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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1808**

State of Minnesota,
Respondent,

vs.

William H. Bushey, III,
Appellant.

**Filed September 10, 2018
Reversed and remanded
Ross, Judge**

Itasca County District Court
File No. 31-CR-17-2016

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Muhar, Itasca County Attorney, Matti R. Adam, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Reyes, Judge; and Florey, Judge.

UNPUBLISHED OPINION

ROSS, Judge

William H. Bushey III was drunkenly arguing with his girlfriend when he pushed her. He pleaded guilty to one count of misdemeanor domestic assault – harm. On appeal, Bushey argues that the district court had an insufficient factual basis to accept his plea

because there was no evidence that his girlfriend was actually harmed or that he intended to harm her. Because there was no factual basis for concluding that Bushey actually caused or attempted to cause his girlfriend harm, we reverse and remand.

FACTS

Grand Rapids police officers responded to a report of a man arguing and breaking things in an apartment. When they arrived, police found Bushey standing outside the building, apparently drunk. They spoke with S.J.P., Bushey's girlfriend, and K.E.B., Bushey's child. S.J.P. and K.E.B. said that Bushey "had pushed each of them in the chest area while he was being disorderly throughout the residence."

Bushey pleaded guilty to one count of misdemeanor domestic assault – harm. At the plea hearing, the factual basis for his guilty plea consisted of the following:

Counsel: Did you put your hands on [S.J.P.]?

Bushey: Yes.

Counsel: And where did you place your hands?

Bushey: By her shoulder.

Counsel: And what did you do once your hands were on her shoulder?

Bushey: Nudged her.

Counsel: Okay. We talked about the term nudging before we got into court today, is that correct?

Bushey: Yeah.

Counsel: And when you say nudging, she says that it was a push or a shove, you understand that?

Bushey: Yeah.

Counsel: Do you agree that you did push or shove her?

Bushey: Yeah.

Counsel: And do you agree when you put your hands on – on somebody and push them or shove them, they have a reason to fear for their safety?

Bushey: Yeah.

The district court found that these facts established guilt and accepted Bushey's plea. The district court entered a conviction on the plea and sentenced Bushey.

Bushey appeals.

D E C I S I O N

Bushey maintains that we should reverse his conviction because his guilty plea is invalid for lack of a factual basis establishing the elements of misdemeanor domestic assault – harm. A plea is invalid if it is not voluntary, intelligent, and accurate. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). The validity of a guilty plea is a question of law we review de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). A plea is not accurate, and the district court should not accept it, unless the record supports the “conclusion that [the] defendant’s conduct falls within the charge to which he desires to plead guilty.” *Kelsey v. State*, 214 N.W.2d 236, 237 (Minn. 1974).

The facts that Bushey admitted to do not establish that he is guilty of misdemeanor domestic assault – harm. To prove misdemeanor domestic assault – harm, the state must establish that the defendant “intentionally inflict[ed] or attempt[ed] to inflict bodily harm upon” a family or household member. Minn. Stat. § 609.2242, subd. 1(2) (2016). Bushey admitted that he pushed S.J.P. and that this could have caused her to fear for her safety. But the state did not charge this offense based on the assault causing fear under section 609.2242, subdivision 1(1) (2016). That Bushey pushed S.J.P. and caused her to fear is insufficient to prove his guilt under the charged offense of subdivision 1(2), requiring evidence of actual or attempted bodily harm. The district court was not asked to amend the

complaint, and we are asked to address the sufficiency of the plea based on the extant complaint only.

The state argues that the district court could accept the plea if Bushey admitted “only that he intentionally committed an act which then resulted in bodily harm.” The state then fails to identify any actual bodily harm that resulted from Bushey’s push. The state maintains that if Bushey intentionally engaged in conduct that logically would have resulted in bodily harm, this is sufficient to establish his guilt as an attempt to cause harm because assault – harm is only a general intent crime. The first problem with the state’s argument is that it reads too much into *State v. Fleck*, because the *Fleck* court established only that the intent-to-harm offense was a general intent crime, and it expressly clarified, “We need not, and do not, address Fleck’s argument that an attempt to inflict bodily harm is a specific-intent crime because the facts of Fleck’s case involve the actual infliction of bodily harm.” 810 N.W.2d 303, 312 n.5 (Minn. 2012). The second problem with the state’s argument is that the state identifies no facts, and we are aware of none in the record, that suggest that the “push” or “shove” or “nudge” discussed in the colloquy is of the nature that one could reasonably assume would lead to bodily harm, which is “physical pain or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7 (2016).

In sum, Bushey failed to admit to facts that establish the element of intent to cause bodily harm or attempt to cause harm.

Reversed and remanded.

A handwritten signature in blue ink, appearing to read "Kevin G. Rose". The signature is fluid and cursive, with a large initial "K" and "R".