**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 6, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2012AP2136** **Cir. Ct. No. 2007CF402**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DELOND M. BLUNT,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed*.

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

¶1 PER CURIAM. Delond Blunt appeals pro se from an order denying his motion for postconviction relief. His appellate arguments are unpersuasive. We affirm the order.

¶2 Blunt was charged with second-degree sexual assault for having sexual contact with an unconscious person. A fraternity brother awoke to find Blunt performing fellatio on him. Blunt pled no contest to that charge and to felony bail jumping. Alleging ineffective assistance of counsel and an improper plea colloquy, Blunt filed what we construe as a WIS. STAT. § 974.06 (2011-12)[1] postconviction motion seeking to withdraw his no-contest pleas. The circuit court denied the motion after a hearing. This appeal followed.

¶3 Blunt first argues that he was denied his constitutional right to counsel at the postconviction motion hearing. He represented himself because he did not meet the State Public Defender's indigency criteria. Blunt asserts that the circuit court should have exercised its inherent authority to appoint counsel at county expense because he "was in fact indigent." We disagree.

¶4 A circuit court may appoint counsel after the SPD has found a defendant financially ineligible if "the 'necessities of the case' and the demands of 'public justice and sound policy' require appointing counsel." ***State v. Kennedy***, 2008 WI App 186, ¶10, 315 Wis. 2d 507, 762 N.W.2d 412. That applies to criminal defendants, however, so as to safeguard their constitutional right to counsel. ***Id.*** A WIS. STAT. § 974.06 proceeding is civil in nature, § 974.06(6), and there is no constitutional right to counsel in a § 974.06 proceeding, ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 649, 579 N.W.2d 698 (1998). Having referred Blunt to the SPD, the court could have reviewed the SPD's determination.

[1] Blunt titled his pro se motion a Petition for a Writ of Habeas Corpus. Courts are not bound by the label a party gives a document.

All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

*See* ***State v. Alston***, 92 Wis. 2d 893, 898, 288 N.W.2d 866 (Ct. App. 1979). Blunt did not ask it to, nor does he say that he attempted to make a showing that he "was in fact indigent." Blunt got all the process he was due.

¶5 Blunt next contends he should have been allowed to withdraw his no-contest pleas because (1) probable cause was not judicially determined in a timely manner, (2) the complaint does not state probable cause that he committed sexual contact, (3) the circuit court did not issue a written opinion, and (4) he was not given a transcript of the plea hearing. A defendant wishing to withdraw no-contest pleas after sentencing bears the heavy burden of establishing by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Blunt does not come close to making that showing.

¶6 Blunt's initial appearance was held six days after his arrest. Under WIS. STAT. § 970.01(1), an arrestee must have his or her initial appearance "within a reasonable time." The United States Supreme Court has decided that the Fourth Amendment requires that a probable cause hearing must occur within forty-eight hours. ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56-57 (1991). Wisconsin has adopted that rule. ***State v. Koch***, 175 Wis. 2d 684, 696, 499 N.W.2d 152 (1993). A judicial determination of probable cause can be made independent of the initial appearance and without the defendant present. ***Id.*** at 697-98. The record is not clear when the probable cause determination was made.

¶7 In any event, making an initial appearance and receiving a finding of probable cause outside the forty-eight-hour time frame are nonjurisdictional defects. ***State v. Aniton***, 183 Wis. 2d 125, 127, 515 N.W.2d 302 (Ct. App. 1994). A plea of no contest waives all nonjurisdictional defects and defenses arising

before the entry of the plea. ***Id.*** at 128. This is true even though Blunt styles his claim as counsel's ineffectiveness for failure to object.

¶8 Were we to entertain the ineffectiveness assertion, Blunt's claim still would fail. To establish ineffective assistance of counsel, a defendant must show both deficient performance and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. To prove deficient performance, the defendant must show that counsel's conduct fell below an objective standard of reasonableness. ***Thiel***, 264 Wis. 2d 571, ¶19. To prove prejudice, he or she must show a reasonable probability that, but for counsel's unprofessional errors, our confidence in the reliability of the proceedings would be undermined. ***Id.***, ¶20. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.***, ¶23. Whether counsel's performance was deficient or prejudicial to the defense are questions of law we determine independently. ***Id.***

¶9 Therefore, assuming arguendo probable cause was not determined within forty-eight hours and that counsel should have objected, Blunt does not allege that any delay was deliberate and prejudiced his ability to prepare a defense. *See* ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994).

¶10 Blunt next contends the complaint was defective because it did not allege specific intent to engage in prohibited conduct. The complaint charged him with second-degree sexual assault for having sexual contact with a person he knew was unconscious, contrary to WIS. STAT. § 940.225(2)(d). The elements of that crime are that the defendant had sexual contact with the victim, that the victim was unconscious at the time of the sexual contact, and that the defendant knew that the victim was unconscious at the time of the sexual contact. ***Id.***; WIS JI—CRIMINAL

1213. For purposes of § 940.225(2)(d), a person can be unconscious by virtue of being asleep. ***State v. Pittman***, 174 Wis. 2d 255, 260, 277, 496 N.W.2d 74 (1993). Intent is part of the definition of sexual contact, WIS. STAT. § 939.22(34), but not an element of the crime of second-degree sexual assault.

¶11 Blunt also asserts that construing WIS. STAT. § 940.225(2)(d) to not require proof of intent would violate his Fourteenth Amendment right to due process. The knowledge prong is the scienter element and, as noted, intent is part of the definition of sexual contact. In any event, he does not develop this argument or support it with legal authority. We address it no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶12 For the same reason, we give short shrift to his conclusory statement that the State was prohibited from prosecuting him because the complaint "contained matter which if true would constitute a legal justification or excuse for the acts charged, or other legal bar to prosecution of the crime charged." He does not identify the "matter," the "legal justification or excuse," or the "legal bar," or in any way explain the claim. If he is alluding to an intoxication defense, the complaint does not allege and the record does not reflect that he was utterly incapable of forming the requisite intentionality. *See* ***State v. Strege***, 116 Wis. 2d 477, 483-84, 343 N.W.2d 100 (1984).

¶13 Blunt next complains that the circuit court did not issue a written opinion. When a circuit court disallows a plea withdrawal without a hearing, it should support its decision with a written opinion. *See* ***State v. Bentley***, 201 Wis. 2d 303, 318-19, 548 N.W.2d 50 (1996). This directive relates to our standard of review. The circuit court has the discretion to deny the motion without a hearing if the record conclusively demonstrates that the defendant is not entitled to

relief. *See* ***id.*** at 310-11. A record of its reasoning facilitates appellate review. Here the record did not take the form of a written opinion, but the motion hearing transcript clearly sets out the court's rationale and its application of the law to the facts. It easily suffices as the functional equivalent of a written opinion.

¶14 Blunt claims he was denied access to a transcript of the plea hearing despite filing a motion to be provided with free copies of all transcripts. The court ordered that Blunt receive only a copy of the sentencing transcript, likely because the only matters then pending related to sentence credit and reconsideration of his sentence. Blunt's next request for free transcripts was after this case was on appeal and did not include a request for a plea hearing transcript. It is the appellant's responsibility to ensure that the appellate record is complete. ***State v. McAttee***, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774. Blunt cannot use the lack of a transcript to show a defect in the plea taking.[2]

¶15 Blunt next asserts that counsel rendered ineffective assistance in several respects. First, he claims counsel failed to investigate an involuntary intoxication defense because counsel "knew that Blunt had consumed intoxicating amounts of alcohol" at a sorority party earlier that evening and had used marijuana. He asserts that counsel should have interviewed people who were at the party to "ascertain [his] condition" and to "verify that the allege[d] victim did

[2] In his reply brief, filed July 15, 2013, Blunt concedes that he "could have been more diligent" in trying to obtain a transcript but asserts that he could not afford the $195 transcript fee and "had no idea of a ***Girouard*** motion." By order dated October 31, 2012, however, this court advised Blunt in regard to a different transcript that if he was unable to pay for it, he must "file a motion in the circuit court to waive the cost of the transcript under ***State ex rel. Girouard v. Circuit Court***, 155 Wis. 2d 148, 454 N.W.2d 792 (1990)." We explained that ***Girouard*** entitles a civil litigant to a free transcript if he or she is indigent and the appeal has arguable merit. We also advised him what to file in the circuit court and serve on the State and that he could appeal an order denying his motion.

not perjure himself at the preliminary hearing," and "could have" questioned the nature of the relationship between him and the victim and explored avenues which "could lead to facts."

¶16 Blunt's conclusory statements do not "allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. He makes no showing that he was so completely inebriated as to make him "utterly incapable of forming the intent requisite to the commission of the crime charged." ***Strege***, 116 Wis. 2d at 483-84 (citation omitted).

¶17 Furthermore, Blunt's attorney testified that he rejected an intoxication defense based on what Blunt told him. He testified that, as Blunt recalled in some detail the events of the evening and said the sex act was consensual, common sense made him conclude that a jury likely would not believe an intoxication defense. We will not second-guess a reasonable trial strategy. ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983). We cannot conceive how counsel's decision not to pursue a defense of involuntary intoxication had any effect on Blunt's decision to enter no-contest pleas.

¶18 Blunt next contends his counsel advised him of incorrect elements of the sexual contact offense, leading him to misunderstand what he pled to. Blunt asserts that fellatio actually is sexual intercourse, not sexual contact, and that counsel did not advise him of "the intent element."

¶19 The complaint and information charge sexual contact. Fellatio fits the definition of both sexual contact and sexual intercourse. *See* WIS. STAT. § 940.225(5)(b)1.a., (5)(c). The plea questionnaire described the elements as "[i]ntentionally hav[ing] sexual contact with NMK who was unconscious w/o

consent" in violation of WIS. STAT. § 940.225(2)(d). The word "intentionally" includes knowledge of those facts that are necessary to make the defendant's conduct criminal. WIS. STAT. § 939.23(3).

¶20 A defendant's understanding of the nature of the charge is measured at the time the plea is entered. ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). Blunt complains that the court performed only a perfunctory plea colloquy. Because he did not supply a transcript of the plea hearing, we may assume that it would have shown that the circuit court used the colloquy to resolve any confusion the questionnaire allegedly generated. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

¶21 Next, Blunt asserts that his counsel failed to adequately advise him of the State's motion to admit other-acts evidence of a nearly identical sexual assault he committed a year earlier. He contends he was not informed of the motion until just before he pled, that "to this day" he has not seen it, and that counsel provided "zero statutory explanation" about it.

¶22 Counsel testified that he showed the motion to Blunt, read it to him and explained why he believed it would succeed. We defer to the circuit court's implicit determination that counsel was more credible. *See* ***McCallum***, 208 Wis. 2d at 479-80.

¶23 The last ineffectiveness claim is that counsel failed to move for a speedy trial. Blunt does not claim to have asked counsel to request a speedy trial and counsel testified that they did not discuss it. Blunt entered his no-contest pleas sixteen months after his arrest. Some delays were occasioned by waiting for results of the DNA analysis; Blunt's initial desire to consolidate the two sexual assault cases then changing his mind, his filing for a substitution of judge, and his

unavailability for one trial date due to the other criminal matter; rescheduling to allow two days to try the case; and losing a coin toss to another case scheduled for trial at the same time. Blunt identifies no prejudice flowing from the delays. He meets none of the criteria for a constitutional speedy trial claim, *see* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972), nor establishes that counsel was ineffective.

¶24 Lastly, Blunt restyles his ineffective assistance allegations as a due process violation by the circuit court for "refusing to fulfill its postconviction obligations." This merely repackages the claims we already have rejected. They fare no better in this formulation.

*By the Court.*—Order affirmed.

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