Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-405

APRIL TERM, 2018

In re Charles Trowell*	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 148-4-17 Wmcv
		Trial Judge: Michael R. Kainen

In the above-entitled cause, the Clerk will enter:

Petitioner Charles Trowell appeals the superior court's decision granting summary judgment to the State and dismissing his petition for post-conviction relief. We affirm.

In February 2013, petitioner, armed with a knife, assaulted a teenager and attempted to take his wallet, cutting the victim's throat as he did so. Petitioner pleaded guilty in April 2014 to one count of assault and robbery causing bodily injury in violation of 13 V.S.A. § 608. At the change-of-plea hearing, the court read the charge and petitioner agreed that he understood it. He admitted that he had been armed with a knife, that he assaulted the victim, and that he cut the victim's throat in an attempt to get some money or property from him. However, he denied having obtained any money or property from the victim during the incident. The court questioned whether petitioner had the requisite intent to commit assault and robbery, and adjourned the proceeding so that petitioner could speak with his attorney. After a forty-five minute recess, the colloquy resumed and the court addressed petitioner as follows:

> The court: The charge now which is in count six is this; that at Brattleboro around February 1 of 2013, you assaulted another. That is as we talked about before, you injured, with a knife apparently, by cutting [the victim], that you did that at least recklessly. Remember how we described recklessly before? You still understand that?
>
> [Petitioner]: Yes.
>
> The court: And you attempted to take from him some property or money. You may not have been successful, but that was one of the things you were trying to do at the time. That's the charge, okay? And in the

process, you did injure him. Okay? So now, do you understand the charge?

[Petitioner]: Yes.

The court: So, did you in fact assault him in the way that we talked about before, did that happen?

[Petitioner]: Yes.

The court: And did you attempt, that is, were you trying to, even if you weren't successful, get some property or money from him in the process?

[Petitioner]: Yes.

The court: And do you agree you cause him some an injury [sic], to his neck obviously, while doing all this?

[Petitioner]: Yes.

The court: Now is there any question about that?

[Petitioner]: No.

Petitioner pleaded guilty and the court sentenced him to serve six to twenty years in prison.

In April 2017, petitioner filed a petition for post-conviction relief in which he sought to vacate his conviction and sentence. He argued that the plea colloquy did not satisfy Vermont Rule of Criminal Procedure 11(f) because the court failed to obtain an admission from him that he intended to permanently deprive the victim of money or property. The State moved to dismiss the petition, arguing that the colloquy satisfied Rule 11(f) and that petitioner's claim was barred because he could have raised it in an earlier petition filed in March 2016. The superior court ruled that petitioner's claim was not barred due to his failure to raise it in the earlier petition because petitioner had voluntarily dismissed that petition while specifically seeking to reserve any Rule 11 issues. However, it found that the change-of-plea court had inquired into the factual basis for all of the elements except for the implied element of intent, and that a specific inquiry into that issue was not required because petitioner obviously had not intended to return the victim's money if he obtained it. The court therefore granted summary judgment for the State. Petitioner appealed.

We review a decision to grant summary judgment de novo, using the same standard as the superior court. In re Barrows, 2007 VT 9, ¶ 5, 181 Vt. 283. "To obtain summary judgment, the moving party must demonstrate that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." Id.

Rule 11(f) provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." To satisfy Rule 11(f), "the record must affirmatively show

sufficient facts to satisfy each element of an offense." In re Dunham, 144 Vt. 444, 451 (1984). We have held that "[a]n admission to the facts by the defendant in the course of the colloquy is usually sufficient." In re Stocks, 2014 VT 27, ¶ 15, 196 Vt. 160; see also In re Bridger, 2017 VT 79, ¶ 21, __ Vt. __ (explaining that "an adequate factual basis sufficient to demonstrate voluntariness must consist of some recitation on the record of the facts underlying the charge and some admission by the defendant to those facts" (quotation omitted)).

Assault and robbery under "13 V.S.A. § 608 is a specific intent crime requiring proof that the accused intended to deprive the person of the property permanently." State v. Dennis, 151 Vt. 223, 224, 559 A.2d 670, 671 (1989). Conviction for attempted assault and robbery requires the same mental intent as the completed crime. Id. Petitioner argues that his April 2014 plea colloquy violated Rule 11(f) because the court did not specifically inquire whether he intended to permanently deprive the victim of his wallet or money.

We agree with the civil division that the plea colloquy satisfied Rule 11(f) because petitioner admitted to sufficient facts to support a conviction for assault and robbery. We dealt with a similar issue in State v. Gabert, 152 Vt. 83 (1989). In Gabert, the defendant was charged with assaulting a woman with a knife and taking her purse and wallet. He claimed that his nolo contendere plea to assault and robbery failed to comply with Rule 11(c) because the court did not explain the implied element of intent to him during the plea hearing. We noted that "the omission of the implied element from the charge is generally not plain error." Id. at 88. We found that "it would be hypertechnical to insist that courts explain an implicit mental element that is established by inferences drawn from the acts of the defendant, especially when the defendant's acts do not lead to equivocal inferences of his mental state." Id. Thus, we concluded that "[t]he failure to elucidate the intent element of assault and robbery in these circumstances does not warrant our setting aside defendant's plea." Id.; see also State v. Francis, 151 Vt. 296, 308 (1989) (holding, in assault and robbery prosecution where defendant struck victim from behind and took his wallet, that court's failure to instruct jury regarding intent required for assault and robbery was not plain error because intent to permanently deprive victim of property "was not one of the close or difficult" questions in case).

Although this case involves a challenge under Rule 11(f) rather than 11(c), the reasoning of Gabert applies here. Petitioner admitted during the colloquy that he cut the victim's throat with a knife while attempting to take the victim's money and wallet. These acts do not suggest an equivocal inference of petitioner's mental state at the time of the incident; "[l]ack of wrongful intent would not have been a plausible defense." Gabert, 152 Vt. at 87. Thus, petitioner's admissions were sufficient to support the change-of-plea court's determination that there was a factual basis for the plea and no further inquiry into intent was required. See Gabert, 152 Vt. at 88.

Having concluded that petitioner's admissions were sufficient to provide a factual basis for petitioner's plea of guilty to the charge of assault and robbery, we need not address the State's alternative argument that petitioner's claim was barred because he could have raised it in an earlier post-conviction relief proceeding. We also do not address petitioner's arguments that his affirmative responses to the judge's questions were "indicative of programming by defense counsel" or that his counsel was ignorant of the law because petitioner did not raise these claims

below. See In re Collette, 2008 VT 136, ¶ 15, 185 Vt. 210 (petitioner must raise claim before trial court in order to preserve it for consideration on appeal).

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Associate Justice

Karen R. Carroll, Chief Justice