COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2155-CR
2011AP2156-CR

Cir. Ct. Nos. 2010CF253
2010CF547

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES R. WEGNER,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. James R. Wegner pled no contest in two separate cases to second-degree sexual assault of a child. The victims were his daughters.

Wegner appeals from the judgments of conviction and from the order denying his postconviction motion seeking to withdraw his pleas and alleging ineffectiveness of trial counsel. We reject his arguments and affirm the judgments and order.

¶2 Sixteen-year-old Jasmine S., a friend of Wegner's fifteen-year-old daughter, told a high school social worker that one night when she spent the night at the Wegner home, Wegner gave her a mixture of crushed "addies," opium, Vicodin and "coke" to snort and then sexually assaulted her. The police contacted the daughter while investigating Jasmine's allegations. The daughter told them that Wegner had molested her five years ago when she was ten, and expressed concern that he would "try to do something" to her nine-year-old sister. The younger daughter later revealed that Wegner already had touched her in "the bad spot" when she was five.

¶3 Wegner was charged in separate cases with second-degree sexual assault of a child. In the case involving his older daughter, he also was charged with manufacture or delivery of non-narcotics and with sexual intercourse with a child age sixteen or older, counts stemming from the Jasmine incident. After the cases were consolidated, Wegner pled no contest to the charges involving his daughters; the charges relating to Jasmine were dismissed and read in. A fourth person, Wegner's twenty-six-year-old cousin, came forward with accusations that Wegner molested her when she was fourteen and he was in his thirties. Her allegations were used as an uncharged read-in.

¶4 Postconviction, Wegner sought to withdraw his pleas on the basis that they were not knowing, voluntary or intelligent because he was not properly informed of and did not understand the definition of sexual contact. He also alleged that trial counsel was ineffective for failing to protect his rights to be

charged during a definitive charging period that would allow him to prepare a defense. The trial court denied his motion after a hearing. Wegner appeals, raising the same claims.

¶5 To withdraw his pleas after sentencing, Wegner must establish that plea withdrawal is necessary to avoid a manifest injustice. *See* ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. Whether his pleas were entered knowingly, intelligently and voluntarily is a question of constitutional fact. *See* ***id.***, ¶16. We decide this question independently of the trial court but uphold its findings of fact unless they are clearly erroneous. *See* ***State v. Straszkowski***, 2008 WI 65, ¶29, 310 Wis. 2d 259, 750 N.W.2d 835.

¶6 The trial court must determine that a plea "is made voluntarily with understanding of the nature of the charge." WIS. STAT. § 971.08(1)(a). To understand the nature of the charge, the defendant must be aware of all the essential elements of the crime. *See* ***State v. Nichelson***, 220 Wis. 2d 214, 218, 582 N.W.2d 460 (Ct. App. 1998). In a charge of sexual assault by sexual contact, the purpose of the sexual contact is an element of the offense. *See* ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18.

¶7 During the plea colloquy, Wegner acknowledged that trial counsel had gone over the elements of the offense with him. The court did not either summarize the elements or ask trial counsel to summarize his explanation of them to Wegner. The jury instruction for second-degree sexual assault of a child, WIS JI—CRIMINAL 2104, was attached to the plea questionnaire/waiver of rights form. The definition of sexual contact, however, is found in WIS JI—CRIMINAL 2101A, a copy of which was not submitted with the plea questionnaire/waiver of rights form. Wegner averred in an affidavit accompanying his postconviction motion

that he never was informed of and did not understand the definition of sexual contact as set forth in WIS JI—CRIMINAL 2101A. No matter how incredible the assertion that he did not understand what "sexual contact" means, coupled with the court's failure to ascertain his understanding, it was sufficient to make a prima facie case. *See* ***Nichelson***, 220 Wis. 2d at 222-23.

¶8 The State conceded as much below and does not challenge on appeal that Wegner made a prima facie showing. It did not oppose Wegner's request for a hearing, at which it bore the burden to show by clear and convincing evidence that Wegner's plea nonetheless was knowingly, voluntarily and intelligently entered. *See* ***State v. Bollig***, 2000 WI 6, ¶49, 232 Wis. 2d 561, 605 N.W.2d 199.

¶9 Trial counsel, Attorney Robert Vander Loop, testified at the postconviction motion hearing. He admitted that not including WIS JI—CRIMINAL 2101A with the plea questionnaire was an "oversight," but that he believed Wegner understood that the touching had to be for sexual gratification, degradation or humiliation, that it had to be intentional, and that he did not think there was "any misunderstanding as to what sexual contact … meant." Vander Loop testified that he explained the definition of sexual contact "in detail" on at least five separate occasions and specifically read aloud to Wegner the definition from WIS JI—CRIMINAL 2101A, and used WIS JI—CRIMINAL 2101B for the definition of sexual intercourse. He testified that he specifically recalled the discussions because, with the multiple charges, he wanted to be sure Wegner understood "what the definition of sexual contact was and what the definition of sexual intercourse was," and because Wegner "didn't think it was fair that the definitions were so broad." Vander Loop explained that he did not leave a copy of the jury instructions with Wegner because Wegner said he "didn't want written

information about his case to be with him at the jail…. [H]e told them he was there for other reasons than sexual assault of a child."

¶10 For his part, Wegner testified at the hearing that Vander Loop "went over the content that's on here [WIS JI—CRIMINAL 2104] and the intercourse" but never discussed with him the definition of sexual contact. Wegner testified that, had he known the definition, he would not have entered the plea.

¶11 The trial court found Vander Loop's failure to attach WIS JI—CRIMINAL 2101A and 2101B to the plea questionnaire was an oversight; that his testimony about his multiple explanations was clear and convincing; and that Wegner's recall of certain portions of his discussions with Vander Loop may be "convenient for him now but [isn't] necessarily credible." The credibility determinations were for the trial court. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291-92, 592 N.W.2d 220 (1999). Any conflicts in the testimony likewise were exclusively for the trial court, not this court. *See* ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). The trial court's findings here are not clearly erroneous. Wegner's efforts to reargue the facts and the witnesses' credibility are to no avail.

¶12 Wegner next contends Vander Loop was ineffective for not seeking to narrow the charging periods, one of which was ninety-two days, the other, a year. He asserts that the charging periods were prejudicial because they diminished his chances for an attractive plea offer or dismissal of the charges and made it virtually impossible to defend the allegations or develop an alibi defense.

¶13 To establish constitutionally ineffective assistance, a defendant must prove deficient performance and prejudice. *See* ***State v. Weed***, 2003 WI 85, ¶33,

263 Wis. 2d 434, 666 N.W.2d 485; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The first prong requires the defendant to show that counsel made errors so serious as to not function as the "counsel" guaranteed the defendant by the Sixth Amendment. ***Weed***, 263 Wis. 2d 434, ¶33. For the second prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations omitted). Failure to establish one prong of the inquiry makes it unnecessary to address the other. *See* ***Strickland***, 466 U.S. at 697.

¶14 Whether the charging period is too expansive to allow the defendant to prepare an adequate defense is an issue of constitutional fact which we decide independently of the trial court. ***State v. Fawcett***, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988). "[W]here time of commission of a crime is not a material element of the offense charged, it need not be alleged with precision." ***State v. George***, 69 Wis. 2d 92, 96, 230 N.W.2d 253 (1975). "Time is not of the essence in sexual assault cases." ***Fawcett***, 145 Wis. 2d at 250. Moreover, where child victims are involved, "a more flexible application of notice requirements is required and permitted. The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance." ***Id.*** at 254.

¶15 Even if we assume that the charging periods were excessive, we conclude that Vander Loop's decision not to challenge these periods was a reasonable strategic decision. He testified that he deliberately chose not to contest the charging periods for two reasons. First, Wegner expressed an "overwhelming concern" that he avoid later commitment as a sexually violent person under WIS.

STAT. ch. 980. Second, Vander Loop deemed it unlikely that a narrowed charging period would have enabled a credible alibi defense because Wegner and his daughters lived in the same residence for the entire charging periods and because Wegner said he recalled little from that time due to "blacking out" from medications he took in combination with "large quantities of liquor." Vander Loop testified that, rather than file a motion challenging the charging period, he thought it more prudent to try to reduce the chance of a ch. 980 commitment by negotiating a plea agreement that would limit the child-sex-offense convictions to two, the Jasmine count to a read-in and the count involving Wegner's cousin to an uncharged read-in.

¶16 Wegner agreed with Vander Loop's strategy at the time. Now, though, he argues that a motion challenging the charging periods might have been dispositive and led to dismissal of charges, given the "unprecedented and lengthy" charging periods not seen in any reported case in Wisconsin. We reject Wegner's criticism. Even if hindsight suggests that another defense might have been effective, the strategic decision employed will be upheld as long as it is founded on a rational assessment of the facts and the law. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992).

By the Court.—Judgments and order affirmed.

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