COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2262-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY D. KINGSTAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed.*

NETTESHEIM, J. Timothy D. Kingstad appeals from a trial court order denying his motion to withdraw his plea of no contest to fourth-degree sexual assault contrary to § 940.225(3m), STATS. Kingstad raises four arguments on appeal: (1) the trial court lacked subject matter jurisdiction to convict Kingstad of the offense; (2) the criminal complaint was factually insufficient to sustain the charge; (3) the trial court should have allowed Kingstad to withdraw his plea

because the plea colloquy was insufficient; and (4) the trial court erroneously precluded Kingstad's trial counsel from testifying at the ***Machner*** hearing on Kingstad's claim of ineffective assistance of trial counsel.[1] We reject each of Kingstad's arguments. We affirm the judgment and the trial court order denying Kingstad's motion for postconviction relief.

FACTS

On April 27, 1995, Kingstad was charged with four counts of fourth-degree sexual assault contrary to § 940.225(3m), STATS. The charges were based upon allegations that Kingstad, a self-employed baker, had nonconsensual sexual contact with S.M.B., a sixteen-year-old girl employed at his bakery, on four separate occasions.

The facts underlying the charges are set forth in the criminal complaint. S.M.B. began working at Kingstad's bakery in November 1994. In January 1995, Kingstad began making comments to S.M.B., telling her that she was pretty and winking at her. S.M.B. stated that these flirtations had lasted for about a month when in February 1995, Kingstad approached her and kissed her on the mouth. S.M.B. indicated that she was afraid of Kingstad and was unable to think clearly and tell him no.

S.M.B. stated that on March 11 or 12, Kingstad was kissing her in the back room of the bakery when he lifted up her apron, put his hand under her shirt and pushed up her bra. S.M.B. did not make an outward attempt to stop Kingstad because she was so shocked by what was happening. S.M.B. stated that

[1] *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979).

she did not give Kingstad permission to touch her breasts. After this incident, Kingstad kissed S.M.B. almost every night that she worked alone with him.

Between March 17 and 19, Kingstad allegedly put his hand up S.M.B.'s shirt, pushed her bra up and touched both of her breasts while kissing her. S.M.B. stated that when Kingstad grabbed her hand and placed it on his crotch, she told him no and pulled her hand away. S.M.B. left the bakery and did not respond to Kingstad when he told her that he loved her.

The last incident upon which the charges are based occurred on March 23, 1995. At that time, Kingstad kissed S.M.B. in the back office, took off her apron and lifted her shirt all the way up. Kingstad then lifted her bra, exposing her breasts, and laid her on the floor. Kingstad then kissed both of her breasts. S.M.B. stated that during this incident Kingstad was lying on top of her and "his crotch was rubbing on her vaginal area." S.M.B. told Kingstad that she had to go home. S.M.B. stated that she was scared and did not know what to do. S.M.B. did not physically stop Kingstad; however, she did not give him permission or consent on any occasion to touch her breasts or rub his penis on her vaginal area.

On March 28, 1995, S.M.B.'s mother found a note in S.M.B.'s pocket which stated, "From me to you. Thinking of you always." Because S.M.B.'s mother was also employed at Kingstad's bakery, she was able to identify the handwriting as Kingstad's. S.M.B.'s mother confronted Kingstad the following day when she reported for work. Kingstad stated that he loved S.M.B. and was glad "it was finally out in the open." S.M.B.'s mother reported the incidents to the Muskego police department. In due course, Kingstad was charged with four counts of fourth-degree sexual assault contrary to § 940.225(3m), STATS.

On December 15, 1995, Kingstad filed a request to enter a no contest plea and waiver of rights. The request included a statement indicating Kingstad's understanding of his plea agreement under which he would plead no contest to one count of fourth-degree sexual assault and the remaining three counts would be dismissed. Following a plea hearing, the trial court accepted Kingstad's plea and entered a judgment of conviction on one count of fourth-degree sexual assault. The court sentenced Kingstad to a stayed term of nine months in the Waukesha county jail and two years' probation with four months in the Waukesha county jail as a condition of probation.

Kingstad subsequently filed a postconviction motion raising certain issues renewed on this appeal. Following a hearing, the trial court issued a written decision denying Kingstad's arguments. Kingstad appeals.

DISCUSSION

Subject Matter Jurisdiction

Kingstad's first argument on appeal is that the trial court lacked subject matter jurisdiction to convict him of the noncrime of "inappropriate sexual contact." Kingstad premises his argument upon the following statement made by the trial court at the plea hearing:

> The Court is then going to accept the plea as freely, voluntarily given…. [T]he facts of the complaint as to the elements being stipulated, he is found guilty of count one, of having sexual contact, of having *inappropriate sexual contact* with a person, and this Court finds him guilty of that offense…. [Emphasis added.]

Kingstad contends that the law does not recognize the offense of "inappropriate sexual contact."

A court does not have subject matter jurisdiction over a nonexistent offense. *See* ***State v. Cvorovic***, 158 Wis.2d 630, 634, 462 N.W.2d 897, 898 (Ct.

App. 1990). However, it is evident from the record in this case that Kingstad was convicted of fourth-degree sexual assault, an offense recognized under the Wisconsin statutes. *See* § 940.225(3m), STATS. In spite of the trial court's characterization of the offense as "inappropriate sexual contact," it is clear from the context that the trial court found Kingstad guilty of "count one"—fourth-degree sexual assault under § 940.225(3m). That was the charge alleged in the complaint; it was the only charge remaining before the court once the State dismissed the other three counts; it was the charge which the court read to Kingstad at the opening of the plea colloquy; and it is the charge of which Kingstad stands convicted per the judgment of conviction. We reject Kingstad's assertion that the court's passing statement demonstrates a lack of subject matter jurisdiction.

Sufficiency of the Complaint

In addition to challenging the trial court's subject matter jurisdiction, Kingstad challenges the sufficiency of the complaint. Kingstad argues that "mere sexual touching was clearly insufficient to convict [him] of fourth degree sexual assault." Specifically, Kingstad argues that the complaint failed to allege that he had knowledge of S.M.B.'s lack of consent and intentionally touched her without her consent. The State argues that Kingstad waived his right to challenge the sufficiency of the complaint when he entered his plea. We agree.

Kingstad did not challenge the sufficiency of the complaint at the circuit court level. Therefore, he waived any objection to the complaint before or

at the time he entered his no contest plea. *See* ***Day v. State***, 52 Wis.2d 122, 124-25, 187 N.W.2d 790, 791-92 (1971).[2]

Withdrawal of the Plea and Sufficiency of the Plea Colloquy

Kingstad next contends that the trial court should have allowed him to withdraw his plea because the trial court failed to comply with the requirements for a plea acceptance as set forth in § 971.08, STATS.,[3] and ***State v. Bangert***, 131 Wis.2d 246, 261-62, 389 N.W.2d 12, 21 (1986). He contends that this constitutes a manifest necessity for withdrawal of his plea. Specifically, Kingstad argues that the trial court erroneously accepted his plea without informing him of the elements of the crime and without ascertaining that a factual basis for the crime existed. The record does not support Kingstad's arguments.

A defendant wishing to withdraw a guilty plea after sentencing must show by clear and convincing evidence that the plea was not voluntarily entered and that withdrawal is necessary to correct a manifest injustice. *See* ***State v. Woods***, 173 Wis.2d 129, 136, 496 N.W.2d 144, 147 (Ct. App. 1992). Whether to

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[2] Kingstad argues that ***State v. Haugen***, 52 Wis.2d 791, 191 N.W.2d 12 (1971), and ***State v. Petrone***, 161 Wis.2d 530, 468 N.W.2d 676 (1991), support his claim. We disagree. Unlike Kingstad who raised his objection to the sufficiency of the complaint after sentencing, the defendants in those cases raised timely objections to the complaint prior to trial. *See* ***Haugen***, 52 Wis.2d at 792, 191 N.W.2d at 13; ***Petrone***, 161 Wis.2d at 552, 468 N.W.2d at 684.

[3] Section 971.08, STATS., provides in relevant part:

> **Pleas of guilty and no contest; withdrawal thereof. (1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

allow a postsentencing plea withdrawal is within the trial court's discretion. *See* ***State v. Canedy***, 161 Wis.2d 565, 579-80, 469 N.W.2d 163, 169 (1991). We will uphold the trial court's findings of fact on such matters unless they are clearly erroneous. *See* § 805.17(2), STATS.

Before accepting a plea, the trial court must determine the defendant's education and general comprehension and establish his understanding of the nature of the crimes and the applicable range of punishment. *See* ***Bangert***, 131 Wis.2d at 261-62, 389 N.W.2d at 21. The trial court must also "personally ascertain whether a factual basis exists to support a plea." ***Id***. Kingstad argues that the trial court failed to perform these duties when accepting his plea.

We first turn to whether the record demonstrates that Kingstad was aware of the nature of the charge such that his plea was knowingly and voluntarily entered. We conclude that it does. Prior to the plea hearing, Kingstad completed and submitted a plea questionnaire and waiver form. According to the information provided by Kingstad at the time of the plea entry, he was a forty-three-year-old man with six years of college education. Kingstad was self-employed and denied the use of drugs or alcohol. Kingstad professed to being in complete control of his faculties.

At paragraph 11 of the form, Kingstad initialed a statement which recited: "I am represented by an attorney. I discussed & understand all the facts and circumstances about this charge pending against me. I have no questions about what has happened in this case so far." Then, at paragraph 15 of the form, Kingstad initialed a statement which reads, "I understand that by pleading *no*

contest, I am admitting that I committed all the elements of the offense(s) of: *4th degree sexual assault—sexual contact with a person without their consent.*"[4]

At the plea hearing, the trial court began by making the following statements based on the criminal complaint:

> The State of Wisconsin says that between the approximate dates of March 11, 95 and March 12 ….
>
> ….
>
> At American Pie and Bakery in the City of Muskego, which is in Waukesha County, that the defendant Timothy D. Kingstad did have sexual contact with a person, to wit: S.M.B., date of birth 10-29-78, without consent of that person, contrary to section 940.225(3m) Wisconsin Statutes. This is a class A misdemeanor, sir. If you are convicted of this offense you could be fined up to $10,000, imprisoned up to nine months or both.

The trial court then turned to the plea questionnaire and waiver of rights form. The court took note of Kingstad's age, employment and educational level. Kingstad stated that the contents of the form had been read to him and that he had read the form himself, initialed it and signed it in the presence of his counsel. Kingstad's counsel then informed the court that she had explained the contents of the form to Kingstad at her office and had talked to him at length about his case. Kingstad agreed with his counsel's statements. The trial court then asked Kingstad if he had fully discussed every initialed paragraph with his attorney. Kingstad responded that he had.

This record establishes Kingstad's educational level, his comprehension of the nature of the crime, and the applicable range of punishment. *See* ***Bangert***, 131 Wis.2d at 261-62, 389 N.W.2d at 21. In addition, the trial court

[4] We have emphasized those portions of the statement which were handwritten.

specifically referred to the initialed paragraphs of Kingstad's signed form and established with Kingstad's counsel that she had discussed and explained the contents of the form to Kingstad. In turn, Kingstad confirmed to the court that his counsel had indeed gone over the form with him and that he had signed and initialed it. This form expressly sets forth the elements of fourth-degree sexual assault pursuant to § 940.225(3m), STATS. We conclude that Kingstad's plea was knowingly and voluntarily entered. Therefore, the court did not erroneously deny Kingstad's request to withdraw his plea on this ground.

Kingstad next contends that there was an insufficient factual basis to accept his no contest plea and that this constituted a manifest injustice requiring the trial court to grant his motion for plea withdrawal. We reject Kingstad's argument.

Kingstad's argument is essentially based on his contention that the factual allegations of the criminal complaint fail to establish that he had knowledge of S.M.B.'s lack of consent but nevertheless had sexual contact with her. The State argues that the complaint need only allege facts sufficient to demonstrate that the victim did not consent, not that Kingstad had knowledge of the lack of consent. We need not answer the State's contention because we conclude that the record of the plea hearing and the criminal complaint revealed facts sufficient to support both the claim that the victim did not consent and that Kingstad knew of such lack of consent.

Section 940.225(3m), STATS., provides: "Except as provided in sub. (3), whoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor." Sexual contact is defined under § 940.225(5)(b) as:

> 1. Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1).

Kingstad argues that the element of "intentional touching" in the definition of sexual contact requires a demonstration that Kingstad had "intent" as defined in § 939.23(3), STATS.[5] However, Kingstad's argument overlooks that he conceded at his plea hearing that a factual basis for the charges existed in the criminal complaint.

At the plea hearing, the trial court asked Kingstad's counsel whether she had reviewed the facts of the complaint with Kingstad. Counsel replied that she had. Counsel additionally stated:

> [W]e believe there are sufficient facts in this case for a no contest plea to stand. And I guess I will explain it as follows. At the time that the event that we are talking about occurred, we are saying they occurred…. My client was under the misapprehension that they were consensual. After discussing it with me at my office, and that includes the panoply of services provided by my office, educating him about criminal and non criminal intimate behavior, about age inappropriate behavior, whether criminal or non criminal, and about how we saw this case, my client has decided to enter the no contest plea. At the time in his mind he did believe it was consensual. He comes to court today saying, Your Honor, it is clear that the complainant did not believe it is consensual…. [V]ery clearly he realizes that at this point the complainant indicates that she did not consent.

[5] Section 939.23(3), STATS., provides:

> **(3)** "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally."

The court then inquired of Kingstad whether he heard, understood and accepted the statement. Kingstad replied that he did.

Kingstad contends that the trial court did not determine whether a factual basis existed for the plea. The record belies Kingstad's contention. At the plea hearing, the trial court stated, "[I]n reviewing the facts of the complaint as to the elements being stipulated, [Kingstad] is found guilty of count one …." Although the court did not use the phrase "factual basis," it is obvious that the court reviewed the complaint and determined that Kingstad should be adjudged guilty based upon those allegations. We conclude that the court determined that a factual basis for the plea existed.

We also reject Kingstad's separate argument that the complaint did not state a factual basis of his plea of no contest. A factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury from the facts even if an exculpatory inference could also be drawn and the defendant asserts the latter is the correct inference. *See* ***State v. Spears***, 147 Wis.2d 429, 435, 433 N.W.2d 595, 598 (Ct. App. 1988). Here, the complaint clearly alleges sexual contact between Kingstad and S.M.B. Although S.M.B. did not usually physically resist this conduct, neither did she invite Kingstad's overtures. Her failure to object or resist nearly all of Kingstad's overtures was because she was frightened, shocked and did not know what to do. Moreover, on the occasion when Kingstad placed S.M.B.'s hand on his crotch, she told him "no" and pulled her hand away. Most importantly, we observe this contact was initiated and perpetuated by a forty-three-year-old adult male against his sixteen-year-old female employee. Kingstad was in a position of power and control over S.M.B., and the allegations of the complaint establish that he used that position to his advantage.

While Kingstad puts a more innocent spin on the allegations of the complaint, we are not obliged to accept that interpretation if the complaint reasonably allows for an inculpatory inference. *See* ***id***. Here, the trial court could reasonably infer from the facts alleged in the complaint that S.M.B. did not consent to sexual contact with Kingstad and that Kingstad understood this. We therefore further conclude that the criminal complaint stated a factual basis for Kingstad's no contest plea.

Ineffective Assistance of Counsel

Kingstad argues that the trial court erred in refusing to compel his trial counsel to testify at the postconviction ***Machner*** hearing. The court did so because Kingstad refused to waive the attorney-client privilege as requested by his trial counsel.

Section 905.03(2), STATS., provides that a person who obtains professional legal services from an attorney has a privilege to prevent the attorney from disclosing confidential communications made for the purpose of rendering those services. *See* ***State v. Simpson***, 200 Wis.2d 798, 804, 548 N.W.2d 105, 107-08 (Ct. App. 1996). However, under § 905.03(4)(c), there is an exception to this privilege when the communications are "relevant to an issue of breach of duty by the lawyer to the lawyer's client." "It is beyond dispute that the privilege disappears when the client … seeks to reverse a criminal conviction on the grounds that counsel rendered ineffective assistance of counsel." ***Simpson***, 200 Wis.2d at 804-05, 548 N.W.2d at 108 (citations omitted).

The record in this case reflects that Kingstad's trial counsel was prepared to testify at the ***Machner*** hearing regarding Kingstad's motion. Although trial counsel acknowledged the presumption that, in filing an ineffective

assistance of counsel claim, there is a waiver of the attorney-client privilege, she refused to testify unless Kingstad formally waived his privilege or the trial court ordered it waived. The trial court agreed with trial counsel that Kingstad should affirmatively waive the privilege before she testified. However, Kingstad refused to do so and trial counsel did not testify. The trial court then adjourned the proceedings in order to receive a written waiver of the attorney-client privilege from Kingstad.

At the adjourned hearing, Kingstad's trial counsel again appeared, prepared to testify. However, when the trial court asked whether Kingstad would waive the attorney-client privilege, Kingstad's postconviction counsel stated, "No, Your Honor, I'm not willing to allow my client to testify to that or to make any statement like that." As a result, no testimony was heard from Kingstad's trial counsel. On July 9, 1997, the trial court rendered a written decision in which it rejected Kingstad's claim of ineffective assistance of trial counsel.

Kingstad argues that the trial court precluded him from making the requisite record regarding his ineffective assistance of counsel claim. We disagree. All the trial court asked of Kingstad was that he confirm and memorialize on the record that his claim of ineffective assistance of counsel constituted a waiver of the attorney-client privilege. We do not view that request as unreasonable or contrary to law. Indeed, it could be argued that this was a commendable procedure for the trial court to pursue. We suspect that most defendants who allege ineffective assistance of counsel do not understand that such a motion constitutes a waiver of the privilege as a matter of law. Here, the trial court was simply trying to confirm Kingstad's understanding of that principle.

Thus, it was Kingstad—not the trial court—who occasioned the present inadequate record. Because of Kingstad's actions, this court does not have the appropriate record upon which to review an ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979) (it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel). We decline to hold that Kingstad's trial counsel's performance was deficient based on his arguments alone. *See* ***id***.

CONCLUSION

We conclude that Kingstad was charged and convicted of a crime recognized under the Wisconsin statutes. As such, the trial court had subject matter jurisdiction over this case. We further conclude that Kingstad waived his right to object to the sufficiency of the complaint. We also reject Kingstad's contention that the trial court failed to comply with the requirements of § 971.08, STATS., and ***Bangert*** when accepting his no contest plea. Instead, we conclude that Kingstad's plea was knowingly and voluntarily entered and that there was a factual basis upon which to base his plea. Therefore, we reject Kingstad's argument that he should have been allowed to withdraw his no contest plea. Finally, we reject Kingstad's contention that the trial court denied him the opportunity to make a record in support of his ineffective assistance of counsel claim.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE RULE 809.23(1)(b)4, STATS.