COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1565-CR **Cir. Ct. No. 2014CF3308**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORNELIUS BOYD, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and JONATHAN D. WATTS, Judges. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Cornelius Boyd, Jr., appeals the judgment convicting him of first-degree sexual assault (sexual contact with a child under the age of thirteen). *See* WIS. STAT. § 948.02(1)(e) (2013-14).[1] He also appeals the order denying his postconviction motion seeking plea withdrawal.[2] The sole issue on appeal is whether the circuit court erred in denying Boyd's postconviction ***Bangert*** motion without an evidentiary hearing.[3] *See also* ***State v. Brown***, 2006 WI 100, ¶¶34-35, 293 Wis. 2d 594, 716 N.W.2d 906 (restating and supplementing the ***Bangert*** plea colloquy outline). We affirm.

I. BACKGROUND

¶2 A complaint filed in July 2014 charged Boyd with three sexual assaults: count one, first-degree sexual assault of a child (sexual intercourse with a child under the age of twelve-victim T.J.); count two, first-degree sexual assault (sexual contact with a child under the age of thirteen-victim S.J.); and count three, first-degree sexual assault (sexual contact with a child under the age of thirteen-victim T.G.).

¶3 On the afternoon of the first day of Boyd's jury trial, three witnesses testified for the State: Amanda Didier, a forensic interviewer at the Child

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The Honorable Jeffrey A. Wagner accepted Boyd's guilty plea and entered the judgment of conviction. The Honorable Jonathan D. Watts issued the order denying Boyd's postconviction motion.

[3] ***State v. Bangert***, 131 Wis. 2d 246, 271-75, 389 N.W.2d 12 (1986), summarizes the circuit court's duties, which are designed to ensure that a defendant's guilty or no-contest plea is knowing, intelligent, and voluntary. If the circuit court fails at one of the duties, it is called a ***Bangert*** violation and a motion raising the alleged error is called a ***Bangert*** motion. ***State v. Cross***, 2010 WI 70, ¶19, 326 Wis. 2d 492, 786 N.W.2d 64.

Protective Center at Children's Hospital of Wisconsin; T.G., the sexual-contact victim identified in count three; and T.G.'s grandmother, P.B., with whom T.G. had lived since birth.

¶4 Didier testified about forensic-interview techniques. Before six-year-old T.G. testified, the prosecutor played for the jury a video of the forensic interview of T.G. When she testified, T.G. identified Boyd as the person who made her lie on top of him while he placed his hand on her chest area and rubbed it.

¶5 P.B. testified about how she learned of Boyd's contact with T.G. and about the ensuing report to law enforcement. After P.B. testified, the prosecutor played for the jury a video of the forensic interview of S.J., the victim identified in count two. After the prosecutor played the second video, the court recessed for the evening.[4]

¶6 On the morning of the second day of trial, the prosecutor advised the circuit court that "it's my understanding that the defendant will be entering a guilty plea to [c]ount [three]. That is the count that involves sexual contact with [T.G.] She's the victim who testified yesterday." In exchange, the State moved to dismiss and read-in counts one and two. Following a plea colloquy and related discussions with the prosecutor and defense counsel, Boyd entered his guilty plea, and the circuit court accepted it.

[4] Neither video is included in the record on appeal. During opening arguments, however, defense counsel told the jury that T.G.'s video would show that "when [T.G.] is interviewed, [T.G.] says Mr. Boyd only touched her over her clothing, in her breast area."

¶7 At the sentencing hearing, Boyd sought to withdraw his plea. When asked about why he wanted to do so, Boyd advised the circuit court as follows:

> THE DEFENDANT: Because I said that I feel like my lawyer wasn't working with me or feel like he [was] working with the D.A.
>
> And plus, at the same time, I was afraid that I was going to lose my case.
>
> THE COURT: You were afraid you were going to lose your case. Okay. Well, is that it?

¶8 When asked the basis for the plea withdrawal motion, defense counsel answered: "The basis is that he was coerced into entering his plea …. The basis would be after me saying that I coerced him[.]" The circuit court denied both the plea withdrawal motion and defense counsel's related motion to withdraw. It went on to sentence Boyd to twenty-two years of imprisonment consisting of twelve years of initial confinement and ten years of extended supervision.

¶9 Boyd then filed a postconviction motion again seeking to withdraw his guilty plea. He alleged that the circuit court conducted a defective colloquy by failing to apprise him of the meaning of "sexual contact" and that he did not understand that element of the crime he committed. The postconviction court denied the motion without holding a hearing.

¶10 On appeal, Boyd continues to pursue his plea colloquy defect argument. Additional facts are included below as necessary.

II. DISCUSSION

¶11 Under Wisconsin case law,

> [w]hen a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in "manifest injustice." One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea.

Brown, 293 Wis. 2d 594, ¶18 (citations omitted). A defendant can challenge the knowing, intelligent, and voluntary nature of his or her plea by demonstrating a plea colloquy defect and alleging that he or she did not understand the information that should have been provided at the plea hearing. ***Id.***, ¶¶2, 39-40.

¶12 In order to be granted an evidentiary hearing, a postconviction motion that concerns an alleged deficiency in the plea colloquy "must (1) make a prima facie showing of a violation of WIS. STAT. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript; and (2) allege that the defendant did not know or understand the information that should have been provided at the plea hearing." ***Id.***, ¶39 (citation omitted). "Whether [a defendant] has pointed to deficiencies in the plea colloquy that establish a violation of … § 971.08 or other mandatory duties at a plea hearing is a question of law we review *de novo.*" ***Id.***, ¶21.

¶13 WISCONSIN STAT. § 971.08(1)(a) requires the circuit court to "determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Here, Boyd entered a plea to first-degree sexual assault (sexual contact with a child under the age of thirteen). WISCONSIN STAT. § 948.02(1)(e) (2013-14) provides: "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." The particular definition of "sexual contact" applicable to first-degree sexual assault, as relevant to this case, is found in WIS. STAT. § 948.01(5) (2013-14):

> "Sexual contact" means any of the following:
>
> (a) Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant:
>
> 1. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.
>
> 2. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.

¶14 Boyd argues that the circuit court conducted a defective colloquy by failing to apprise him of the meaning of "sexual contact" and that he did not understand that element of the crime he committed. *See* ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18 (explaining that courts have crafted the purpose of the sexual contact to be an element of the offense of sexual assault of a child).

¶15 The plea hearing transcript reflects that during its colloquy, the circuit court inquired: "And you have read the complaint or had it read to you. So you understand what the charge was and you understand what the testimony was, which was about that little girl."[5] Boyd responded: "Yes, sir."

¶16 The circuit court additionally informed Boyd that all twelve jurors would have to unanimously agree that he "had sexual contact with the victim of the offense for the purpose of sexually arousing or gratifying yourself. And that

[5] According to the complaint, then five-year-old T.G. told police that the defendant had touched "her private part … over her clothing with his hand. T.G. pointed to her vaginal area and said that [the defendant] would touch her 'down there.'"

the victim had not attained the age of thirteen at the time of the sexual contact." Boyd told the circuit court he understood. The circuit court continued: "And you've gone over sexual contact with your lawyer so you understand that also. Is that also correct?" Boyd again responded affirmatively.

¶17 After Boyd entered his guilty plea, the circuit court inquired:

> Okay. On the plea then of guilt, the [c]ourt will make a finding of guilt. And if there's [sic] no objections, the [c]ourt will use the criminal complaint along with that testimony that was given yesterday by that child as a factual basis for the plea and waive any other testimony.
>
> [PROSCUTOR]: I would ask the [c]ourt to rely primarily on the testimony of the child which happened in front of the jury trial in open court yesterday. I believe it was compelling testimony. It certainly satisfies all of the elements.
>
> THE COURT: Any objections by defense?
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: All right. The [c]ourt will do so.

Thus, to establish a factual basis for Boyd's plea, the circuit court—by the stipulation of the parties—relied on the complaint allegations and T.G.'s trial testimony.

¶18 The plea colloquy reflects that the circuit court provided Boyd with the required information about "sexual contact." The circuit court explicitly advised him that the State would have to prove beyond a reasonable doubt that Boyd touched T.G. "for the purpose of sexually arousing or gratifying yourself."

¶19 Boyd argues that the circuit court's recitation left out key components. For instance, that "sexual contact" required "intentional touching." *See* WIS. STAT. § 948.01(5)(a) (2013-14). Additionally, Boyd faults the circuit

court for not explaining that the "sexual contact" could occur not just for the purpose of sexually gratifying the defendant but also for the purpose of sexually humiliating or degrading the victim. ***Id.***

¶20 Boyd has not established that the circuit court was required to provide, verbatim, the statutory definition of sexual contact during the plea colloquy in order to satisfy its duty to determine that he understood the nature of the charge. Furthermore, we agree with the State that it was not required to prove both purposes of sexual contact, which exist as alternatives. Rather, Boyd only needed to understand the purpose that applied to his situation—namely, his own sexual gratification.[6] ***Bangert*** does not require the circuit court to conduct a plea colloquy in a ritualized or formulaic way; to the contrary, a circuit court has considerable flexibility to conduct a plea colloquy in a manner that best suits the circumstances. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30, 32 & n.18, 317 Wis. 2d 161, 765 N.W.2d 794.

¶21 Insofar as Boyd relies on the fact that he was receiving treatment for mental illness to argue that the circuit court should have done more during its colloquy, we are not convinced. The plea hearing transcript reveals that it was Boyd's decision to seek out the plea bargain after the trial began and that he and defense counsel assured the circuit court numerous times that he was competent to proceed and wished to do so.

By the Court.—Judgment and order affirmed.

[6] Boyd does not claim that humiliating or degrading T.G. played any role in his conduct.

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