COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1248-CR **Cir. Ct. No. 2002CF271**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUKE C. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Luke Anderson appeals a judgment convicting him of third-degree sexual assault and an order denying his motion to withdraw his no contest plea. He argues that there was an insufficient factual basis for the plea and

that he was misinformed about the elements of third-degree sexual assault. We reject those arguments and affirm the judgment and order.

¶2 Anderson was initially charged with second-degree sexual assault of a child, WIS. STAT. § 948.02(2)[1], because he had "sexual contact" with a person who had not attained the age of sixteen years. Anderson admitted to police that he touched the victim's vaginal area through her clothes. Pursuant to a plea agreement, he pled no contest to a reduced charge of third-degree sexual assault, WIS. STAT. § 948.225(3), for having "sexual intercourse with a person" without consent. At the plea hearing, after the trial court described the amendment as charging "sexual contact without consent," the prosecutor corrected the court and gave a detailed explanation of the charge:

> Actually, the charge is one of sexual intercourse without consent as required by law. The allegation of the intercourse is – under the auspices of the definition of the charge is any intrusion, no matter how slight, and the allegation the state is advancing is there was intrusion by the finger over the clothing into the vaginal area. That's making it a third-degree sexual assault, simply a touching, in actuality, but by law an intercourse.

When the court asked if the charge was to include sexual contact, the prosecutor answered "No, your Honor. It has to read sexual intercourse." The court then made that change on the face of the amended information.

¶3 In his postconviction motion to withdraw the no contest plea,[2] Anderson argued that the record contains no support for the prosecutor's claim

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Anderson also filed a presentencing motion to withdraw the plea on other grounds that are not pursued on appeal.

that Anderson's touching of the victim's vaginal area through her clothes could have led to any penetration. He also argues that the record does not establish that he assented to the facts as recited by the prosecutor, and instead admitted to "sexual contact," a term used by the trial court four times during the plea colloquy.

¶4 In order to withdraw his no contest plea after sentencing, Anderson must establish a manifest injustice. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The trial court's decision on a motion to withdraw a plea will be reversed only for an erroneous exercise of discretion. *See* ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987). A manifest injustice occurs if the trial court fails to establish a factual basis for a plea. *See* ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836.

¶5 The record as a whole supports the trial court's finding that there was a sufficient factual basis for the plea. ***Id.***, ¶¶21-23. The prosecutor's explanation of the amended charge, noting the difference between the statutory definition of intercourse and how that term is used in common parlance, set the stage for the entire plea colloquy. The prosecutor made clear that the State's theory was that Anderson's finger slightly penetrated the victim's vagina through her clothing. Anderson voiced no objection to the amendment to the charge or the prosecutor's explanation. He entered his no contest plea based on the prosecutor's recitation, thereby assenting to the prosecutor's description. A defendant is not required to admit the factual basis in his own words. ***Id.***, ¶18. Therefore, the trial court reasonably determined that the conduct Anderson admitted constitutes third-degree sexual assault.

¶6 In addition, even if there were no factual basis for the element of sexual intercourse, there was a factual basis for the greater offense of sexual

contact with a child. The requirements of WIS. STAT. § 971.08 (2003-04) are met if a basis is shown for either the offense to which Anderson pled or a more serious charge related to that offense. *See* ***State v. Harrell***, 182 Wis. 2d 408, 419, 513 N.W.2d 676 (Ct. App. 1994).

¶7 Anderson next argues that his plea was not knowingly entered because he was misinformed by the trial court about the nature of the charge to which he pled. The record supports the trial court's implicit finding that Anderson failed to make a prima facie case that the plea colloquy was deficient and, alternatively, that the plea was knowingly, voluntarily and intelligently entered despite any shortcomings in the plea colloquy. Anderson notes the trial court's use of the term "sexual contact" rather than intercourse when describing the elements of the offense. In light of the prosecutor's explanation of the legal definition of intercourse, the court's use of the term "sexual contact" to describe this slight penetration did not confuse the issue. Some of the court's references to sexual contact describe what the State would have had to prove if the plea agreement had not been reached, that is, the elements of second-degree sexual assault of a child. Anderson responded that he understood the court's statement.

¶8 In addition, Anderson's postconviction testimony and his trial attorney's testimony establish sufficient knowledge of the elements. His attorney testified:

> In my discussions with Mr. Anderson, I pointed out sexual intercourse doesn't not have to be the traditional concept of penile-vagina intercourse. It's the insertion of a finger or could be an object. And it could be over the clothing and the penetration would have to just be ever so slight under the law to constitute intercourse.

Anderson conceded when asked whether he knew the elements of third-degree sexual assault at the time of his plea: "I mean, I mean, I did. I understood it that it was intercourse, but that's 'cause . . . Attorney Zoesch went over it."

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).