COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1318-CR **Cir. Ct. No. 2012CF3774**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH E. FREEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Kenneth E. Freeman appeals a judgment of conviction entered upon his no-contest plea to one count of second-degree sexual

assault of a child. *See* WIS. STAT. § 948.02(2) (2013-14).[1] He also appeals a postconviction order that denied his motion for plea withdrawal. Because Freeman does not show that the circuit court failed to establish a factual basis for his plea, we affirm.

BACKGROUND

¶2 The State charged Freeman with one count of second-degree sexual assault of a child, one count of false imprisonment, and one count of disorderly conduct. As relevant here, the criminal complaint reflects that CDW was fifteen years old when she encountered Freeman in the basement of the church they attended. Freeman asked CDW to hug him, and then "kept holding on to her to[o] long, and was grabbing her buttocks in both hands and squeezing them, and rubbing his hand u[p] and down from her back to her buttocks repeatedly." The complaint went on to allege that Freeman is a convicted sex offender required to register in the State of Illinois and that he was in violation of his registration rules.

¶3 Freeman demanded a jury trial, but during *voir dire* he decided to resolve the case with a plea bargain. He entered a no-contest plea to the charge of second-degree sexual assault of a child, advising the circuit court that he "would not challenge the evidence that is contained in the criminal complaint." The remaining charges were dismissed and read in for sentencing purposes, and the State agreed not to make a specific recommendation for disposition. At sentencing, the circuit court imposed a seven-year term of imprisonment,

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

bifurcated as four years of initial confinement and three years of extended supervision.

¶4 In postconviction proceedings, Freeman moved for plea withdrawal on the ground that the circuit court failed to establish a factual basis for his plea. The circuit court denied the motion without a hearing, and Freeman appeals.

DISCUSSION

¶5 There are two paths to plea withdrawal. *See* ***State v. Howell***, 2007 WI 75, ¶2, 301 Wis. 2d 350, 734 N.W.2d 48. An offender may allege that a plea is invalid: (1) due to an alleged deficiency in the plea colloquy, pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); and (2) due to a factor extrinsic to the colloquy, *see* ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). In this appeal, the State expressed some uncertainty in its respondent's brief as to the precise nature of Freeman's allegations. Freeman clarified in his reply brief that he is pursuing only a ***Bangert*** challenge to his plea. Accordingly, we address only his ***Bangert*** claim. *See* ***Riley v. Town of Hamilton***, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989) ("'[Q]uestions not argued will not be considered or decided.'") (citation omitted).

¶6 Under ***Bangert***, a defendant may move to withdraw a plea by making a two-prong showing. *See* ***id.***, 131 Wis. 2d at 274. First, the defendant must show that the plea colloquy did not conform with WIS. STAT. § 971.08 or other duties mandated during a plea hearing. *See* ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14. To satisfy this prong of a ***Bangert*** motion, a defendant "must point to deficiencies in the plea hearing transcript." ***State v. Cross***, 2010 WI 70, ¶19, 326 Wis. 2d 492, 786 N.W.2d 64. As to the second

prong, the defendant must allege that he or she did not know or understand the information that should have been provided at the hearing. ***Hampton***, 274 Wis. 2d 379, ¶46. If the defendant makes the necessary two-prong showing, the circuit court must hold an evidentiary hearing at which the burden is on the State to establish by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶40, 293 Wis. 2d 594, 716 N.W.2d 906. We consider *de novo* the sufficiency of the plea colloquy and the need for an evidentiary hearing. *See* ***State v. Hoppe***, 2009 WI 41, ¶17, 317 Wis. 2d 161, 765 N.W.2d 794.

¶7 In this case, Freeman claims the circuit court did not fulfill its obligation under WIS. STAT. § 971.08(1)(b) to establish a factual basis for his no-contest plea. *See* ***Brown***, 293 Wis. 2d 594, ¶35. To establish a factual basis, the circuit court must conduct an inquiry into whether the defendant committed the crime to which he or she pleads guilty or no contest. *See* § 971.08(1)(b). An inquiry is "'a seeking or request for truth, information, or knowledge,'" *see* ***State v. Black***, 2001 WI 31, ¶11, 242 Wis. 2d 126, 624 N.W.2d 363 (citation omitted), and the inquiry need only be sufficient to satisfy the circuit court that the defendant committed the crime charged, *see* ***id.***, ¶12.

¶8 During the course of the plea colloquy here, Freeman acknowledged signing a plea questionnaire and waiver of rights form along with an addendum. He told the circuit court he had provided honest and truthful information on the forms. The forms reflect that Freeman is an educated person with a GED and fourteen years of schooling and that he is familiar with the criminal complaint because his attorney read it to him.

¶9 The circuit court questioned Freeman regarding his understanding of the allegations in the criminal complaint and the elements the State would have to prove before a fact finder could find him guilty of second-degree sexual assault of a child:

> THE COURT: Mr. Freeman, the State would have to prove the elements that you had sexual contact with C.[]W.[] and that child was under the age of 16 at the time of the sexual contact. Do you understand that?
>
> [FREEMAN]: Yes sir.
>
> THE COURT: Do you understand that sexual contact is an intentional touching, in this case of the butto[cks] of the child, by you and that intentional touching may be direct[] or over the clothing, but it was an intentional touching and you acted with the intent to either become sexually aroused or gratified, is that correct?

Trial counsel interposed that Freeman "would be pleading no contest to that." Trial counsel then went on to explain Freeman's position:

> [DEFENSE COUNSEL]: We believe that the evidence would show and I think that's undisputed at least to this, that Mr. Freeman was a missionary in a church and Ms. W.[] was a congregant of that church. They both met up in a basement of the church. Ms. W.[]'s version is that he came up and put his arms around her and put his hands on her butt. [Freeman]'s version is that he gave her a hug and it was not specifically where his hands are located, *but [he] would not challenge the evidence that is contained in the criminal complaint*.
>
> THE COURT: Mr. Freeman, is that correct?
>
> [FREEMAN]: Yes, sir, that is.

(Emphasis added.)

¶10 The court then discussed the elements further:

> THE COURT: And this contact, whether it was a hug or touching or other parts of the victim's body, was

> intention[al]? In other words, you intended to do that and you are not contesting that fact, is that correct? In other words, you didn't accidently bump into this child, correct?
>
> [FREEMAN]: Yes, Your Honor.

¶11 Near the conclusion of the plea proceedings, the circuit court said it had read the complaint as it applied to the charge underlying Freeman's plea and then asked the parties:

> THE COURT: I take [it] the State is stipulating and the defense is not contesting those allegations based on the plea and based on what both sides stated earlier, is that correct?
>
> [THE STATE]: That's correct.
>
> [DEFENSE COUNSEL]: Yes sir.

The circuit court then found a factual basis for Freeman's no-contest plea to second-degree sexual assault of a child.

¶12 The record shows that the circuit court discussed the facts and explained the elements of the crime to Freeman, determined that he understood the allegations against him, and received his express assurance that he did not challenge the allegations in the criminal complaint. In light of the foregoing, we must reject Freeman's contention that the circuit court failed to satisfy itself that a factual basis existed for his plea.

¶13 Freeman protests that he admitted only "hugging CDW." A hug, he argues, does not constitute second-degree sexual assault of a child, and his admission that he hugged CDW falls short of establishing that his actions were for the purpose of sexual arousal or gratification. Freeman misunderstands both the nature of his plea and the purpose of the plea colloquy.

¶14 First, a no-contest plea is an implied confession, not an unqualified admission, and the defendant is not required to admit his or her guilt. ***Black***, 242 Wis. 2d 126, ¶15. Therefore, when the defendant offers a no-contest plea, the circuit court need not secure the defendant's admission to each element of the crime. Indeed, "where the defendant has pled no contest, the circuit court would not ask the defendant to admit his or her guilt to every charge." ***Id.***, ¶15 n.3.

¶15 Second, the purpose of the plea colloquy is not to prove to the defendant that he or she committed the crime. *See* ***id.***, ¶12. Rather, the circuit court must satisfy *itself* that the defendant's conduct constitutes the elements of the offense. ***Id.*** Here, Freeman told the circuit court that he did not challenge CDW's version of the events contained in the criminal complaint, and the circuit court determined that his responses during the colloquy, coupled with the conduct CDW described, constitute a factual basis for his plea to second-degree sexual assault of a child.

¶16 Freeman responds that the complaint does not explicitly allege one of the elements of the crime, namely, that he touched the victim for the purpose of sexual arousal or gratification. *See* WIS. STAT. §§ 948.02(2), 939.22(34). A factual basis for the plea exists, however, if the complaint supports an inculpatory inference, "even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one. This is the essence of what a defendant waives when he or she enters a guilty or no contest plea." ***Black***, 242 Wis. 2d 126, ¶16 (internal citations omitted). In this case, the complaint includes allegations that Freeman clutched and squeezed and rubbed the buttocks of his victim. These allegations are plainly sufficient to support an inference that his actions were for the purpose of sexual arousal or gratification. Indeed, no reasonable contrary argument can be made.

¶17 Finally, Freeman maintains he did not understand when he entered his no-contest plea how the facts alleged satisfy the elements of the crime of second-degree sexual assault of a child. In the absence of a defect in the plea colloquy, however, Freeman's self-serving contention about the limits of his understanding earns him nothing. A defendant who seeks to withdraw a plea pursuant to ***Bangert*** must identify a deficiency in the plea hearing transcript before the circuit court is required to hold a hearing on the claim. *See* ***Cross***, 326 Wis. 2d 492, ¶¶19-20. We affirm.

By the Court.—Judgment and order affirmed.

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