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April 15, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2431-CR State of Wisconsin v. Jay R. Mueller (L.C. #2008CF404)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Jay Mueller appeals a judgment convicting him of first-degree sexual assault of a child and an order denying his postconviction motion for plea withdrawal without a hearing. Mueller sought to withdraw his plea on the alternate grounds that the plea colloquy was defective regarding the explanation of an element of the offense which Mueller did not, in fact, fully understand, and that counsel provided ineffective assistance for failing to adequately advise Mueller about that same element. He raises those same two issues on this appeal. After reviewing the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9 and 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a plea withdrawal claim, that means the facts alleged would, if true, either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). In order to warrant relief on a claim of ineffective assistance of counsel, the alleged facts would need to establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. No hearing is required, however, when a motion presents only conclusory allegations or when the record conclusively demonstrates that the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for the court to meaningfully assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23.

Mueller first contends that the plea colloquy was defective because the circuit court did not state the definition of sexual contact when it recited the other statutory elements of the offense and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

asked whether Mueller understood the charge. As the State correctly points out, however, the circuit court was not required to personally advise Mueller about the definition of sexual contact in order to establish that Mueller understood the nature of the charge. *See* ***State v. Brown***, 2006 WI 100, ¶¶46-48, 293 Wis. 2d 594, 716 N.W.2d 906 (discussing several ways in which court can fulfill its duty, including summarizing the elements or having counsel do so). Rather, the court could and did reasonably rely upon counsel's assertion that:

> I went over with Mr. Mueller verbatim [from Criminal Jury Instruction 2101A] the requirements for the purposes of sexual contact; specifically, that there was an intent to become sexually aroused or gratified by him, and he is able to answer questions regarding that.
>
> ….
>
> … So, that the Court understands, that Mr. Mueller agrees that the conduct was done for the purposes of sexual gratification with the concept of intent incorporated in that.

Because the court itself accurately summarized most of the elements of the offense directly from the statute and counsel supplemented that information by accurately summarizing the remaining element as set forth in a jury instruction, the record does not establish that the plea colloquy was defective, and Mueller was not entitled to a hearing on his ***Bangert*** claim.

Mueller's alternative claim—that he should be allowed to withdraw his plea based upon ineffective assistance of counsel—fails because his motion does not allege sufficient facts to establish prejudice. Mueller provided an affidavit with his postconviction motion disputing counsel's assertions at the plea hearing that she had explained the meaning of sexual contact to Mueller and that Mueller agreed that his conduct had been for the purpose of sexual gratification. What was missing from Mueller's motion and affidavit was any allegation, much less plausible explanation, as to why Mueller would have proceeded to trial if the element had been better explained to him.

Mueller admitted—both to the presentence investigation writer and to the court at sentencing—that he had, in fact, touched the vagina of a twelve-year old girl, and he offered no innocent explanation for his conduct. To the contrary, he told the court that he completely understood that his conduct was "wrong on so many levels," and that he could not believe that he was "capable of such disgusting behavior." Mueller is not now denying his actual conduct, and still is not alleging any other purpose for his conduct other than the obvious inference of sexual gratification. Moreover, in exchange for his plea, the State dismissed two additional sexual assault charges and two bail jumping charges. In sum, there is nothing in the postconviction motion that explains what possible misunderstanding of the term "sexual contact" Mueller could have had that would have led him to make a different evaluation of either his chances at trial or the advantages of the plea deal. We therefore conclude that Mueller was also not entitled to a hearing on his ineffective assistance claim.

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals