COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP432-CR **Cir. Ct. No. 2009CF1913**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRONE T. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Tyrone Robinson appeals a judgment of conviction, entered after he pled no contest to second-degree sexual assault of a child and false imprisonment, as well as an order denying his postconviction

motion. *See* WIS. STAT. § 948.02(2) and § 940.30 (2011-12).[1] On appeal, Robinson argues that he is entitled to withdraw his plea of no contest to the sexual assault count because the plea colloquy did not conform to WIS. STAT. § 971.08 in that he was never informed, and was otherwise unaware, that the State had to prove sexual gratification as an element of the offense. Robinson also challenges the sentence imposed on the sexual assault count. For the reasons set forth below, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 This case arises from events that took place during the night and early morning hours of November 21-22, 2009. The complaint alleged that Robinson committed repeated sexual assaults of the same child, who was then fifteen years old. Robinson pled no contest to second-degree sexual assault of a child and false imprisonment. On the sexual assault count, the court imposed a bifurcated sentence of seventeen years of initial confinement and thirteen years of extended supervision. On the false imprisonment count, the court imposed a concurrent bifurcated sentence of two years of initial confinement and two years of extended supervision.

¶3 After sentencing, Robinson filed a postconviction motion to withdraw his plea as to the sexual assault count and to modify his sentence on that count. The circuit court concluded that Robinson was entitled to an evidentiary hearing, at which the State had the burden of proof to show by clear and convincing evidence that the plea was knowingly and voluntarily made. *See* ***State***

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

v. Bangert, 131 Wis. 2d 246, 275, 389 N.W.2d 12 (1986). At the conclusion of the evidentiary hearing, the circuit court denied Robinson's postconviction motion. Robinson now appeals.

STANDARD OF REVIEW

¶4 Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. We will accept the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous, but whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary is subject to our independent review. ***Id.*** As to Robinson's challenge to his sentence, our review of a sentence is limited to determining whether the circuit court erroneously exercised its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

DISCUSSION

Plea Withdrawal

¶5 A defendant who shows by reference to the plea hearing transcript that the procedures outlined in WIS. STAT. § 971.08 or other court-mandated duties were not followed at the plea colloquy (*i.e.*, a ***Bangert*** violation), and further alleges that he did not understand the omitted information is entitled to a hearing on his plea withdrawal motion. ***State v. Hampton***, 2004 WI 107, ¶¶56-65, 274 Wis. 2d 379, 683 N.W.2d 14. In this case, it is not disputed that the plea hearing transcript reveals that the circuit court did not explain the term "sexual intercourse" or "sexual conduct" to Robinson during the plea colloquy.

¶6 Robinson argues that he was entitled to withdraw his plea after sentencing because he was never informed, and was otherwise unaware, that the State had to prove sexual gratification as an element of second-degree sexual assault of a child. The State concedes that the circuit court did not inform Robinson during the plea colloquy that sexual gratification was an element of the crime. However, the State takes the position that second-degree sexual assault does not necessarily require proof of sexual gratification. *See* WIS. STAT. § 948.02(2). The State argues that, to prove second-degree sexual assault of a child, the State needs only to prove either sexual intercourse *or* sexual contact by the defendant, and that proof of sexual gratification is required only in those cases where sexual contact is the basis of the crime.

¶7 WISCONSIN STAT. § 948.02(2) states, "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony." This court has held that, when a defendant pleads guilty or no contest to sexual assault of a child based on sexual contact, the defendant must be informed that one element of the crime is that "'the alleged contact was for the purpose of defendant's sexual gratification or the victim's humiliation.'" ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18 (quoted source omitted). We know of no such requirement when a defendant pleads guilty or no contest to having sexual intercourse with a child under the age of sixteen years.

¶8 In this case, the complaint contains detailed factual accounts of three separate acts of sexual intercourse between Robinson and the victim that occurred on November 21-22, 2009. The complaint also contains allegations of one incident of sexual contact without intercourse in that same time frame. Before

accepting Robinson's plea, the court asked whether the complaint could provide a factual basis for the plea. Defense counsel confirmed on the record that it could.

¶9 In addition, Robinson testified at the evidentiary hearing on the postconviction motion that, when he pled no contest, he understood second-degree sexual assault to mean "[h]aving sex with a minor." He confirmed that, when he entered his plea, he understood "sex" to include various forms of penile penetration, hand to penis contact, and finger to vagina contact. He admitted that he understood that he was pleading to having had sex in one way or another with the victim.

¶10 Robinson's trial counsel, Daryl Jensen, testified at the evidentiary hearing that it was his routine practice to go over the elements of the crime charged with his clients. Although Jensen testified that he could not say with one hundred percent certainty that he had discussed the definitions of sexual contact and sexual intercourse with Jensen, he believed that he had done so. Jensen also testified that his notes indicated that he had met with Robinson twenty-six times to discuss the case. Robinson testified that he had met with Jensen only two or three times. Robinson also testified that Jensen never explained the definition of sexual contact or sexual intercourse to him.

¶11 The circuit court's decision to deny Robinson's postconviction motion was based, in part, on its finding that Jensen's testimony was credible. We will not overturn credibility determinations on appeal unless the testimony upon which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d

588, 644 N.W.2d 269. We find nothing in the record to suggest that that is the case here.

¶12 Prior to the plea hearing, the State filed a second amended information. Jensen requested that the State add the words "or sexual contact" to Count 1, which previously had alleged only that Robinson "did have sexual intercourse with a child under the age of sixteen." Jensen testified at the postconviction motion hearing that he did this because Robinson had requested this change. The circuit court indicated in its oral decision on the postconviction motion that the change to the second amended information was strong evidence that Robinson knew what he was pleading to and understood the distinction between "sexual contact" and "sexual intercourse." We agree. In light of this and the other record facts discussed above, we are satisfied that Robinson's plea was knowing and voluntary, such that the circuit court properly denied his motion to withdraw the plea.

Sentencing

¶13 Robinson argues that the circuit court erroneously exercised its discretion by relying upon inaccurate information at sentencing. A defendant has a constitutionally protected due process right to be sentenced based upon accurate information. *See* ***U.S. v. Tucker***, 404 U.S. 443 (1972); WIS. CONST. art. I, § 8, cl. 1. However, a defendant moving for resentencing on the basis that the circuit court relied upon inaccurate information must establish both that there was information before the sentencing court that was inaccurate and that the circuit court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1.

¶14 Specifically, Robinson argues that the DNA evidence in this case indicates that it is extremely unlikely that sexual intercourse occurred between him and the victim. He argues that, therefore, the victim's allegations in the complaint were not accurate. Once again, we note that Robinson accepted the facts alleged in the criminal complaint, with its detailed accounts of sexual intercourse and sexual contact with the victim, as a factual basis for his plea.

¶15 In addition, Robinson fails to identify any incorrect or inaccurate information related to the DNA evidence. The DNA evidence derived from the victim's body and the crime scene did not conclusively prove that Robinson was guilty of the alleged acts of sexual intercourse. However, as the circuit court noted both at sentencing and at the conclusion of the evidentiary hearing on the postconviction motion, the lack of conclusive DNA evidence does not prove that Robinson is innocent. Inconclusive evidence is not the same thing as inaccurate information, and Robinson has failed to identify any inaccurate information relied upon by the circuit court at sentencing. We find nothing in the record to indicate that the circuit court erroneously exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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