COURT OF APPEALS
DECISION
DATED AND RELEASED

December 17, 1996

No. 96-2271-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT N. PENDLETON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Sawyer County: NORMAN L. YACKEL and FREDERICK A. HENDERSON, Judges. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Robert N. Pendleton appeals a judgment of conviction following his plea of no contest to one count of second-degree sexual assault of a child and an order denying his motion to withdraw his plea. Pendleton contends that the trial court failed to advise him that sexual intercourse was an element of the offense to which he pled no contest and that the court should not have accepted his no contest plea when it was accompanied by protestations of innocence. Because this court concludes that the record adequately disclosed Pendleton's understanding that sexual

intercourse was an element of the offense to which he pled no contest and that there was an adequate factual basis to support the court's acceptance of the plea notwithstanding Pendleton's version of the events that gave rise to the charge, the judgment of conviction is affirmed.

The facts giving rise to this appeal arise as a result of a negotiated plea where the State agreed to dismiss one count alleging sexual contact with a person under the age of thirteen in return for Pendleton's agreement to enter a plea to one count of second-degree sexual assault involving sexual intercourse with a person under the age of sixteen. Pendleton entered a plea of no contest to count two of the information alleging sexual intercourse with a person under the age of sixteen, and in accordance with the terms of the plea bargain, the State moved to dismiss count one charging sexual contact with a person under the age of thirteen. A joint sentencing recommendation was offered to the court providing an imposed but stayed sentence of four years and the imposition of a ten-year term of probation with one year to be served in the county jail as a condition of probation.

During the initial plea colloquy Pendleton made statements indicating that he did not actually have sexual intercourse with the victim and offered his version of events that indicated that the victim was the sexual aggressor and a willing participant in the encounter. Because Pendleton denied sexual intercourse, the court recessed and suggested that Pendleton confer with his attorney during the recess in regard to his plea decision. Following adjournment, defense counsel assured the court that they had discussed in great detail the allegations contained in the criminal complaint. Although Pendleton did not agree with all of the facts set forth in the complaint, placing the responsibility for initiating this sexual contact on Pendleton, he did agree there were sufficient facts that the State could prove justifying a finding of guilty.

Pendleton personally affirmed his counsel's statement to the court and affirmatively acknowledged his understanding that based upon his plea he would have a record of conviction for sexual intercourse with someone under the age of sixteen. The court accepted the plea, entered a finding of guilt based upon information contained in the complaint and statements made by Pendleton and his counsel and proceeded immediately to sentencing without the benefit of a presentence investigation. The court accepted the joint

recommendations of Pendleton and the State and imposed the proposed sentence.

Sometime following the sentencing hearing Pendleton, represented by different appointed counsel, filed a motion to withdraw his plea based on his contention that he did not understand he was charged with sexual intercourse with a child at the time of the plea and that there were insufficient facts to support the finding of guilty, particularly in light of his "protestations of innocence."

The original trial judge recused himself from hearing the claims of ineffective assistance of counsel also made in Pendelton's motion to withdraw his plea. The matter was assigned to a second judge who denied the motion to withdraw the plea upon finding that "the record is replete with evidence ... that [defendant] at times material to this plea, understood the first element of sexual intercourse."

Postconviction motions to withdraw a plea of guilty or no contest are addressed to the trial court's discretion. ***State v. Clement***, 153 Wis.2d 287, 292, 450 N.W.2d 789, 790 (Ct. App. 1989). When a motion to withdraw a plea is made following a finding of guilt and the imposition of sentence, the plea is permitted to be withdrawn "only when necessary to correct a manifest injustice." ***Id.*** The burden is on the defendant to prove the basis for withdrawing his plea by clear and convincing evidence. ***State v. Rock***, 92 Wis.2d 554, 559, 285 N.W.2d 739, 742 (1979).

In this case, Pendleton alleges that he should be permitted to withdraw his plea because he did not understand at the plea hearing that one of the elements of the offense to which he was entering a plea involved sexual intercourse with a person under the age of sixteen. A plea of no contest must be knowingly, voluntarily and intelligently made. ***State v. Bangert***, 131 Wis.2d 246, 268-69, 389 N.W.2d 12, 24 (1986). A knowing and voluntary plea involves an understanding of the elements of the offense to which a plea is offered. ***Id.***

We will assume for the purposes of this appeal that the failure to understand an element of the offense is sufficient to establish a manifest

injustice entitling Pendleton to withdraw his plea. Nonetheless, we conclude the trial court correctly found the record sufficient to establish that Pendleton was fully aware that sexual intercourse was an element of the offense to which he pled. Not only did the criminal complaint clearly allege sexual intercourse, the trial court advised Pendleton during the hearing that sexual intercourse was an element of the offense charged. Additionally, Pendleton's attorney reported that he had exhaustively reviewed with Pendleton the elements of the offense, including the element of sexual intercourse that was alleged in the complaint. Pendleton affirmed his attorney's statement to the court. Moreover, Pendleton specifically acknowledged that he would have a record that reflected sexual intercourse with a child under sixteen years old as a result of this plea. This is sufficient to establish conclusively that Pendleton was aware of this element of the charged offense at the plea hearing.

Pendleton contends that because some of these statements were made after he offered his plea, they are irrelevant to his understanding of the nature of the plea at the time the plea was offered. We find no merit to such a contention. First, the information was given to Pendleton during the entire plea colloquy and before a finding of guilt was made. More importantly, the trial court declared a recess to give Pendleton a full and complete opportunity to review this matter with his attorney before the plea was accepted. After the conference, both Pendleton and his attorney acknowledged that they had fully reviewed the criminal complaint and were well aware of the allegations contained therein. The suggestion that Pendleton was not aware of the nature of the offense alleged in the face of such a record is disingenuous. We therefore conclude that the record is sufficient to establish Pendleton's knowledge of the elements of the offense charged and the trial court properly denied his motion to withdraw the plea of no contest entered by Pendleton.

Pendleton next asserts that there is insufficient evidence to support a finding of guilt based upon what he characterizes as his protestations of innocence. We need not consider whether Pendleton was offering a proper ***Alford***[1] plea because we conclude there is sufficient evidence to support a finding of guilt, even if the plea could be characterized as an ***Alford*** plea.

[1] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

An ***Alford*** plea permits a plea of guilty by a defendant without an admission that he committed the offense to which he is pleading. The acceptance of an ***Alford*** plea is the acknowledgment that the state has sufficient evidence to obtain a finding of a guilt notwithstanding his claim of innocence. *See* ***State v. Garcia***, 192 Wis.2d 845, 858-59, 532 N.W.2d 111, 116 (1995). By permitting a defendant to enter a plea while claiming innocence, the court is permitting the defendant to engage in a plea agreement resolving a matter without the necessity of the delay and expense connected with a trial and permitting the exercise of a plea made for the defendant's strategic reasons, e.g., limiting sentence exposure. When an ***Alford*** plea is offered the State must offer strong proof of guilt in support of a finding of guilty. ***Garcia***, 192 Wis.2d at 859-60, 532 N.W.2d at 116-17.

In this case, Pendleton's statement as to the nature of the offense charged amounts more to charging the victim with being the instigator and sexual aggressor in their sexual contact. Because of the victim's age, the circumstances in which the sexual acts occurred do not represent a defense to the offense charged. The information before the trial court, including the statements made in the criminal complaint, the defense counsel's acknowledgment that the State possessed sufficient evidence to obtain a finding of guilty and Pendleton's acknowledgment of the acts committed, albeit in circumstances different from those the victim alleged, are sufficient to sustain the finding of guilt. We find no merit in the contention that there is insufficient evidence to support a finding of guilt if Pendleton's plea is accepted as an ***Alford*** plea.

Furthermore, we are not persuaded that Pendleton's statements are tantamount to protestations of innocence but merely a different version of circumstances which nonetheless demonstrate he committed a second-degree sexual assault on a person under the age of sixteen years. The judgment of conviction and order denying the motion to withdraw the plea are accordingly affirmed.

By the Court.—Judgment and order affirmed.

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