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

**December 26, 2002**

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



**Appeal No. 02-0679-CR** **Cir. Ct. No. 00-CF-849**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL RAY JUBER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael Ray Juber appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. The issue on appeal is whether the circuit court properly denied his motion to withdraw his plea, whether he received ineffective assistance of trial counsel, and whether the sentence imposed was excessive. Because we

conclude that the circuit court did not err either in denying the motion or imposing sentence, and that Juber did not receive ineffective assistance of counsel, we affirm.

¶2 Juber pled guilty to one count of sexual intercourse with his daughter. The specific conduct charged was digital penetration of her vagina. The criminal complaint stated two counts of sexual intercourse. At the plea hearing, defense counsel initially stated that Juber would be pleading to the second count and that count one would be dismissed and read in. When the court recited the count as sexual intercourse, defense counsel stated that he and the prosecutor had discussed that Juber would plead to sexual contact. The prosecutor stated that it was his position that Juber needed to plead to the court as charged. Defense counsel then stipulated that the facts in the complaint created a factual basis for the sexual intercourse charge. The court stated that while the penalty for sexual contact and sexual intercourse was the same, there needed to be "some clarity made as to exactly what Mr. Juber is pleading guilty or no contest to." The prosecutor stated that it was to sexual intercourse and defense counsel agreed. The court then asked Juber what he pled to the charge of sexual intercourse. Juber pled guilty. The court conducted a plea colloquy and accepted Juber's plea.

¶3 After sentencing, Juber brought a motion to withdraw his plea arguing that he thought he was pleading to sexual contact and not sexual intercourse. He further argued that the plea questionnaire he had signed listed the elements of sexual contact and not sexual intercourse. Initially, the court ruled that Juber had satisfied the burden of showing that his plea had not been knowingly, intelligently and voluntarily entered, and that the burden then shifted to the State. The State disagreed and argued that there were two elements that Juber needed to satisfy before the burden switched to the State. First, Juber

needed to establish that there had been some violation of WIS. STAT. § 971.08, which Juber had done. Then, the State argued relying on ***State v. Bangert***,[1] that Juber needed to show that he actually did not understand the information which should have been provided. The court agreed to take some testimony from Juber to determine his understanding at the time he entered his plea.

¶4 After hearing Juber's testimony, the court found that, while there was some question about the specific charge to which Juber pled, it was clear from Juber's testimony that he understood he was pleading to sexual intercourse. The court noted that Juber disputed the legality of the legislature defining sexual intercourse to include digital penetration, but that he understood sexual intercourse to include digital penetration under Wisconsin law. The court found, therefore, that he entered his plea to sexual intercourse knowingly, voluntarily and intelligently and would not allow him to withdraw his plea.

¶5 A motion to withdraw a plea is addressed to the trial court's discretion and we will reverse only if the trial court has failed to properly exercise its discretion. ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). Juber argues that the colloquy establishes that he was confused about the specific charge to which he was entering his plea. Further, he argues that the plea questionnaire did not adequately set out the elements of either sexual intercourse or sexual contact.

[1] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

¶6 We agree with the circuit court's ultimate determination that Juber, in fact, understood the elements of the charge of sexual intercourse and knowingly entered his plea to that charge. We conclude that the plea colloquy was adequate and that any confusion that may have been created was cleared up almost immediately. Even assuming that Juber met his threshold burden under ***Bangert*** and the burden shifted to the State, however, we conclude that his testimony at the postconviction hearing established that he knowingly entered his plea to the charge of sexual intercourse with his daughter.

¶7 At the postconviction hearing, Juber testified that his attorney had explained to him that digital penetration was included in the definition of sexual intercourse under Wisconsin law, but that he disagreed with that law. The State then asked: "If the Court had asked you that at the plea hearing, given what you've already told us, you did understand sexual intercourse to mean inserting your finger into your daughter's vagina, correct?" And Juber responded: "I had understood that the State does view that as such and I do not." We conclude that Juber knowingly entered his plea. Consequently, the circuit court's decision to deny his motion to withdraw his plea was proper.

¶8 Juber next argues that his trial counsel was ineffective because he did not properly advise Juber of the elements of the offense to which he pled. The circuit court dismissed this claim without holding a ***Machner***[2] hearing. Juber's testimony, however, established that his counsel had explained to him the elements of both offenses. Since the circuit court had already rejected the premise for Juber's claim of ineffective assistance of counsel, the circuit court properly

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

refused to hold the ***Machner*** hearing, and rejected Juber's claim of ineffective assistance of counsel.

¶9 Juber also argues that the sentence he received was excessive. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. ***Id.*** The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The weight to be given the various factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶10 Juber argues that the court's comment at sentencing that this case has "been a prison case since day one" shows the court had decided that incarceration was merited no matter what mitigating factors were presented. The transcript of the sentencing proceeding, however, shows that the court carefully considered all of the appropriate factors, including the statements made in support of Juber. At sentencing, Juber presented statements from people who testified to his character and stated that this conduct was not likely to occur again. In fact, the court relied on one of these statements to conclude that Juber's conduct was "situational." The court considered, however, additional factors including the seriousness of the offense, and the need to protect the public. Specifically, the court considered that the behavior had occurred over a considerable period of time and had not stopped when the victim, Juber's daughter, asked him to stop. The court stated that Juber had violated the trust and confidence placed in him by his

daughter. The court further noted there was a need in our society and community to punish people who act in this way. Based on all of the court's comments, we cannot conclude that the court erroneously exercised its discretion when it sentenced Juber. For the reasons stated, we affirm the judgment and order of the circuit court.

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

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