



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 IV

August 10, 2016

To:

Hon. William E. Hanrahan
Circuit Court Judge
215 South Hamilton, Br. 7, Rm. 4103
Madison, WI 53703

Christine A. Remington
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Corey C. Stephan
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Patricia A. FitzGerald
Patricia A. FitzGerald Law Office
229 N. Grove St.
Mt. Horeb, WI 53572-1615

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

2015AP1246-CR

State of Wisconsin v. Daniel R. Fierro (L.C. # 2012CF1625)

Before Lundsten, Sherman and Blanchard, JJ.

Daniel Fierro appeals a judgment of conviction and an order denying postconviction relief. 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.

Fierro was convicted of and sentenced for one count of second-degree sexual assault of a child. *See* WIS. STAT. § 948.02(2). Count 1 of the criminal complaint, to which Fierro entered a

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

guilty plea, alleges that Fierro violated § 948.02(2) by having engaged in sexual intercourse with a child under the age of 16. This matter was previously before us following the circuit court's denial of Fierro's motion to withdraw his plea without an evidentiary hearing. *State v. Fierro*, No. 2014AP1270-CR, unpublished slip op. (WI App Mar. 5, 2015). We reversed the order and remanded the matter for an evidentiary hearing due to a defect in the plea colloquy, namely, that, in advance of the plea, Fierro's counsel had reviewed the elements of the offense of sexual *contact* with a child under the age of 16, rather than sexual *intercourse* with a child under the age of 16, both violations of § 948.02(2),² and that the court had not independently reviewed the requisite elements, relying instead on the plea questionnaire and counsel's ostensible review. *See State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Following the evidentiary hearing,³ the court found that, despite the error, Fierro understood that the State needed to prove that he had sexual intercourse with the child. This finding is supported by the record.

We accept the circuit court's findings of historical fact unless those findings are clearly erroneous, while independently determining whether the facts demonstrate that Fierro knowingly, voluntarily, and intelligently entered his plea. *See State v. Hoppe*, 2009 WI 41, ¶45, 317 Wis. 2d 161, 765 N.W.2d 794. The circuit court looked, as it is entitled to do, to the record as a whole in determining that Fierro knowingly entered his plea, *see id.*, ¶47, relying on the following facts: (1) the court inquired at the plea hearing whether Fierro understood that he was being charged with sexual intercourse with a child, and Fierro responded in the affirmative;

² To review the elements prior to the plea hearing, trial counsel mistakenly used the pattern jury instruction for a "sexual contact" violation rather than a "sexual intercourse" violation, and he attached a copy of the erroneous instruction to the plea questionnaire.

³ Fierro's trial counsel was the only witness who testified at the evidentiary hearing.

(2) Fierro indicated that he had two children and feared pregnancy;⁴ and (3) at the plea hearing, when asked whether the criminal complaint, which alleged that Fierro had sexual intercourse with a child, provided a sufficient factual basis to support the plea, Fierro's counsel responded in the affirmative.

In addition, at the evidentiary hearing on remand trial counsel testified that he would have gone over in advance with Fierro whatever Fierro was pleading to, and that counsel was comfortable at the time that Fierro knew that he was pleading to sexual intercourse. Counsel also noted that he would not have permitted Fierro to enter the plea if he thought Fierro did not understand the offense to which he was pleading. Counsel testified that he believed Fierro was of average intelligence and that Fierro did not display any difficulty understanding the elements of the offense when they talked about the case. Further, counsel testified that he had reviewed with Fierro the police reports and the victim's allegations, and that Fierro made it clear from the outset of the case that he did not intend to go to trial but wanted to accept responsibility for his conduct. Finally, counsel explained that, had Fierro indicated that he had sexual contact with the child, but not sexual intercourse, counsel would have used that information for purposes of negotiations with the prosecutor.

All of these references in the record support the circuit court's finding that, for purposes of the plea colloquy, Fierro understood the meaning of the term "sexual intercourse."

⁴ Fierro's trial counsel acknowledged that the police reports made reference to Fierro's victim having become pregnant and that she subsequently had a miscarriage, and Fierro having advised the investigator that he tried to use a condom but that it fell off.

Accordingly, we affirm the circuit court's finding that Fierro understood that the State needed to prove that he had sexual intercourse with the child and, therefore, we affirm the circuit court's conclusion that Fierro knowingly, voluntarily, and intelligently entered his guilty plea.

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals