**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

July 3, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 00-2056-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL J. BIELEFELDT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Michael J. Bielefeldt appeals from a judgment of conviction of second-degree sexual assault, false imprisonment and battery. He also appeals from an order denying his postconviction motion. Bielefeldt argues that he should have been allowed to withdraw his guilty plea prior to sentencing

because he was pressured to enter his plea and his decision was made without a full exploration of the facts. We affirm the judgment and order.

¶2 Bielefeldt was charged with five counts as a result of the alleged assault on a female victim. The victim reported to police that she had given Bielefeldt a ride home from a bar and that he pulled her from the car into his apartment. Inside the apartment, Bielefeldt overpowered the victim, removed her clothing and attempted to have intercourse with her. He also attempted to put his penis in her mouth. The victim managed to escape and after driving to a friend's house reported to a hospital. After receiving treatment, the victim went with police to Bielefeldt's apartment and identified him through the window. The police found a dark-colored sweatshirt in the apartment that matched the description of the one the victim said she had left behind.

¶3 On the morning of trial, a plea agreement was reached. A kidnapping charge was reduced to false imprisonment. Bielefeldt entered a no contest plea to that reduced charge, second-degree sexual assault and misdemeanor battery. Charges of attempted second-degree sexual assault and disorderly conduct were dismissed.

¶4 Two days after the entry of his plea, Bielefeldt filed a pro se motion to withdraw his plea based on a claim that he was denied the effective assistance of counsel. Bielefeldt alleged that under pressure from his trial attorney, he panicked and entered his plea under coercion. His simultaneous motion for new counsel alleged that his trial attorney had never sat down with him to discuss or review the criminal complaint or preliminary hearing transcripts and did nothing to formulate a defense.

¶5 New counsel was appointed to represent Bielefeldt. A hearing was conducted at which former trial counsel, Attorney Robert Bramscher, testified. In its written decision denying Bielefeldt's motion to withdraw his plea, the trial court recounted that the negotiations on the morning of trial were ongoing and the plea agreement was not reached in a matter of minutes. The court looked at its plea colloquy with Bielefeldt and its intent in that colloquy to be sure that there was no undue pressure or coercion causing Bielefeldt to enter the plea. It recalled that Bielefeldt expressed that he was not happy with what was occurring but understood the procedure and believed it was the best thing to do. The court found Bielefeldt's desire to withdraw his plea to be merely "buyer's remorse" and that Bielefeldt's change of mind was not a fair and just reason to permit plea withdrawal.

¶6 A motion to withdraw a no contest plea filed prior to sentencing is addressed to the discretion of the trial court. ***State v. Shanks***, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989). We review the trial court's resolution of the motion for an erroneous exercise of its discretion. ***Id.*** at 289.

¶7 A defendant has the burden to show by a preponderance of the evidence that there is a "fair and just reason" for withdrawal of the plea. ***State v. Canedy***, 161 Wis. 2d 565, 583-84, 469 N.W.2d 163 (1991). "The 'fair and just' standard contemplates the mere showing of some adequate reason for the defendant's change of heart." ***Shanks***, 152 Wis. 2d at 288. Whether the reason given adequately explains the change of heart is also a matter within the trial court's discretion. ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999).

¶8 Bielefeldt's underlying reason for wanting to withdraw his plea is that he was pressured to enter his plea. He relies heavily on Attorney Bramscher's admission that he exerted pressure on Bielefeldt to accept the plea agreement and Attorney Bramscher's belief that he influenced Bielefeldt's decision. Attorney Bramscher explained that his strong urging to accept the plea agreement was because the charges were serious, the plea agreement greatly reduced Bielefeldt's prison exposure, and the case involved a sympathetic witness. These are appropriate factors to consider in recommending a plea agreement. Attorney Bramscher indicated that he considered Bielefeldt to be a smart man capable of understanding the waiver of his constitutional rights as outlined on the plea questionnaire. The pressure or advice from Attorney Bramscher does not translate to coercion or detract from the fact that the ultimate decision to enter the plea was solely for Bielefeldt to make. There is nothing to suggest that Bielefeldt's free will was overcome. Bielefeldt confirmed during the plea colloquy that he had not been coerced to enter his no contest plea. That confirmation is strong evidence in light of Bielefeldt's previous reluctance to consider a plea agreement.

¶9 Bielefeldt also claims that he was pressured when the district attorney spoke directly to him about the plea agreement. Attorney Bramscher explained that after going back and forth to clarify terms of the plea agreement, he asked the district attorney to directly relay the terms to Bielefeldt because "under those circumstances the client has a chance to probe a little bit, the demeanor so to speak, and attitude of the prosecutor; and that probably gives the client a better sense of where he stands in the scheme of things." Attorney Bramscher confirmed that the district attorney said nothing inappropriate during his conversation with Bielefeldt. It was not improper for the district attorney, on Attorney Bramscher's request, to speak to Bielefeldt about the plea agreement. It was done to give

Bielefeldt a clear understanding of the agreement. Again, the decision to accept the plea agreement was solely Bielefeldt's.

¶10 Bielefeldt testified that the reading of the plea questionnaire was rushed. He believed from the questionnaire that he had twenty days before sentencing to withdraw his plea and that he would not be subject to classification as a sexual predator. Bielefeldt's testimony also suggested that on the morning of trial he thought Attorney Bramscher was not prepared for trial. While Bielefeldt maintained that things were rushed, he acknowledged the truthfulness of the affirmative answer he gave to the trial court about having had sufficient time to discuss the plea agreement with his attorney.

¶11 The trial court found Bielefeldt's testimony about misunderstanding the consequences of his plea and believing his attorney to be ill-prepared for trial to be incredible. This credibility determination is supported by the record. Bielefeldt's picture of how the plea agreement was reached was in stark contrast to Attorney Bramscher's explanation of going back and forth between Bielefeldt and the district attorney. Indeed, Bielefeldt admitted his own attempt to persuade the district attorney to accept a plea only to the false imprisonment charge. The plea questionnaire makes no reference to the right to withdraw a plea and the twenty-day reference is only for a time after sentencing. The questionnaire also advises that if the defendant is convicted of a sexually violent offense, he or she may be subject to involuntary commitment as a sexual predator. Advisement about possible sexual predator commitment proceedings need not be part of a plea colloquy in order to assure that a defendant's plea was knowing and voluntary. ***State v. Bollig***, 224 Wis. 2d 621, 636, 593 N.W.2d 67 (Ct. App. 1999), *aff'd*, 232 Wis. 2d 561, 605 N.W.2d 199 (2000). Finally, Attorney Bramscher indicated that

he was absolutely prepared for trial. He indicated that he had met with Bielefeldt individually and with his investigator prior to trial.

¶12 We acknowledge that Bielefeldt quickly moved to withdraw his plea. However, a prompt motion to withdraw is not itself a fair and just reason for a plea withdrawal, but is a factor bearing on whether the proffered reason of coercion is credible. *See* ***State v. Shimek***, 230 Wis. 2d 730, 740 n.2, 601 N.W.2d 865 (Ct. App. 1999). As we have indicated, the trial court found Bielefeldt's later assertion of coercion to be incredible. Further, the trial court's findings that the plea was not hastily made and that the plea was what Bielefeldt then believed to be in his best interest are sound.

¶13 During his testimony, Attorney Bramscher indicated that he had just been made aware of certain things that should have been noted in the victim's clothing because the victim was menstruating at the time of the assault. Attorney Bramscher suggested that the absence of notations about either a tampon, menstrual pad, or stains "changes the situation considerably with respect to the ability to show fabrication on the part of the alleged victim" and that he would not have recommended the plea agreement. Bielefeldt's postconviction motion seeking to withdraw his plea alleged that Attorney Bramscher failed to fully investigate this aspect of the case. On appeal, Bielefeldt does not directly raise ineffective assistance of counsel. He argues that the lack of information on this point impaired his judgment on the decision to enter his plea.

¶14 We first point out that Bielefeldt moved to withdraw his plea prior to sentencing without reference to information that the victim was menstruating at the time of the assault. It was not a factor bearing on Bielefeldt's claim of coercion.

¶15 Secondly, that the victim was menstruating was not new information. The medical records provided to the defense indicated that the victim was actively bleeding and the extent of that bleeding. What occurred was that Attorney Bramscher, because of his male perspective, overlooked the possible evidentiary significance of the victim's menstrual state.

¶16 What was arguably new was the district attorney's offer of proof at the plea withdrawal hearing that the victim indicated in a pretrial interview that Bielefeldt's inability to penetrate her vagina may have been affected by the menstrual pad she was wearing. By posthearing correspondence, the accuracy of this offer of proof was called into question. The district attorney sought to correct the offer of proof to reflect that it was the prosecution's speculation that a menstrual pad may have hampered penetration. The trial court refused to consider the posthearing amendment to the offer of proof. Thus, we are left with a record that is not clear as to whether the victim suggested penetration was hampered by her form of menstrual protection and whether she was utilizing a tampon or menstrual pad.

¶17 Bielefeldt makes a suggestion that he should be allowed to withdraw his plea because the prosecution withheld evidence about the victim's use of a menstrual pad. Even if we considered the claim adequately briefed, we reject it. This is not a case like ***State v. Sturgeon***, 231 Wis. 2d 487, 490, 605 N.W.2d 589 (Ct. App. 1999), where the defendant was allowed to withdraw his plea based on the postplea discovery of exculpatory evidence within the exclusive control of the State. The opportunity to determine the victim's choice of menstrual protection was not exclusively the State's. Moreover, whether the victim was wearing a menstrual pad or tampon is not exculpatory evidence for which a duty of disclosure exists because it was not relevant.

¶18 There was never a claim that complete penetration had occurred. Nor was complete penetration necessary as an element of the offense. *See* ***Baldwin v. State***, 59 Wis. 2d 116, 123, 207 N.W.2d 630 (1973). The complaint reported that Bielefeldt attempted to have sex with the victim but could not. It indicated that the victim said Bielefeldt penetrated her vagina but did not ejaculate. The victim testified at the preliminary hearing that Bielefeldt tried to stick his penis in her vagina but it would not go in. She reported that only part of his penis went into her vagina. Simply put, the reason Bielefeldt was not able to fully penetrate the victim is not a fact of consequence. If the presence of a tampon hampered his ability to fully penetrate, it would not serve to impeach the victim's testimony that he was unable to do so. Even if other discovery material suggested that Bielefeldt was not able to fully penetrate the victim because he was unable to maintain an erection, the presence of a tampon still lacked impeachment value. Those two reasons are not mutually exclusive. There is no basis for suggesting that the presence of a tampon would have prevented any penetration. If the victim utilized a menstrual pad, it would not have provided any explanation for Bielefeldt's inability to fully penetrate the victim or prevented any penetration. The victim indicated that Bielefeldt removed her underwear. The pad would have been removed with it. Exploration about the type of menstrual protection the victim was utilizing would not have served to impeach the victim.

¶19 At best, as the postconviction motion suggested, the absence of menstrual blood on Bielefeldt's couch or elsewhere in his apartment might have supported his claim that there was no sexual intercourse in his residence. The absence of such evidence is not probative of any fact in consequence in light of the lack of complete penetration and the victim's report to the hospital.

¶20 In the context of a motion to withdraw a plea, the relevant inquiry regarding a potential error is whether there is a reasonable probability that, but for the error, the defendant would have refused to plead and would have insisted on going to trial. ***State v. Semrau***, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376, *review denied*, 234 Wis. 2d 176, 612 N.W.2d 733 (Wis. Apr. 28, 2000) (No. 98-3443-CR). We are not bound by the defendant's assertion that he or she would have. We look to: "(1) the relative strength and weakness of the State's case and the defendant's case; (2) the persuasiveness of the evidence in dispute; (3) the reasons, if any, expressed by the defendant for choosing to plead guilty; (4) the benefits obtained by the defendant in exchange for the plea; and (5) the thoroughness of the plea colloquy." ***Id.*** Here, the victim's menstrual status did not serve to impeach her testimony and did not directly bear on the defense theory that the assault never occurred. Moreover, the victim's version was corroborated by the abrasions on her hands and left knee and the discovery of the sweatshirt at Bielefeldt's apartment. Even considering what little use could be made of evidence regarding the victim's menstrual period, Bielefeldt was still at significant risk of being convicted. The plea agreement significantly reduced Bielefeldt's prison exposure. As the plea colloquy established, Bielefeldt entered his plea upon his then-belief that it was in his best interest. Based on the entire record in this case, we conclude that there is no reasonable probability that Attorney Bramscher would not have recommended the plea agreement and that Bielefeldt would not have entered into the plea agreement.

*By the Court.*—Judgment and order affirmed.

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