

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2921

Cir. Ct. No. 2002CF845

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES K. PROFIT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. James Profit, pro se, appeals an order denying a WIS. STAT. § 974.06¹ postconviction motion. We affirm.

¶2 Profit was charged with the brutal attack of a woman in her home. After breaking into her home, Profit repeatedly sexually assaulted her, beat her and stole money from her. DNA evidence and fingerprint samples from the scene matched database records for Profit.

¶3 At the arraignment, Profit's attorney advised the court that he would have to withdraw because of a conflict. The attorney also advised the court that Profit wanted to enter a plea. After appropriate inquiry into Profit's competency to represent himself and his understanding of an attorney's role, the court granted Profit's request to proceed without counsel.

¶4 After a plea colloquy, Profit was convicted, upon his no contest pleas, of three counts of second-degree sexual assault, battery, false imprisonment, burglary and theft. We affirmed the convictions on direct appeal, pursuant to a no-merit report.

¶5 Profit subsequently filed a WIS. STAT. § 974.06 postconviction motion. Profit argued: (1) postconviction counsel was ineffective for failing to argue the circuit court did not inform Profit of all the elements of the crime; (2) this court did not perform a full examination of the record pursuant to the no-merit procedure; (3) standby counsel never informed Profit of all the elements

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless noted otherwise.

of second-degree sexual assault; and (4) his no contest pleas were not entered knowingly, voluntarily and intelligently.

¶6 The circuit court denied Profit's postconviction motion. This appeal follows.

¶7 We note at the outset that Profit failed to reply to the State's brief to this court. Unrefuted arguments are deemed admitted. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). But even on the merits, Profit's arguments were properly denied.

¶8 Profit argues that he is entitled to withdraw his plea after sentencing because he was not informed that, when a sexual assault charge is based on sexual contact, the State must prove "the sexual arousal or gratification of the defendant or the sexual humiliation or degradation of the victim." However, the State may prove second-degree sexual assault by proving either sexual intercourse or sexual contact. See WIS. STAT. § 90.225(2). The three counts of sexual assault charged in this case were described as oral, vaginal and anal intercourse. It is only the sexual-contact mode of commission that requires proof of sexual gratification or the victim's humiliation. See *State v. Jipson*, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18.

¶9 Accordingly, the circuit court properly informed Profit, "the State would have to prove ... that you had sexual intercourse, that the individual with whom you had sexual intercourse did not consent to that intercourse, and finally that you had sexual intercourse with that ... person by use [or] threat of force or violence." Profit indicated at the plea hearing that he understood this to be the State's burden.

¶10 There was no need for the circuit court to explain to Profit the legal definition of “sexual contact.” Profit conceded the facts as pleaded in the complaint were true. A sufficient basis supported the convictions. The record demonstrated that Profit’s plea was entered voluntarily, knowingly and intelligently.

¶11 Profit also argues this court failed to perform a full examination of the record pursuant to the no-merit report. A defendant challenging a no-merit decision has the burden of proving that the court did not fulfill its no-merit duties, “perhaps by identifying an issue of such obvious merit that it was an error by the court not to discuss it.” *See State v. Allen*, 2010 WI 89, ¶83, 328 Wis. 2d 1, 786 N.W.2d 124.

¶12 The only issue Profit identifies as purportedly missing from this court’s independent review is the “sexual-contact element” argument discussed above. There is no merit to this issue, so Profit has failed to demonstrate that this court did not fulfill its no-merit duties.

¶13 Profit also argues “ineffective standby counsel” because he did not explain to Profit the “sexual-contact element” of the crime, and thus deprived Profit of a meritorious basis to withdraw his plea before sentencing.² Once again, Profit’s “sexual-contact element” argument is meritless. Thus, there could be no deficient performance for failing to advise Profit to withdraw his plea on that ground. *See State v. Tolliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App.

² At the sentencing hearing, Profit was represented by counsel. Profit indicated that he did not wish to withdraw the pleas previously entered.

1994) (counsel does not perform deficiently by failing to make a meritless argument).

By the Court.—Order affirmed.

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

