COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2288-CR **Cir. Ct. No. 01-CF-292**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CYNTHIA A. PROVO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Cynthia Provo appeals a judgment entered on her no contest plea to physical abuse of a child by recklessly causing great bodily harm and fourth offense operating while intoxicated. She also appeals an order denying her motion for postconviction relief. Provo claims she did not enter her plea knowingly and intelligently because she did not understand the meaning of the

"reckless" element of the child abuse charge. Specifically, she argues the court should have explained or defined the element. We disagree. Provo's proposed understanding of an element is not required for a valid plea under WIS. STAT. § 971.08[1] and ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), nor is the court required to explain or define the elements of the crime. We therefore affirm the judgment and order.

BACKGROUND

¶2 In October 2001, Provo pled no contest to one charge of physical abuse of a child by recklessly causing great bodily harm and one count of fourth offense OWI. The charges arose after Provo hit and severely injured a six-year-old boy while driving her boyfriend's pickup truck.

¶3 At the plea hearing, the court engaged in the following colloquy with Provo and her attorney regarding the recklessly causing great bodily harm charge:

> THE COURT: Okay. We have recklessly causing great bodily harm under Section 948.03(A). It's a Class D Felony, that I mentioned before, with a maximum penalty of a ten-year prison term. The State would have to prove beyond a reasonable doubt, if it went to trial, that you caused great bodily harm to the child involved, that you recklessly caused that harm, and the victim, the child, did not attain the age of 18 years at the time of the alleged offense. Do you understand those things?
>
> MS. PROVO: Yes.
>
> THE COURT: Do you have any questions about the plea you're making or anything about this case at this time?
>
> MS. PROVO: No.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> THE COURT: Mr. Anderson [Provo's attorney], have you talked to your client about the rights she is giving up?
>
> MR. ANDERSON: Yes, I have.
>
> THE COURT: Are you satisfied she understands those rights?
>
> MR. ANDERSON: Yes.
>
> THE COURT: Do you believe she's making her plea voluntarily?
>
> MR. ANDERSON: Yes.
>
> THE COURT: Do you believe she understands the potential consequences of her plea?
>
> MR. ANDERSON: Yes.
>
> THE COURT: I'll find that the defendant has made her plea to these charges then knowingly and voluntarily.

¶4 The court sentenced Provo to ten years for the child abuse charge, with two and a half years in prison and the remainder on extended supervision. In addition, the court sentenced Provo to 350 days' incarceration, served consecutively, on the OWI charge.

¶5 Provo filed a motion for postconviction relief. She argued her plea was not knowingly and intelligently made because she did not know or understand the definition of "reckless." At the motion hearing, Provo's trial attorney testified that although he did not specifically remember whether Provo had read the plea questionnaire and waiver of rights form, he would not have had her sign it if she had not read it. Anderson said he wrote "recklessly causing great bodily harm to a child" in the section of the form labeled "understandings" because those were the elements of the offense, although he acknowledged he misidentified the crime on a different section of the form. He also said he did not go through the jury

instructions with Provo and did not recall specifically discussing with Provo how her conduct would satisfy the elements of the crime.

¶6 Patricia Dunne-Jones, who had prepared Provo's presentence investigation, said she went over the criminal complaint with Provo in preparing her report, but not the statutes. Provo did not testify at the hearing.

¶7 The court denied Provo's motion. Specifically, the court pointed to the colloquy and Provo's admission that she understood the charges. The court further noted that reckless has a "general common-sense interpretation" and that although no one explained the definition to her, it was not required. Provo appeals.

DISCUSSION

¶8 To withdraw a plea after sentencing, a defendant needs to establish by clear and convincing evidence that failure to allow a withdrawal would result in a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. One of the situations where plea withdrawal is necessary to correct a manifest injustice is when the plea was involuntary, or was entered without knowledge of the charge. ***State v. Trochinski***, 2002 WI 56, ¶17, 253 Wis. 2d 38, 644 N.W.2d 891. Whether Provo's plea was knowingly and intelligently entered poses a constitutional fact question, which we independently review, benefiting from the circuit court's analysis. *See* ***id.*** at ¶47 ("A plea violates due process unless the defendant has a full understanding of the nature of the charges."); *see also* ***State v. Brandt***, 226 Wis. 2d 610, 618, 594 N.W.2d 759 (1999) (application of a set of facts to the appropriate legal standard is a question of law we review independently). The historical or evidentiary facts we apply to the legal standard are determined by the circuit court and we will not upset these findings unless they

are clearly erroneous. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199.

¶9 The standard and procedure for determining whether a plea is knowingly and intelligently made are laid out in WIS. STAT. § 971.08 and ***Bangert***. To withdraw her plea, Provo must first make a prima facie case that the circuit court violated § 971.08 and allege that she did not know or understand the information that the court should have provided at the plea hearing. *See* ***Bangert***, 131 Wis. 2d at 274. After establishing a prima facie case, the burden then shifts to the State "to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered." ***Id.***

¶10 At Provo's postconviction motion hearing, the parties disputed whether Provo had made a prima facie case by alleging her plea was not knowingly made because she did not understand the definition of reckless. The court assigned the burden to the State, although the court never explicitly determined Provo had made a prima facie case. We conclude, based on ***Trochinski***, that Provo's allegation did not establish a prima facie case that her plea was not knowingly and intelligently made.

¶11 Trochinski pled no contest to one count of exposing a minor to harmful materials after he gave a seventeen-year-old convenience store clerk nude pictures of himself. ***Id.*** at ¶¶5, 9. He sought to withdraw his plea saying he did not understand the "harmful to children" element of the crime. ***Id.*** at ¶13. At his postconviction hearing, he said he understood the elements of the offense, but did not understand what was going to have to be proven for his conviction. ***Id.*** He also said he knew the photos were harmful and inappropriate for children. ***Id.***

The trial court concluded Trochinski had not made a prima facie case and refused to allow him to withdraw his plea. ***Id.***

¶12 The supreme court affirmed. ***Id.*** The court determined that nothing in ***Bangert*** required a circuit court to "describe the elements of the offense and ensure the defendant specifically understands *how* the State must prove each element." ***Trochinski***, 2002 WI 56 at ¶22. Instead, WIS. STAT. § 971.08 and ***Bangert*** require that a defendant know and understand the elements of the offense. ***Trochinski***, 2002 WI 56 at ¶22. The court also noted that a valid plea requires only knowledge of the elements of the offense, not knowledge of the nuances and descriptions of the elements. ***Id.*** at ¶29. Pointing to Trochinski's signing of the plea questionnaire and the colloquy, the court determined Trochinski had been aware of and understood the elements of the crime and that he failed to make a prima facie case that his plea was not knowing, intelligent, and voluntary. ***Id.*** at ¶30.

¶13 Similarly, we conclude the record shows Provo was aware of and understood the elements of recklessly causing great bodily harm to a child. She signed a plea questionnaire and engaged in a colloquy with the court. These are two of the three methods suggested by ***Bangert*** for circuit courts to ensure the validity of a defendant's plea. ***Trochinski***, 2002 WI 56 at ¶23. The court was not required to define reckless for Provo, but only required to ensure she was aware and understood the essential elements.

¶14 Provo distinguishes ***Trochinski*** by arguing Trochinksi was aware of the photos' harmfulness. In support, she points to his admission that the photographs were inappropriate for children and the court's explanation that the

photos were the harmful material. Provo contends there is no similar evidence that she was aware her conduct was reckless.

¶15 We are not persuaded. Provo's primary contention is she was unaware of the exact definition of reckless. This is not required, nor does the trial court need to provide it. In ***Trochinski***, the trial court did not give the modified obscenity test that defines "harmful to children" to Trochinski. *See* ***id.*** at ¶11 n.6; *see also* WIS. STAT. § 948.11(1)(b). Instead, it was enough that Trochinski was aware and understood the nature of the elements of the charges against him.

¶16 The record before us reflects Provo's awareness and understanding of the charges against her. She did not need to know the precise legal definition of reckless nor was the court required to give her one before accepting her plea. Instead, all that was required was that she understood recklessnesss was an essential element of the charges against her. Provo's allegation that she did not understand the exact meaning of reckless does not establish a prima facie case that her plea was not knowingly and intelligently made.

By the Court.—Judgment and order affirmed.

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