

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP370-CR

Cir. Ct. No. 2008CF1146

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW G. SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Judgment affirmed; order reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Matthew Scott appeals from a judgment convicting him of second-degree sexual assault of a child and from an order denying his postconviction motion seeking to withdraw his guilty plea. We conclude that the

circuit court should have held an evidentiary hearing on Scott's motion to withdraw his plea. Therefore, we reverse the order denying Scott's postconviction motion and remand for an evidentiary hearing. We affirm the judgment of conviction because plea withdrawal must be determined in a postconviction evidentiary hearing.

¶2 We review whether the circuit court erroneously denied Scott's postconviction motion without an evidentiary hearing. A defendant is entitled to an evidentiary hearing if the defendant's postconviction motion makes a prima facie showing, based on the transcript of the plea hearing and the defendant's allegations, that the colloquy was deficient and the defendant did not know or understand information that should have been provided at the plea hearing. *State v. Hoppe*, 2009 WI 41, ¶44 n.26, 317 Wis. 2d 161, 765 N.W.2d 794; *State v. Brown*, 2006 WI 100, ¶2, 293 Wis. 2d 594, 716 N.W.2d 906. We independently determine the sufficiency of the plea colloquy and the necessity of an evidentiary hearing. *Hoppe*, 317 Wis. 2d 161, ¶17.

¶3 During the plea colloquy, the circuit court must “[e]stablish the defendant's understanding of the nature of the crime with which he is charged.” *Id.*, ¶18. To understand the nature of the charge, the defendant must be aware of all of the crime's essential elements. *State v. Jipson*, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18. Scott pled guilty to second-degree sexual assault of a child by sexual contact contrary to WIS. STAT. § 948.02(2) (2009-10).¹ Sexual contact includes “intentional touching, whether direct or through clothing, if that

¹ All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.” Section 948.01(5)(a). In a charge of sexual assault by sexual contact, the purpose of the sexual contact is an element of the offense. *Jipson*, 267 Wis. 2d 467, ¶9. Therefore, a defendant must be aware of this element before the defendant can knowingly plead to the crime. *Id.*

¶4 We agree with Scott that the circuit court erroneously denied his postconviction motion without an evidentiary hearing. Scott’s postconviction motion alleged a deficiency in the plea colloquy that was apparent from the transcript and he further alleged that he did not understand information the circuit court was bound to provide to him under *Hoppe*.² See *Brown*, 293 Wis. 2d 594, ¶5. We therefore reverse and remand for an evidentiary hearing on Scott’s plea withdrawal motion. See *id.*, ¶6.

¶5 The transcript of the plea colloquy reveals the following. The circuit court confirmed that Scott signed a plea questionnaire and waiver of rights form. While the court mentioned the other elements of second-degree sexual assault that would have to be established at trial, the court did not confirm Scott’s understanding of the purpose of the sexual contact as required by *Jipson* and *Hoppe*. The court confirmed that Scott reviewed the elements “attached to your plea form for the offense,” and that Scott and his counsel discussed the elements. Unfortunately, the definition of sexual contact was not included in the attached jury instructions for second-degree sexual assault of a child, WIS JI—CRIMINAL

² The State conceded in response to the motion that an evidentiary hearing would be required.

2104. Scott confirmed that he and his counsel discussed “the definition or what it means under Wisconsin law to have sexual contact with another person,” but no details of the discussion were placed on the record. Scott acknowledged that he understood the charge of sexual contact with a child under the age of sixteen. Scott described the sexual contact as touching the victim’s breasts. When the court asked Scott whether he touched the victim’s breasts “mistakenly” or “intentionally,” Scott responded “mistake.” The court then clarified that Scott actually intended to touch her breasts and that it was wrong. The court then accepted Scott’s guilty plea to the charge.

¶6 Scott’s postconviction motion alleged that the plea colloquy was defective because he was not advised of the sexual contact element and he did not understand that element when he pled guilty. Scott alleged that he would not have pled guilty had he known that the State had to prove beyond a reasonable doubt that he intentionally touched the victim with the purpose of becoming sexually aroused or gratified or to sexually degrade or humiliate the victim. For these reasons, Scott moved to withdraw his guilty plea.³

¶7 In denying Scott’s plea withdrawal motion without an evidentiary hearing, the circuit court relied upon that portion of the plea colloquy in which the court asked Scott about his discussion with counsel about the meaning of sexual contact but did not elicit the substance of that discussion. The court’s reliance was misplaced. If trial counsel must “summarize the extent of the explanation,

³ Scott’s motion is governed by the standards for a post-sentencing request to withdraw a plea. See *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Scott must establish a manifest injustice requiring plea withdrawal. See *id.* An unknowing, involuntary and unintelligent plea constitutes a manifest injustice. *Id.*

including a reiteration of the elements, at the plea hearing,” *Brown*, 293 Wis. 2d 594, ¶¶47, 53, we do not see why the standard should be less when the defendant is asked to confirm his or her discussion with counsel about the elements. Scott’s understanding of the elements should have been put on the record during the colloquy.

¶8 The circuit court also relied upon that portion of the plea colloquy in which the court clarified that Scott had touched the victim intentionally. Although the court clarified that Scott intentionally touched the victim, the clarification did not take place within the context of Scott’s knowledge of the purpose of the sexual contact. Scott’s initial response that he mistakenly touched the victim suggests that Scott lacked the necessary knowledge and understanding about an element of the crime at the time he pled guilty.

¶9 The State argues that Scott misrepresented the plea colloquy in his postconviction motion. To support its claim that Scott was advised of the sexual contact element, the State relies upon the circuit court’s reference to the second-degree sexual assault jury instructions. As discussed above, the jury instructions did not include a definition of sexual contact.

¶10 The plea colloquy does not establish that Scott knew that the State had to prove the purpose of the sexual contact as an element of the crime. *See Jipson*, 267 Wis. 2d 467, ¶16. Scott made the necessary allegations to obtain an evidentiary hearing on his plea withdrawal motion. The circuit court erroneously denied Scott’s postconviction plea withdrawal motion without a hearing. We reverse the postconviction order and remand for an evidentiary hearing on the postconviction motion. We affirm the judgment of conviction.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

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

