OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

December 14, 2015

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Donna Odrzywolski
6650 W. State St., Unit D, #234
Wauwatosa, WI 53213

Robert Probst
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2014AP2938-CR State of Wisconsin v. Fidel Torres, III (L.C. # 2012CF3904)

Before Lundsten, Higginbotham and Sherman, JJ.

Fidel Torres, III, appeals a judgment of conviction and an order denying postconviction relief. Torres contends that his plea was not knowing, intelligent, and voluntary because he did not understand the "sexual contact" element of incest at the time he entered his 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 summarily affirm.

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

In February 2013, Torres pled no contest to incest with a child. Incest with a child is defined as sexual contact with a child that the defendant knew was related, and the child was related in a degree of kinship closer than second cousin. WIS. STAT. § 948.06(1); WIS JI—CRIMINAL 2131 (May 2008). Sexual contact, in turn, is defined as "intentional touching ... for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." WIS. STAT. § 948.01(5); WIS JI—CRIMINAL 2101A (May 2007).

Torres filed a postconviction motion to withdraw his plea, contending that the plea colloquy was defective because the court did not advise Torres of an essential element of the crime of incest. *See* WIS. STAT. § 971.08(1)(a) (circuit court's duties during plea colloquy include ensuring defendant is aware of nature of charge); ***State v. Nichelson***, 220 Wis. 2d 214, 218, 582 N.W.2d 460 (Ct. App. 1998) (to understand the nature of the charge, the defendant must be aware of all the essential elements of the offense). Specifically, Torres pointed to the absence of any definition of "sexual contact" during the plea colloquy or on the plea questionnaire. *See* ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18 (when a crime against a child is alleged to have been committed by "sexual contact," an essential element of the crime is that the contact must have been "for the purpose of defendant's sexual gratification or the victim's humiliation") (quoted source omitted). Torres asserted that he was never informed of the "purpose element" of sexual contact as an element of the crime of incest and that he did not understand that information. *See* ***State v. Howell***, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48 (a defendant who can show that the circuit court failed to follow mandatory plea procedures, and who alleges he did not understand the omitted information, may seek plea withdrawal).

The circuit court held a hearing on Torres's motion for plea withdrawal, at which the State bore the burden to prove by clear and convincing evidence that Torres's plea was knowing, intelligent, and voluntary despite the defect in the plea colloquy. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986) (where a postconviction motion establishes a prima facie case for plea withdrawal based on a defect in the plea colloquy, the burden shifts to the State to demonstrate by clear and convincing evidence that, despite the deficiency, the defendant otherwise knew or understood the missing information). At the hearing, the State introduced testimony by Torres's trial counsel that counsel met with Torres multiple times to discuss this case prior to Torres entering a plea. Counsel testified that he went over the definition of "sexual contact" with Torres, informing Torres that the alleged contact "would either have to be for some sort of sexual purposes or would have to be to degrade or humiliate the victim." Counsel testified that he explained to Torres which facts counsel believed would support each element of the charge, and explained to Torres each element, including the definition of "sexual contact." Torres did not present any evidence or testimony.

The circuit court denied Torres's motion to withdraw his plea. The court found that the uncontroverted testimony by Torres's trial counsel was highly credible, and established that counsel discussed the elements of incest with Torres prior to Torres entering his plea. The court found that, during the pre-plea conversations between counsel and Torres, counsel explained the purpose element of sexual contact, defined sexual contact, and explained to Torres how the facts related to each element of the offense. The court therefore found that the State had met its burden to show that Torres's plea was knowing, voluntary, and intelligent.

On appeal, Torres contends that the State did not meet its burden at the postconviction motion hearing to show by clear and convincing evidence that Torres was fully advised of the

sexual contact element at the time he entered his plea. Torres argues that his trial counsel's testimony that counsel informed Torres that sexual contact would have to be "for some sexual purpose" was insufficient. Torres argues that the definition of "sexual contact" is not that the contact must have been "for some sexual purpose," but rather is that the contact must have been "for the purpose of … sexually arousing or gratifying the defendant." *See* ***Jipson***, 267 Wis. 2d 467, ¶13 (quoted source omitted). Torres contends that the State failed to show that Torres was ever advised as to that specific element. We disagree.

"Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted).

Here, counsel's explanation that he informed Torres that the contact had to be for a sexual purpose was sufficient to show that counsel informed Torres as to the purpose element of sexual contact. In context, it is clear that counsel was providing shorthand testimony for the many discussions counsel had with Torres, rather than repeating verbatim the words he used in those discussions.

Torres argues in his reply brief that his plea was not knowing, intelligent, and voluntary because he did not understand that the sexual contact must have been *intentional*. Torres points out that, aside from the purpose element, "sexual contact" requires that the contact itself was intentional. *See* WIS. STAT. § 948.01(5)(a). Aside from this argument being developed for the first time in the reply brief, and thus not properly before us, we reject it on the merits. During

the plea colloquy, the circuit court asked Torres whether he had reviewed the elements of the offense with his counsel, and if he understood the allegations as "that you did have sexual contact, mouth to breast, with the child that you knew who was related by blood in a degree of kinship closer than a second cousin and *that you intended to have sexual contact with her*[.]" (Emphasis added.) Torres affirmed that he understood. Additionally, in his postconviction motion, Torres only alleged that the plea colloquy was deficient because the court failed to advise Torres as to the "purpose" element, and that Torres did not understand that sexual contact included that element. Torres did not allege that he did not understand that the contact must be intentional. Accordingly, we do not address this argument further.

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals