

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDWARD WARDELL BERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69156

FILED

MAY 18 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of child abuse, neglect or endangerment. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

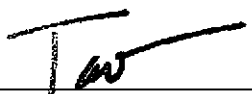
Appellant Edward Wardell Berry argues the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and “a district court may grant a defendant’s motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just,” *Stevenson v. State*, 131 Nev. ___, ___, 354 P.3d 1277, 1281 (2015). To this end, the Nevada Supreme Court recently disavowed the standard previously announced in *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused exclusively on whether the plea was knowing, voluntarily, and intelligently made, and affirmed that “the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.” *Stevenson*, 131 Nev. at ___, 354 P.3d at 1281.

Here, Berry filed a presentence motion to withdraw his guilty plea, which alleged his counsel improperly advised him the State could

amend the charge to allege he caused the victim to suffer substantial bodily harm. Berry asserted he relied upon this advice and pleaded guilty to avoid the potential enhancement to the original child abuse charge. The district court held an evidentiary hearing and heard testimony from Berry's original counsel. Counsel testified that the State filed notice of an expert witness, a forensic pediatrician. Counsel stated this concerned her because the victim was a three-month-old baby, Berry had possibly shaken the baby, and in such cases injuries may not be discovered until a later date. Counsel testified she advised Berry of the expert witness and that there was a possibility the State could seek to amend the charge to prove the baby suffered substantial bodily harm. Counsel also testified Berry was eligible to be adjudicated as a habitual criminal and the State asserted it would file a notice of its intent to seek adjudication as a habitual criminal if Berry did not enter a guilty plea. The district court concluded counsel was credible, counsel's advice was reasonable under the circumstances of this case, and Berry did not demonstrate it was fair and just to permit him to withdraw his guilty plea. *See id.* The record reveals the district court applied the correct standard when reviewing the motion to withdraw guilty plea. We conclude the district court did not abuse its discretion by denying the motion and we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Jennifer P. Togliatti, District Judge
Gregory & Waldo
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk