colloquy was inadequate on that point. Because the colloquy was inadequate, the burden shifted to the State to prove by clear and convincing evidence that Taylor understood the elements of the charge, including the definition of "sexual contact." ***State v. Nichelson***, 220 Wis. 2d 214, 220-26, 582 N.W.2d 460 (Ct. App. 1998); ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18 (stating the elements of the offense).

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

¶4 We will not upset the circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891. On appeal, Taylor argues that, to the extent the circuit court found that Taylor's trial counsel informed him of the elements of the offense, that finding is clearly erroneous because there is no evidence of what Taylor knew at the time of the plea; there is no affirmative evidence that counsel told Taylor the elements, other than counsel's testimony that it was his usual practice to do that; and counsel's omission of the "purpose" element from the plea questionnaire suggests that he also did not inform Taylor of that element at the time of the plea hearing. The State responds that the evidence supports the finding that counsel told Taylor the elements, and that he understood them.

¶5 Although we conclude that the State met its burden, we begin by clarifying those portions of the State's argument we do *not* rely on for that conclusion. The State asserts that trial counsel testified that when he was reviewing the evidence with Taylor, he discussed the elements with Taylor. While that is an accurate description of one question and answer, the State fails to acknowledge that, in the very next answer, counsel clearly backed away from that answer and said that he did not recall whether he discussed the elements. That position is consistent with the remainder of counsel's testimony, during which he testified several times that he did not remember whether he explained the elements to Taylor.

¶6 The State also asserts that trial counsel testified he believed he went over the elements with Taylor. This overstates the record. The actual question to counsel, after he confirmed that it was his "usual practice" to explain what sexual contact means before his clients enter pleas, was this: "And you would have done that with Mr. Taylor?" Counsel replied: "That's my belief." There is a significant difference between somebody testifying that he believes he did something, and

testifying that he believes he *would have* done something. The former is a statement of belief about what actually happened in a specific instance, while the latter is an assumption about what would have happened, if everything had been done normally. In other words, the latter is essentially another way of saying that an explanation of sexual contact is counsel's usual practice. That would be consistent with, but not add to, counsel's other testimony, expressed several times in various verbal formulations, that it was his usual practice to provide an explanation of the elements.

¶7 The State also argues that the only reasonable reading of the complaint is that the contact was for the purpose of sexual gratification. It relies as well on testimony by Taylor's trial counsel that counsel went over the complaint and the evidence with Taylor, and that counsel informed Taylor that counsel thought the State could prove the charge. We do not rely on these points because none go to the question of whether counsel explained the legal elements the State would have to prove, or whether Taylor understood them. Finally, the State also asserts that the court "made the credibility determination that [trial counsel's] memory was better than Taylor's." Such a determination has little relevance to the key question because counsel testified several times that he did not remember whether he explained the elements to Taylor.

¶8 The evidence that does support a finding that the elements were explained to Taylor, and that he understood them, is counsel's testimony that it was his usual practice to explain them, and that counsel would not have gone ahead with the plea if he felt Taylor did not understand them. The fact that counsel did go ahead with the plea suggests that counsel held a contemporaneous belief that Taylor understood the elements. We are satisfied that this evidence is sufficient to establish that it was not clearly erroneous for the circuit court to find that the State proved Taylor's understanding to a clear and convincing degree.

By the Court.—Judgment and order affirmed.

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