COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1136-CR **Cir. Ct. No. 2010CF98**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. BROWN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Robert Brown appeals an order denying his motion for plea withdrawal. In Brown's previous appeal, we remanded for an evidentiary hearing on whether Brown understood the legal meaning of "sexual contact" when he entered his guilty plea to second-degree sexual assault. *See* ***State v. Brown***,

No. 2011AP2527-CR, unpublished slip op. ¶2 (WI App June 26, 2012). Brown contends that, on remand, the circuit court erroneously relied on the testimony of his former attorney, and incorrectly concluded Brown understood the elements of second-degree sexual assault. We affirm.

BACKGROUND

¶2 Pursuant to a plea agreement, Brown pleaded guilty to repeated second-degree sexual assault of the same child. ***Id.***, ¶3. He was sentenced to twenty years' imprisonment, consisting of fifteen years' initial confinement and five years' extended supervision. ***Id.*** Brown's post-conviction motion was denied, and he appealed. The State conceded the plea colloquy was inadequate with respect to the "sexual contact" element, which requires intentional touching of the victim's intimate parts "for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." ***Id.***, ¶9; *see also* WIS. STAT. § 948.01(5).[1] We therefore reversed and remanded to the circuit court with directions "to hold an evidentiary hearing at which the State will bear the burden of proving that Brown understood the term 'sexual contact.'"[2] ***Brown***, unpublished slip op., ¶10.

¶3 The circuit court conducted an evidentiary hearing on October 18, 2012. Attorney James Rennicke, who represented Brown during the plea process, testified that he discussed the elements of second-degree sexual assault with

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

[2] The burden of proof at such a hearing is "clear and convincing evidence." ***State v. Hoppe***, 2009 WI 41, ¶44, 317 Wis. 2d 161, 765 N.W.2d 794.

Brown several times, including detailed explanations of the "sexual contact" element. Rennicke opined that, based on their interactions, Brown understood the elements of the offense to which he pleaded. Brown testified he did not recall any discussions with Rennicke about the plea process, the elements of the offense, or the facts necessary to support a conviction.

¶4 The circuit court found Rennicke's testimony credible and concluded Brown understood the "sexual contact" element at the time of his plea. Specifically, the court found Brown knew that an essential element of the offense was touching for the purpose of sexually degrading or humiliating the victim, or the defendant's sexual gratification. The court additionally noted that Brown was sixty-eight years old, with eleven years of education; could read, write, and understand English; and had adequate time to discuss the plea with counsel. Accordingly, the court denied Brown's post-conviction motion. Brown now appeals.

DISCUSSION

¶5 Brown advances two arguments on appeal. First, he asserts the circuit court erroneously admitted Rennicke's testimony. Second, he contends the court erred when it concluded Brown understood the elements of sexual assault, including the "sexual contact" element's degradation, humiliation, or gratification component.

Admissibility of Rennicke's testimony

¶6 Brown contends Rennicke's testimony was inadmissible for two reasons. First, he argues Rennicke's testimony did not satisfy the criteria for lay opinion testimony under WIS. STAT. § 907.01. Second, he argues Rennicke's

testimony was barred by ***State v. Romero***, 147 Wis. 2d 264, 432 N.W.2d 899 (1988). We reject these arguments.

¶7 The admission of opinion evidence pursuant to WIS. STAT. § 907.01 lies in the sound discretion of the circuit court. *See* ***State v. Dishman***, 104 Wis. 2d 169, 173, 311 N.W.2d 217 (Ct. App. 1981). "A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 306, 470 N.W.2d 873 (1991).

¶8 Brown's first argument concerns the criteria for admitting lay opinion testimony. These criteria are set forth in WIS. STAT. § 907.01, which provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:
>
> (1) Rationally based on the perception of the witness.
>
> (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).

Brown does not appear to challenge the admissibility of Rennicke's testimony under subsection (3), but does contend Rennicke's opinion was not based on his perception and did not aid the determination of a fact in issue under subsections (1) and (2), respectively.

¶9 Brown's primary argument is that Rennicke's testimony regarding Brown's understanding of the "sexual contact" element could not have been

rationally based on Rennicke's perception under WIS. STAT. § 907.01(1). This is because, Brown argues, Rennicke could not have any knowledge of the mental state of another individual. Determining whether Rennicke's testimony was proper requires a review of the challenged testimony.

¶10 Rennicke testified that when he initially met Brown, they "discussed extensively" the meaning of "sexual contact." They had several conversations before the plea hearing. The two talked specifically about the degradation, humiliation, or gratification component. Rennicke testified he used "layperson language rather than statutory language" and talked with Brown about the manner and purpose of the contact. Because some of the contacts involved ejaculation, Rennicke focused on the gratification component, which he explained to Brown as "sexual pleasure" or "arousal."[3] Although Rennicke did not list the elements of the offense on the plea form, he stated he did review and discuss the elements with Brown "at least twice" before Brown signed the form. Rennicke stated he specifically asked if Brown had any questions about the plea questionnaire, and Brown replied he did not.

¶11 Because Brown is hard of hearing, Rennicke stated he met with Brown personally, repeated information several times, made eye contact, and spoke loudly. Rennicke testified Brown "was not shy about telling me" if there was something which with he did not agree. Based on these interactions, Rennicke opined that Brown understood the "sexual contact" element. Rennicke

[3] Rennicke stated, "We didn't really talk about degradation or humiliation so much as we talked about the result for ejaculation on his part being for sexual gratification." Brown's admission to having the child touch his penis with her hand until he ejaculated formed part of the factual basis for his plea.

also believed Brown "knew … the sexual contact meant for sexual gratification …."

¶12 We agree with the State: "Regardless of whether Rennicke correctly perceived Brown's mental state, his opinion was rationally based on his perception of Brown during his discussions with Brown." Rennicke's opinion was based on the content of his in-person conversations with Brown, Brown's conduct during these discussions, and Rennicke's efforts to educate and advise Brown. Accordingly, we conclude the circuit court did not erroneously exercise its discretion when admitting Rennicke's testimony pursuant to WIS. STAT. § 907.01(1).

¶13 We also observe we have previously relied on counsel's perception of whether a defendant had a sufficient understanding of matters during and prior to a plea hearing. The State cites several cases, the most persuasive of which are ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, and ***State v. Plank***, 2005 WI App 109, 282 Wis. 2d 522, 699 N.W.2d 235.

¶14 In ***Hoppe***, 317 Wis. 2d 161, ¶2, the defendant moved to withdraw his guilty plea, asserting it was not knowingly, intelligently, and voluntarily entered. The circuit court held an evidentiary hearing, at which Hoppe and his trial counsel testified. ***Id.***, ¶14. On appeal, our supreme court noted the state "may 'rely on the totality of the evidence, much of which will be found outside the plea hearing record.' The State, for example, 'may present the testimony of the defendant and defense counsel to establish the defendant's understanding.'" ***Id.***, ¶47 (quoting ***State v. Brown***, 2006 WI 100, ¶40, 293 Wis. 2d 594, 716 N.W.2d 906) (footnotes omitted). The supreme court concluded the evidence in the record, including substantial testimony from trial counsel, was sufficient to determine as a

matter of law that the state proved by clear and convincing evidence Hoppe's plea was knowing, intelligent, and voluntary. ***Id.***, ¶¶50, 52, 56.

¶15 In ***Plank***, 282 Wis. 2d 522, ¶8, the defendant asserted his plea was not knowing and voluntary because he mistakenly believed the court would impose the sentence recommended in the plea agreement. The state argued it met its burden at a subsequent evidentiary hearing to show Plank knew the court was not bound by the plea agreement's sentencing recommendation. ***Id.,*** ¶8. We agreed with the State, noting among other things that Plank's counsel "testified that he believed Plank understood the rights he was waiving." ***Id.***, ¶¶8-10. We held the circuit court could properly credit this testimony over the defendant's self-serving testimony to the contrary. ***Id.***, ¶11.

¶16 We also reject Brown's argument based on WIS. STAT. § 907.01(2), that Rennicke's testimony was not helpful in determining the fact in issue. As Brown recognizes, the sole issue presented at the evidentiary hearing was whether Brown understood the degradation, humiliation, or gratification component of the "sexual contact" element. Brown does not explain why his attorney's opinion regarding the degree of Brown's understanding was not helpful in resolving that issue. Indeed, counsel appears uniquely situated to testify about historical facts regarding the representation and conduct or demeanor that might indicate understanding. Accordingly, we deem this argument undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (we will not address undeveloped arguments).

¶17 Brown's second argument is that Rennicke's testimony was barred by ***Romero***. In ***Romero***, 147 Wis. 2d at 277, a social worker and a police officer indicated, respectively, that the victim of an alleged sexual assault was "honest

with us from the time of the first interview" and "was being totally truthful with us." Our supreme court determined these statements violated ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), under which no witness is permitted to give an opinion that another mentally and physically competent witness is telling the truth. ***Romero***, 147 Wis. 2d at 278. Permitting such testimony usurps the role of the jury. ***Id.***

¶18 Brown argues Rennicke's testimony violated ***Romero*** (and, by extension, ***Haseltine***) because "Rennicke's testimony was [essentially] that [Brown] would be lying if he claimed to not understand the elements of the crime." Brown asserts that only he could know whether he adequately understood the elements of the crime, and therefore Rennicke should not have been permitted to offer an opinion on the matter.

¶19 While we are highly skeptical of Brown's interpretation of ***Romero***, we conclude we need not reach the issue because it was not adequately raised below. "In order to preserve an issue for appeal as a matter of right, a party must object to the error at trial, stating the proper ground for the objection." ***Romero***, 147 Wis. 2d at 274. When the issue concerns the admissibility of evidence, the objection must be made promptly, and in terms which inform the circuit court of the "exact grounds upon which the objection is based." ***State v. Hartman***, 145 Wis. 2d 1, 9, 426 N.W.2d 320 (1988). An objection preserves for appeal only the specific ground stated in the objection. ***Id.***

¶20 At the post-conviction hearing, the district attorney asked Rennicke, "Do you believe that Mr. Brown, from your conversations with him, in preparation to and during the plea colloquy, … knew what the term sexual contact meant?" Brown's counsel objected, stating, "It's speculation. He is asking Mr. Rennicke to

say what was in Mr. Brown's mind." Counsel never mentioned ***Romero*** or ***Haseltine***, or asserted that the specific question required an opinion as to the truthfulness of another witness. Accordingly, we conclude the issue has been forfeited because the objection raised by counsel was insufficient to apprise the court of the exact ground upon which Brown now challenges Rennicke's testimony. *See* ***Hartman***, 145 Wis. 2d at 9-10.

Brown's understanding of the "sexual contact" element

¶21 Brown also maintains the circuit court erroneously found he understood the degradation, humiliation, or gratification component of the "sexual contact" element. A defendant is entitled to plea withdrawal as a right if he or she demonstrates the plea was not voluntarily, knowingly, and intelligently entered. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). A plea is considered involuntary if the defendant does not have a complete understanding of the charge. ***Id.*** at 139-40.

¶22 The issue of whether Brown's plea was voluntary, knowingly, and intelligently entered is a question of constitutional fact. *See* ***id.*** at 140. We independently review the circuit court's ultimate determination of whether the plea was voluntarily, knowingly, and intelligently entered. ***State v. Taylor***, 2013 WI 34, ¶25, 347 Wis. 2d 30, 829 N.W.2d 482. However, we will not upset the circuit court's findings of evidentiary or historical facts unless they are clearly erroneous. ***Van Camp***, 213 Wis. 2d at 140. "A circuit court's findings of fact are clearly erroneous when the finding is against the great weight and clear preponderance of the evidence." ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶12, 290 Wis. 2d 264, 714 N.W.2d 530.

¶23 On appeal, Brown's strategy in arguing he did not understand the elements of "sexual contact" consists of emphasizing his own testimony while attempting to undermine Rennicke's. For example, Brown notes the "lack of information conveyed to Rennicke by [Brown] confirming that [Brown] in fact understood the elements of sexual assault[,]" Rennicke's failure to recall whether he brought the Information with him to a client meeting, and that Rennicke "failed to even come close to expressing the elements in his written explanation contained within the plea questionnaire."

¶24 The State responds by observing that Rennicke's testimony provided a sufficient basis for the court to conclude that Brown's plea was voluntarily, knowingly, and intelligently entered. The State observes, "Brown's argument consists primarily of a list of reasons why he believes the circuit court should have reached the opposite conclusion." As the State notes, "even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding." *See* ***Royster-Clark***, 290 Wis. 2d 264, ¶12.

¶25 We agree with the State. Brown has failed to demonstrate that the countervailing evidence was so overwhelming that the circuit court erred, or that the State failed to meet its burden of proof. In any event, Brown has not responded to the State's arguments on this issue. We therefore deem them conceded. *See* ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590 (WI App 1999) (unrefuted arguments are deemed conceded).

By the Court.—Order affirmed.

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