COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP2237
2010AP2238

Cir. Ct. Nos. 2007CF0859
2007CF1275

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS JAMES SCHRODER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Thomas James Schroder, *pro se*, appeals judgments convicting him of two counts of second-degree sexual assault and an order denying his motion for sentence modification. He argues: (1) that his

no-contest pleas were not knowingly, intelligently and voluntarily entered because he did not have a complete understanding of the charges against him; (2) that he should have been allowed to withdraw his pleas before sentencing; (3) that the State violated the plea agreement; and (4) that the circuit court erroneously exercised its discretion in imposing a DNA surcharge. We affirm.

¶2 Schroder first argues that his no-contest pleas to two counts of second-degree sexual assault of a child were not knowingly, intelligently and voluntarily entered because he did not have a complete understanding of the legal charges against him. He contends that he was not informed of the elements of the crimes before he pled guilty and the legal definition of sexual contact, which is one of the elements, was never explained to him.

¶3 Schroder's claims are directly contradicted by the record. During the plea colloquy, the circuit court explained the elements of the crimes to Schroder in detail. The circuit court also informed Schroder that "sexual contact is the intentional touching of an intimate part of the buttocks of the child for the purpose of sexual gratification." We therefore reject Schroder's argument that his pleas were not knowingly, intelligently and voluntarily entered because he did not have a complete understanding of the charges against him.

¶4 Schroder next argues that he should have been allowed to withdraw his plea before sentencing. "A defendant seeking to withdraw a plea before sentencing must present a fair and just reason which the trial court finds credible, *and* rebut evidence offered by the State that the State will be substantially prejudiced by the plea withdrawal." ***State v. Rhodes***, 2008 WI App 32, ¶7, 307 Wis. 2d 350, 746 N.W.2d 599. The decision to grant or deny a motion to withdraw a plea before sentencing is committed to the circuit court's discretion.

Id. "'Fair and just' means some other adequate reason besides the defendant simply changing his mind." ***Id.***

¶5 At the hearing on the motion to withdraw, Schroder testified that he felt "threatened" into entering a plea because his attorney, Kerri Cleghorn, had not adequately communicated with him and was not prepared for the trial, which was already underway when he entered the plea. Attorney Cleghorn testified that she had prepared for trial by meeting with Schroder in person, talking to him on the phone, exchanging written communication with him, talking to Schroder's former attorney, reviewing discovery materials, and attempting to interview witnesses, though she was largely unsuccessful because they were not available to her. She testified that Schroder's only viable defense was to contend that the assaults did not happen, so her strategy was to point out inconsistencies in the accounts of the witnesses.

¶6 The circuit court denied the motion to withdraw the pleas before sentencing because Schroder's complaints about his attorney's performance were contradicted by his own statements during the plea colloquy. Schroder told the circuit court during the plea colloquy that he was satisfied with his attorney's performance and that he did not feel pressured into entering the pleas. The circuit court noted that Schroder had been given the opportunity during the colloquy to volunteer information, to ask questions, and to change any answers he had already given, but that he had not raised any concerns. The circuit court concluded that Schroder's motion for plea withdrawal was based on the fact that he changed his mind, which was not an adequate reason for the circuit court to allow him to withdraw the pleas. The circuit court also concluded that there would be prejudice to the State if Schroder were allowed to withdraw his pleas because the victims were very young, it would be traumatic for them to again face testifying at trial

and the delay would likely affect their memory. Because the circuit court's decision was reasoned and reasonable, and based on the applicable law and the facts of record, we conclude that the circuit court properly exercised its discretion in denying the motion for plea withdrawal.

¶7 Schroder next argues that the State violated the plea agreement because the prosecutor stated during her sentencing argument that the circuit court should decide the appropriate amount of prison time. Again, Schroder's argument is belied by the record. The plea agreement provided that the State would recommend that Schroder be given a total of three to four years of confinement for both crimes, with the period of extended supervision left to the court. During sentencing, the prosecutor discussed Schroder's character and background at length, concluding:

> I think that when … the Court is balancing those things against each other, the three to four years the State is recommending is the appropriate amount of time.
>
> ….
>
> He would have to serve the three to four years, whatever the Court would decide is the appropriate amount of time, and after that, then he would have to attend supervision, whatever the Court would deem to be appropriate….

¶8 The sentencing transcript shows that the State urged the circuit court to impose three to four years of incarceration in accord with the plea agreement. The State's comment that the circuit court "would decide the appropriate amount of time" was simply an acknowledgement that the decision was committed to the circuit court's discretion. Therefore, we reject Schroder's argument that the State violated the plea agreement.

¶9 Schroder next argues that the circuit court misused its discretion in imposing a $250 DNA surcharge against him at sentencing because the circuit court did not explain why it was imposing the surcharge. He cites ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, for the proposition that the circuit court must explain its reasons on the record for ordering a discretionary DNA surcharge.

¶10 Schroder's reliance on ***Cherry*** is misplaced. ***Cherry*** provides that the circuit court must set forth on the record its reasons for imposing a DNA surcharge under WIS. STAT. § 973.046(1g) (2009-10), which allows, but does not mandate, that the circuit court impose a DNA surcharge when a defendant is convicted of a felony. *See* ***Cherry***, 312 Wis. 2d 203, ¶¶5-9. Here, a DNA surcharge was imposed on Schroder pursuant to WIS. STAT. § 973.046(1r), which provides that a circuit court *is required* to order DNA testing and impose a surcharge against a defendant convicted of certain sex crimes, including second-degree sexual assault of a child. *See* ***Cherry***, 312 Wis. 2d 203, ¶5. Because the circuit court's duty to impose the surcharge was mandatory, rather than discretionary, the circuit court was not required to explain the reasons for its actions on the record.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).