COURT OF APPEALS DECISION DATED AND FILED

July 16, 2002

Cornelia G. Clark
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. 01-2883-CR
02-0378-CR

Cir. Ct. No. 00-CF-286

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID GALLAGHER,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed*.

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

¶1 PER CURIAM. David Gallagher appeals his conviction for having sexual intercourse with a child under the age of thirteen, contrary to WIS. STAT.

§ 948.02(1),[1] and an order denying postconviction relief. Gallagher argues that the trial court failed to determine that he understood the nature of the offense before accepting his no contest plea. Specifically, Gallagher contends that he was not advised of and did not understand the elements of the offense. We disagree and conclude that Gallagher understood the elements of the offense with which he was charged and that the record shows that he entered his no contest plea voluntarily, knowingly and intelligently. We therefore affirm the judgment and order.

BACKGROUND

¶2 The State charged Gallagher, in both the criminal complaint and the information, with having sexual intercourse with a child under age thirteen. In the complaint, there were statements from a three-year-old child that Gallagher had touched her vagina, that it hurt and that he "used two fingers to break her body." A sexual assault nurse found two tears in the child's vagina and said that the initial examination revealed that the child had been sexually assaulted in her vagina. She stated that the child's injuries were consistent with digital penetration.

¶3 At his arraignment, Gallagher waived reading of the information, and his counsel informed the court that, "Mr. Gallagher's aware of the nature of the allegations against him, as well as the penalties associated therewith." Before accepting his plea, the court confirmed that Gallagher had reviewed and signed the plea questionnaire and waiver of rights form. The court specifically reminded

[1] WISCONSIN STAT. § 948.02(1) punishes "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years …." All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Gallagher of the portion of the form pertaining to his "right to have a jury trial and have guilt established beyond a reasonable doubt." That portion of the form also informed Gallagher that he had been charged with having sexual intercourse with a child under age thirteen years. Gallagher stipulated that the criminal complaint and the preliminary hearing both provided the factual basis for his plea, and the court accepted his no contest plea.

¶4 At the postconviction hearing, Gallagher's trial counsel testified that he had repeatedly discussed the elements of the charge with Gallagher and, specifically, that he had "at least some discussion about the legal definition of intercourse as opposed to a layman's use of that term."[2] Further, Gallagher admitted that his attorney had reviewed the plea questionnaire with him. Gallagher argued, however, that he was not advised of and did not understand the elements of the offense with which he was charged. Specifically, he claimed that he did not understand what he baldly asserted was the "sexual gratification" element of the offense. The court decided that Gallagher had not made a prima facie showing that he entered his plea without knowledge of the crime of which he had been accused and pointed out that sexual gratification simply was not an issue in the case. Gallagher now appeals.

DISCUSSION

¶5 On appeal, Gallagher makes a more generalized assertion. He argues that the court failed to adequately determine that he understood the nature

[2] WISCONSIN STAT. § 948.01(6) provides: "'Sexual intercourse'" means vulvar penetration … or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required."

of the offense with which he was charged. He contends that the court did not comply with the requirements of WIS. STAT. § 971.08 for taking a plea and did not ensure that he understood the elements of the offense. However, Gallagher's argument on appeal is so generalized that he does not specifically identify the element or elements that he contends were not described to him or that he claims he did not understand. Gallagher also claims that even without the deficiencies in taking the pleas, nothing shows that he had sufficient understanding of the offense to voluntarily and knowingly enter a plea. We disagree.[3]

A. PLEA WITHDRAWAL

¶6 Before accepting a plea of guilty or no contest, WIS. STAT. § 971.08(1)(a) requires that a court address "the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." In ***State v. Bangert***, 131 Wis. 2d 246, 267-68, 389 N.W.2d 12 (1986), the court explained that the trial court can satisfy the § 971.08(1)(a) requirement to determine the defendant's understanding of the nature of the charge by using any one or a combination of three methods.[4] However, in ***State v. Brandt***, 226 Wis. 2d 610, 619-20, 594 N.W.2d 759 (1999), the court emphasized that the ***Bangert*** list is not exclusive. It

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[3] Gallagher also suggests, but does not develop, an argument that he was improperly charged.

[4] The trial court may (1) summarize the elements of the crime charged by reading from the appropriate jury instructions or from the applicable statute; (2) 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; and (3) 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).

clarified that a trial court's colloquy need not be done in any particular fashion as long as the record demonstrates that the defendant knowingly, voluntarily and intelligently entered the plea. ***Id.*** at 620.

¶7 Whether a plea is entered knowingly, voluntarily and intelligently is a question of constitutional fact that we review without deference to the trial court. ***State v. Nichelson***, 220 Wis. 2d 214, 217, 582 N.W.2d 460 (Ct. App. 1998). In ***Brandt***, 226 Wis. 2d at 620-22, the court outlined the necessary analysis in claims to withdraw pleas. To successfully withdraw a plea, a defendant must first make a prima facie showing that the trial court violated WIS. STAT. § 971.08 by failing to demonstrate that the defendant understood the nature of the crime to which he or she had pled. ***Id.*** at 617-18.

B. ELEMENTS OF THE OFFENSE

¶8 Here, the court demonstrated that Gallagher understood the charge against him and satisfied WIS. STAT. § 971.08(1)(a) by reviewing the plea questionnaire and waiver of rights form in the plea colloquy.[5] A court may "specifically refer to and summarize any signed statement of the defendant which might demonstrate that the defendant has notice of the nature of the charge." ***Bangert***, 131 Wis. 2d at 268.

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[5] If the defendant makes a prima facie showing of a WIS. STAT. § 971.08(1)(a) violation and alleges that he or she in fact did not understand the elements of the crime, then the burden shifts to the State to show by clear and convincing evidence that the defendant entered the plea knowingly, voluntarily and intelligently. ***Bangert***, 131 Wis. 2d at 274-75. Here, however, we conclude that Gallagher failed to make a prima facie showing that the trial court erred by taking his plea.

¶9 Gallagher asserts that the court's discussion of the plea questionnaire is insufficient to satisfy WIS. STAT. § 971.08(1)(a) because the form merely recites the language of the statute. However, the language of the sexual assault statute clearly indicates the elements of the offense. WISCONSIN STAT. § 948.02(1) prohibits both sexual contact and sexual intercourse with a child under the age of thirteen.[6] As indicated, Gallagher was charged with sexual intercourse with a child. Only two elements must exist to support a conviction for this offense. WIS JI—CRIMINAL 2102. First, the person must have had intercourse with the child. ***Id.*** Second, the child must have been under the age of thirteen. ***Id.*** Here, every pleading and the plea colloquy made it clear that the State had charged Gallagher with having sexual intercourse with a child based on digital penetration of her vagina, as opposed to mere sexual contact.

¶10 We conclude that Gallagher was advised of the two elements of the charged offense—sexual intercourse and age.[7] No further explanation was necessary and, in fact, Gallagher has never claimed that he did not understand these two elements.

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[6] When the State charges a defendant with a violation based on sexual contact, it must prove the "sexual gratification" element. *See* WIS. STAT. § 948.02(5) and (6). However, as the trial court observed, when a defendant is charged with having sexual intercourse with a child, sexual gratification is not an element.

[7] The complaint, information and plea questionnaire and waiver of rights form all describe the charge against Gallagher. Sexual intercourse with a child under age thirteen requires the State to prove just that: having sexual intercourse, as defined by the statutes, and having it with a child under age thirteen. WIS. STAT. § 948.02(1). These documents, along with testimony of digital penetration at the preliminary hearing and the attorney's postconviction testimony that he described to Gallagher the statutory definition of sexual intercourse, establish the two elements of the offense.

C. VOLUNTARY AND KNOWING PLEA

¶11 In any event, we conclude that Gallagher's challenge to his plea fails because the record demonstrates that Gallagher was aware of the charge against him. The record is clear that he entered a knowing and voluntary plea.

¶12 Gallagher's trial counsel testified that he had repeatedly discussed the elements of the actual charge with Gallagher and that they had "at least some discussion about the legal definition of intercourse as opposed to a layman's use of that term." The court specifically inquired whether Gallagher had reviewed the plea questionnaire and waiver of rights form, and Gallagher personally admitted that he had and acknowledged his signature. The form explains that by pleading to the charge, Gallagher was agreeing to release the State from its obligation to prove, beyond a reasonable doubt, the elements of the charged offense of first-degree sexual assault of a child. Finally, Gallagher, through counsel, stipulated that the criminal complaint and the preliminary hearing transcript provided a factual basis for his pleas. Both clearly establish that Gallagher must have been aware of and understood the allegations to which he pled.

CONCLUSION

¶13 Gallagher failed to make a prima facie case that the trial court did not demonstrate that Gallagher understood the nature of the crime to which he had pled. In fact, Gallagher acknowledged the nature of the charges and assented that he understood them. The trial court complied with WIS. STAT. § 971.08(1)(a). Gallagher has no grounds on which to withdraw his plea.

By the Court.—Judgment and order affirmed.

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