

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 24, 2007

David R. Schanker
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 Nos. 2006AP2902-CR
2006AP2903-CR
2006AP2904-CR**

**Cir. Ct. Nos. 2003CM1563
2004CM1641
2004CF636**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACK A. JEFFREY,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Marathon County: GREGORY B. HUBER and VINCENT K. HOWARD, Judges. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jack Jeffrey appeals a judgment of conviction for sexual assault of a child and disorderly conduct and an order denying his motion

for postconviction relief. Jeffrey contends: (1) he should be permitted to withdraw his guilty plea; (2) his counsel was ineffective; and (3) the court erroneously exercised its sentencing discretion. We reject Jeffrey's arguments and affirm.

¶2 Jeffrey pled guilty to one count of sexual assault of a child under the age of thirteen and two counts of disorderly conduct, in exchange for the dismissal of another charge of sexual assault of a child and bail jumping. The parties presented a joint sentence recommendation, which the court adopted. On the sexual assault charge, the court stayed a sentence of fifteen years' initial confinement and fifteen years' extended supervision, with a ten-year period of probation and a twelve-month jail sentence as a condition of probation. Six months of the jail sentence was stayed and credit was given for the other six months already served. On the disorderly conduct counts, the court sentenced Jeffrey to two years' probation on each count, to run concurrently. Jeffrey filed a postconviction motion seeking to vacate his plea. Following a *Machner*¹ hearing, the court denied the request. This appeal follows.

¶3 Jeffrey argues he should be allowed to withdraw his guilty plea for multiple reasons. Jeffrey contends there is no factual basis supporting his sexual assault conviction. Jeffrey characterizes the following portion of the complaint in the police report as an unsatisfactory allegation of sexual contact between Jeffrey and the child-victim:

[J.K.P.] said in early August, 2003, [Jeffrey] also attempted intercourse with her. She was alone with him at home and her mom was at work. He was drunk. He told her to get in

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

his bedroom and get undressed. She did as he told her. He stood by the side of the bed and she was on her back. He tried for a few minutes to penetrate her but was unable to. She pushed him away and ran into her room. He later gave her \$40.00.

¶4 It is reasonable to construe Jeffrey's attempt to penetrate the victim as involving direct, intentional touching by Jeffrey of the child's intimate areas for the purpose of sexual gratification or arousal. Furthermore, Jeffrey's attorney conceded at the plea hearing there was a factual basis for the plea, noting a jury could find Jeffrey's guilt beyond a reasonable doubt. *See State v. Thomas*, 2000 WI 13, ¶23, 232 Wis. 2d 714, 605 N.W.2d 836. The facts contained in the police report, in conjunction with concession of Jeffrey's attorney that a factual basis supported the plea and Jeffrey's guilty plea, properly satisfied the court that Jeffrey committed the offenses to which he pled. The court fully stated its rationale for accepting the factual basis for the plea in its lengthy memorandum decision on the postconviction motion.

¶5 Moreover, a reviewing court may analyze the entirety of the record to determine whether a defendant has accepted the factual basis presented underlying the guilty plea. *Id.* Here, the record reveals a strong factual basis for the entry of the guilty plea, including the videotaped testimony of the child-victim. The court received the victim's videotaped testimony into evidence at the preliminary hearing under WIS. STAT. § 908.08(4).² In the videotape, the victim clarified that during the sexual assault, Jeffrey's "private part" did go inside her private part "about this much," gesturing with thumb and forefinger slightly apart

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

to indicate the distance. The court did not err in concluding that a factual basis supported Jeffrey's pleas.

¶6 The plea questionnaire, together with the court's colloquy, also informed Jeffrey of the constitutional rights he waived by pleading guilty, the elements of the crimes, and the potential penalties. The court confirmed on numerous occasions that Jeffrey's pleas were knowingly, intelligently and voluntarily entered. See *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986).

¶7 Jeffrey insists he had no knowledge of the essential elements of the offenses. Jeffrey contends he "did not know the state had to prove or that the statute required, as an element of first degree sexual assault of a child, that he had sexual contact for purposes of sexual degradation, humiliation of the victim or for his arousal or gratification." The record belies Jeffrey's contentions. Under the heading "Understandings" on the plea questionnaire, Jeffrey confirmed he understood that the crimes to which he was pleading had elements the State would have to prove beyond a reasonable doubt if he had a trial, and that the elements of the crimes were explained to him by his attorney. The sheet attached to the plea questionnaire contained a description of the elements of the charges to which Jeffrey pled. By signing the plea questionnaire, Jeffrey confirmed that "I have reviewed and understand this entire document and any attachments."

¶8 Jeffrey also insists he did not knowingly waive his constitutional rights. This argument is disingenuous. The court noted the boxes on the plea questionnaire were marked indicating Jeffrey understood the constitutional rights he was giving up, and the court asked Jeffrey if he understood those rights. Jeffrey stated that he had read them to himself while his attorney read them to him,

and that he understood them. When the court offered to read those rights to him, Jeffrey replied, “I’m confident that they were well explained to me.” Jeffrey also told the court that he had no questions about any of those constitutional rights. There is nothing in the record to support Jeffrey’s contention that the “entire plea process had all the indicia of haste and confusion.” The court did not err in refusing to allow Jeffrey to withdraw his plea after sentencing.

¶9 Jeffrey next contends he received ineffective assistance of counsel regarding his plea because his attorney did not investigate or properly prepare, and that his attorney coerced the plea. This claim is also belied by the record. First, his attorney did not coerce Jeffrey’s pleas. At the plea hearing, the following was stated:

[ATTORNEY] SCHELLPFEFFER: And we spoke at length on those couple of occasions about you’re not forced to proceed with the plea. You’re not forced to proceed with me as your trial counsel, is that correct?

THE DEFENDANT: That’s correct.

¶10 The record also supports the circuit court’s finding that Jeffrey’s attorney’s performance was not deficient. The trial court found that Schellpfeffer was a more credible postconviction witness than Jeffrey. Jeffrey has not met his burden of demonstrating ineffective assistance of counsel.

¶11 Jeffrey next argues the circuit court erroneously exercised its sentencing discretion. When a defendant affirmatively joins or approves a sentence recommendation, the defendant cannot attack the sentence on appeal. *State v. Scherreiks*, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989). Here, the court sentenced Jeffrey consistent with the joint recommendation. In any event, it cannot be argued that Jeffrey’s sentence was harsh or excessive.

Jeffrey faced a possible sixty-year prison sentence on the sexual assault charge. Jeffrey received probation with a stayed thirty-year sentence.

¶12 Finally, we note that Jeffrey’s briefs misstate the record and ignore facts contrary to Jeffrey’s position. This is particularly notable with regard to Jeffrey’s alleged lack of knowledge of the elements of the charges, lack of understanding of the constitutional rights he waived, the contention the plea was a result of coercion and haste, and the assertion that sexual contact was not established. Jeffrey’s briefs fail to conform to the requirements of WIS. STAT. RULE 809.19(1)(d), which require an objective recitation of the facts. It should be clear to all lawyers that appellate briefs must not be interspersed with “spin,” and that facts must be stated with absolute, uncompromising accuracy. Facts should never be overstated or “fudged” in any manner. Judge William Eich, *Writing the Persuasive Brief*, WISCONSIN LAWYER, Vol. 75, No. 2 (Feb. 2003).

By the Court.—Judgment and order affirmed.

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

