

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 2009

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 No. 2008AP1614-CR

Cir. Ct. No. 2007CF129

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK C. HUFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Patrick Huff pled no contest to third-degree sexual assault contrary to WIS. STAT. § 940.225(3) (2007-08).¹ After sentencing, he sought to withdraw his plea because he did not understand the elements of the crime. We agree with the circuit court that the totality of the evidence demonstrates that Huff had the requisite knowledge and understanding of the elements of third-degree sexual assault. We affirm the judgment of conviction and the order denying Huff’s motion to withdraw his no contest plea.

¶2 We agree with the State that the plea colloquy was defective because the circuit court did not ensure that Huff understood the elements of third-degree sexual assault before accepting Huff’s no contest plea. *State v. Bangert*, 131 Wis. 2d 246, 266-67, 389 N.W.2d 12 (1986) (an understanding of the nature of the charge must include an awareness of the essential elements of the crime).

¶3 Because Huff made a prima facie showing that the plea colloquy was defective, *id.* at 274, the burden shifted to the State to show that Huff’s no contest plea was entered knowingly, intelligently and voluntarily, despite the deficiencies in the plea hearing. *State v. Brown*, 2006 WI 100, ¶40, 293 Wis. 2d 594, 716 N.W.2d 906. To meet its burden, the State “may rely ‘on the totality of the evidence, much of which will be found outside the plea hearing record.’” *Id.* (citation omitted). Such evidence can include testimony from the defendant and trial counsel to establish the defendant’s understanding, documentary evidence and transcripts of prior hearings. *Id.*

¹ All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 To be convicted of third-degree sexual assault, WIS. STAT. § 940.225(3), a defendant must have had sexual intercourse with a person who did not consent. WIS JI—CRIMINAL 1218. At the plea withdrawal hearing, Huff’s trial counsel testified that he and Huff discussed the elements of the charged crimes at their first meeting, including third-degree sexual assault, “pretty extensively.” They discussed the elements of third-degree sexual assault again prior to the preliminary hearing and at least three times before the plea hearing. Huff intended to offer a defense that the victim consented to the conduct in order to negate the element of nonconsent. Although Huff did not execute a plea questionnaire, counsel testified that he reviewed disposition options with Huff, including trial rights, what the State had to prove and the elements of the offense. Huff did not exhibit any lack of understanding in the course of the representation. Counsel believed that Huff understood the elements and entered his no contest plea knowingly, voluntarily and intelligently.

¶5 Huff testified that he did not recall discussing the elements of any of the charged crimes, including third-degree sexual assault, with his trial counsel before he entered his no contest plea. Huff recalled having two or three discussions with trial counsel about a plea. Huff claimed that at the time he entered his plea, he did not understand that he was conceding that he had sex with the victim without her consent. Rather, Huff believed that he was conceding that he had consensual sex with an under-age person even though the complaint did not level such a charge. Huff stated that he did not know what he was charged with until after he entered his plea, he never looked at the criminal complaint or the information, and he did not listen to the judge when the judge identified the charges he faced. Huff contended that he followed instructions from his counsel

and, even though he did not understand the proceedings, he responded to the court at the plea hearing as if he did.

¶6 Huff further testified that he visited the jail law library before his plea hearing to research the sexual assault statutes, including third-degree sexual assault. After reviewing the statutes, Huff concluded that he should have been charged with having consensual sex with someone seventeen or younger. Nevertheless, Huff maintained that despite his independent research, he still did not understand the elements of third-degree sexual assault at the time he pled no contest to that charge.

¶7 The circuit court found that trial counsel was credible and Huff was not. Counsel explained the elements of third-degree sexual assault to Huff on more than one occasion before the plea hearing and the elements are not difficult to understand. Huff manifested no intellectual limitations that would have prohibited understanding the elements of third-degree sexual assault at the plea hearing, and Huff conceded at the plea hearing that he had read the complaint and that its allegations were true. Furthermore, Huff admitted that he researched the sexual assault statutes and found a statute he thought more closely fit with his conduct. The court pointed to a twelve-page letter Huff wrote to the court setting out his version of events as evidence that Huff was able to understand items in writing. Huff was able to understand the proceedings, and he was informed of and understood the elements of third-degree sexual assault. The court concluded that based on the totality of the record, Huff knowingly, intelligently and voluntarily entered his no contest plea.

¶8 To withdraw his plea after sentencing, Huff had to establish that plea withdrawal would avoid a manifest injustice. *State v. Trochinski*, 2002 WI 56,

¶15, 253 Wis. 2d 38, 644 N.W.2d 891. Whether Huff's plea was entered knowingly, intelligently and voluntarily is a question of constitutional fact. *Id.*, ¶16. We decide this question independently of the circuit court. *State v. Straszkowski*, 2008 WI 65, ¶29, 310 Wis. 2d 259, 750 N.W.2d 835. However, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.*

¶19 On appeal, Huff essentially asks us to re-weigh the evidence before the circuit court and reach different findings about his credibility. This we cannot do; credibility determinations are for the circuit court to make. *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). Huff argues that the plea colloquy was defective. This is conceded by the State and need not detain us. Huff argues that the failure of trial counsel to use a plea questionnaire requires plea withdrawal. This is not the law. While using a plea questionnaire may be a helpful practice, *see State v. Hoppe*, 2009 WI 41, ¶32, ___ Wis. 2d ___, 765 N.W.2d 794, its absence does not preclude a voluntary, intelligent and knowing plea. The propriety of the plea may be determined from the totality of the evidence. *Brown*, 293 Wis. 2d 594, ¶40.

¶10 The circuit court's findings of fact are not clearly erroneous, and its credibility determinations are binding upon us. Because the totality of the record confirms that Huff knew and understood the elements of third-degree sexual assault when he entered his no contest plea, Huff has not shown a manifest injustice warranting plea withdrawal.

By the Court.—Judgment and order affirmed.

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

