COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2527-CR **Cir. Ct. No. 2010CF98**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Order reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Robert Brown appeals a judgment convicting him of repeated second-degree sexual assault of a child and an order denying his postconviction motion for plea withdrawal. Brown argues he is entitled to plea

withdrawal because the plea colloquy failed to adequately confirm his understanding of two elements of the crime: (1) the meaning of "sexual contact"; and (2) the "specified period of time" within which at least three acts occurred.

¶2 We reject Brown's claim with respect to the time-frame element. The State, however, concedes the colloquy was inadequate as to the meaning of "sexual contact." Based on the State's concession, we will reverse the order and remand the matter with directions to hold an evidentiary hearing on whether Brown understood the sexual contact element when he entered his guilty plea.[1]

BACKGROUND

¶3 The State charged Brown with repeated first-degree sexual assault of the same child contrary to WIS. STAT. §§ 948.02(1)(b) and 948.025(1)(b).[2] Pursuant to a plea agreement, Brown pled guilty to an amended charge of repeated second-degree sexual assault of the same child contrary to WIS. STAT. §§ 948.02(2) and 948.025(1)(e). In exchange for his plea to the amended charge, the State dismissed a felony bail jumping charge. The circuit court ultimately imposed a twenty-year sentence consisting of fifteen years' initial confinement and five years' extended supervision. Brown's postconviction motion for plea withdrawal was denied without an evidentiary hearing and this appeal follows.

[1] Resolution of this issue on remand will determine whether the judgment of conviction must be vacated or remains intact.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

DISCUSSION

¶4 When taking a plea, the circuit court has a statutory obligation to establish on the record that the defendant understands, among other things, the elements of the crime charged. *See* WIS. STAT. § 971.08(1); ***State v. Bangert***, 131 Wis. 2d 246, 262-72, 389 N.W.2d 12 (1986). When moving for plea withdrawal based on an alleged defect in the plea colloquy, a defendant must (1) make a prima facie showing that the plea was accepted without the trial court's conformance with WIS. STAT. § 971.08 or other mandatory procedures; and (2) allege that he or she did not know or understand the information that should have been provided at the plea hearing. ***State v. Howell***, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48. If the defendant satisfies both prongs, the State has the burden to prove at an evidentiary hearing that the plea was knowing, intelligent, and voluntary. ***Id.***, ¶29.

¶5 Second-degree sexual assault consists of "sexual contact or sexual intercourse with a person who has not attained the age of 16 years." WIS. STAT. § 948.02(2). One engages in repeated acts of sexual assault of the same child when three or more violations of § 948.02(2) are committed within a specified period of time involving the same child. WIS. STAT. § 948.025(1)(e). The present offense was based on allegations of repeated "sexual contact" of a child. In his postconviction motion, Brown argued the plea colloquy failed to adequately confirm his understanding of both the meaning of "sexual contact," and the "specified period of time" within which at least three acts occurred. Brown also alleged that he did not understand either of these elements.

¶6 We reject Brown's claim with respect to the time-frame element. Brown admitted to a police officer that he had sexual intercourse with the same child on at least three occasions between July 30, 2006 and July 30, 2009.[3] Based on that admission, the Complaint and Information identified those dates as the time period during which the assaults occurred. The amended charge to which Brown ultimately pled identified the same time period for the assaults. During the plea colloquy, the court indicated there had to be a sequence of at least three violations and Brown confirmed he had engaged in sexual contact with a person under the age of sixteen at least three times.

¶7 Immediately after the plea hearing, the court learned that WIS. STAT. § 948.025 had been amended effective March 26, 2008, which fell within the charged time period. The court consequently reconvened the next day to clarify the time frame of the offense. After the court inquired whether there had been three sexual assaults occurring after the effective date of the statutory change, defense counsel indicated Brown would stipulate that there were three acts that took place between April 1, 2008 and July 30, 2009.

¶8 The court engaged Brown in a colloquy to determine whether he understood the stipulation. When Brown appeared to be confused with the concept, the court allowed Brown extra time to talk with his attorney. The court also informed Brown: "You can undo everything I did yesterday unless you can tell me that indeed you had sexual contact … with the child … between that operative period, sexual contact with this child … who had not attained the age of

[3] Brown later denied having sexual intercourse with the child, but admitted sexual contact.

16 years, between April 1, 2008 and July 30, 2009." After a break, the following exchange occurred:

> [Court]: [H]ave you had an opportunity to talk to Mr. Brown?
>
> [Defense counsel]: Yes. I believe he was a little bit hard of hearing. Once we got in the room and spoke, I did explain to him about the statute and the time period. And we also reviewed some of the things we talked about yesterday. And he is in agreement that there was sexual contact with [the child] between April 1st of '08 and July 30th of '09. … On at least three occasions.
>
> [Court]: Do you agree with that, Mr. Brown?
>
> [Brown]: Yes, sir.
>
> [Court]: Can you specify after looking at your memory specific dates that you may have touched this child in a sexual manner?
>
> [Brown]: No, sir, not really. It was during the summertime.
>
> [Court]: Okay.
>
> [Defense Counsel]: I believe it was in the summer and after the time they moved to a particular house, in their backyard basically.
>
> [Court]: Do you agree that you touched this child in a sexual manner three times after April 1, 2008, and before July 30, 2009?
>
> [Brown]: Yes, sir.

Based on this record, we conclude the circuit court adequately confirmed Brown's understanding of the time-frame element. Therefore, Brown is not entitled to an evidentiary hearing on this aspect of his postconviction motion.

¶9 Turning to the "sexual contact" element, the State concedes the plea colloquy was inadequate. For an act to constitute "sexual contact," the defendant must intentionally touch the complainant's intimate parts "for the purpose of

sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." WIS. STAT. § 948.01(5); *see also* WIS JI—CRIMINAL 2101A (2007).

¶10 Here, the court explained that sexual contact is "touching with any human body part, generally the hand, on a sexual area of another human being, whether it be the breast, the vagina, the buttocks, you name it." The State acknowledges, however, that the court failed to discuss the sexual degradation, gratification, or humiliation component of "sexual contact." *See* ***State v. Jipson***, 2003 WI App 222, ¶¶8-9, 267 Wis. 2d 467, 671 N.W.2d 18. Therefore, we will reverse the order denying Brown's postconviction motion and remand the matter to the circuit court with directions to hold an evidentiary hearing at which the State will bear the burden of proving that Brown understood the term "sexual contact."

By the Court.—Order reversed and cause remanded with directions.

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