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DISTRICT II

October 28, 2015

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

2014AP2791-CR State of Wisconsin v. Adam T. Miller (L.C. #2013CF607)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Adam T. Miller appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the circuit court erred in denying his motion to withdraw his guilty plea. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm the judgment and order of the circuit court.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Miller was convicted following a guilty plea to one count of repeated acts of sexual assault of a child. The charge stemmed from allegations that on or between January 1, 2001 and December 31, 2002, Miller had sexual contact with the same child on at least three separate occasions before she had attained the age of thirteen.[2]

After sentencing, Miller filed a motion to withdraw his guilty plea. The motion alleged that Miller did not knowingly, voluntarily, and intelligently enter his plea because the circuit court failed to advise him of the elements of the offense. The motion further alleged that there was an insufficient factual basis to support the plea.

Following an evidentiary hearing, the circuit court found that Miller understood the elements of the offense to which he entered his guilty plea. The court also determined that there was a sufficient factual basis for the plea. Accordingly, it denied Miller's motion. This appeal follows.

A defendant who seeks to withdraw a plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. One way to show a manifest injustice is to demonstrate that a plea was not knowingly, voluntarily, and intelligently entered. ***Id.*** A manifest injustice also occurs if there was an insufficient factual basis to support the plea. *See* ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836.

[2] The child was born in 1997.

Whether a plea was knowingly, voluntarily, and intelligently entered is a question of constitutional fact that this court reviews independently. ***Brown***, 293 Wis. 2d 594, ¶19. Whether a factual basis exists from documents in the record is also an issue that this court reviews independently. *See* ***State v. Peralta***, 2011 WI App 81, ¶16, 334 Wis. 2d 159, 800 N.W.2d 512. We may review the entire record when applying the manifest injustice test. *See* ***State v. Cain***, 2012 WI 68, ¶¶29-31, 342 Wis. 2d 1, 816 N.W.2d 177.

On appeal, Miller contends that the circuit court erred in denying his motion to withdraw his guilty plea. He renews his arguments that the court failed to advise him of the elements of the offense and that there was an insufficient factual basis to support the plea.

The elements of repeated acts of sexual assault of a child are: (1) the defendant committed at least three sexual assaults of the same child; and (2) at least three sexual assaults took place within a specified period of time. *See* WIS. JI—CRIMINAL 2107. For purposes of Miller's prosecution, each of the three sexual assaults must constitute first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (2001-02). This subsection defines first-degree sexual assault to include "sexual contact or sexual intercourse with a person who has not attained the age of 13 years." ***Id.*** Sexual contact includes a defendant's intentional act of touching a victim's intimate body part for the purpose of sexual gratification. *See* WIS. STAT. § 948.01(5)(a) (2001-02).

Here, the record demonstrates that Miller understood these elements. At the plea hearing, the circuit court identified the time period for the charge and the victim, who was less than thirteen years old when the assaults were committed. The court also informed Miller that the charge required that he commit three or more acts of first-degree sexual assault against the same

victim. In addition, the prosecutor and Miller's attorney clarified that the sexual assault related to sexual contact for the purpose of sexual gratification. Miller indicated that he understood all of this.

Although Miller complains that the circuit court never advised him of the definition of "sexual contact," the failure to do so does not render his plea colloquy deficient. There was no need for the court to explore Miller's understanding of the term in light of his signed plea questionnaire. That plea questionnaire, which Miller's attorney referenced during the plea colloquy, indicated that the elements of the offense had been explained to Miller and contained the following notation: "On or between January 1, 2001 and December 31, 2002, I intentionally had contact with the vagina of [the victim] for the purpose of sexual gratification on at least 3 separate occasions before she was thirteen." This confirmed Miller's understanding that the charge involved intentional sexual contact between him and an intimate body part of the victim, specifically, her vagina, for the purpose of sexual gratification.[3] Taken together, the plea colloquy and plea questionnaire adequately informed Miller of the elements of the offense such that he could knowingly, voluntarily, and intelligently enter his plea.

The record also demonstrates that there was a sufficient factual basis for the plea. At the plea hearing, Miller's attorney stipulated that a factual basis existed for the offense. The court agreed, noting that a factual basis existed "within the documentation that has been provided to [it]." At that time, the court possessed both Miller's plea questionnaire and the criminal

[3] The plea questionnaire notation is consistent with Miller's postconviction testimony explaining why he entered his guilty plea. Miller stated, "I touched [the victim] and it was wrong…. The touching of her vagina." As noted by the State, touching is synonymous with contact.

complaint. The plea questionnaire contained Miller's acknowledgement to satisfying the elements of the offense. The complaint, meanwhile, contained (1) the victim's allegation that Miller had repeatedly touched and licked her vagina when she was around five years old; and (2) Miller's statement to investigators that he had been touching and licking the victim's vagina since 2001 or 2002 and would sometimes masturbate while touching her.

Accordingly, we are satisfied that the circuit court properly denied Miller's motion to withdraw his guilty plea.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals