VERMONT SUPREME COURT
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Case No. 2021-009

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

NOVEMBER TERM, 2021

State of Vermont v. Gary W. Pickard* } APPEALED FROM:
} Superior Court, Bennington Unit,
} Criminal Division
} CASE NO. 1077-10-18 Bncr
Trial Judges: John W. Valente, Cortland Corsones

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

Defendant appeals his conviction for aggravated sexual assault of a child, contending that his plea of guilty lacked a factual basis and the trial court abused its discretion in denying his motion to withdraw his plea. We affirm.

In October 2018, the State charged defendant with one count of aggravated sexual assault of a child and one count of lewd and lascivious conduct with a child. The charging affidavit alleged that defendant had repeatedly molested his granddaughter by touching her vagina with his fingers and mouth, rubbing his penis against the outside of her vagina, and forcing her to rub his penis until he ejaculated. The abuse began when the granddaughter was seven years old and continued until she was ten, when her mother learned of the abuse and reported it to police. Defendant was arrested and, after waiving his Miranda rights, admitted to police that he had touched the granddaughter's vagina, breasts, and "bottom," and had ejaculated while doing so. He stated that he knew it was wrong. When asked by police how long he had been engaging in this behavior, he said a few months. However, he indicated that he had no reason to dispute the granddaughter's statement that the behavior had been occurring for a few years.

In December 2019, defendant pled guilty to the aggravated sexual assault charge. The lewd-and-lascivious-conduct charge was dismissed as part of the plea agreement. At the change-of-plea hearing, defendant indicated that he was satisfied with his attorney's representation; agreed that his plea was voluntary; denied that his plea was the result of threats or promises; and stated that he was not under the influence of alcohol, drugs, or medication that would make it difficult to understand the proceeding. The court asked defendant if he suffered from any mental or physical condition that would make it difficult for defendant to understand what he was doing at the hearing, and defendant stated, "No."

The court went on to describe the elements of the crime, the minimum and maximum penalties, and explained defendant's other rights as set forth in Vermont Rule of Criminal

Procedure 11(c)(3)-(8). The court then asked the state's attorney to explain what the facts of the case were. It stated, "once he's given me those facts, I ask you if those facts are correct, okay, because I have to have a factual basis for the plea. So listen very carefully and then I'll ask you if that's what happened." The following exchange then occurred:

> [STATE'S ATTORNEY]: So Your Honor, on or between August 21, 2014 and October 17, 2018, the defendant lived . . . in North Pownal, Vermont. His date of birth is [in 1952], making him over the age of eighteen years. And during that time, he engaged in a sexual act with the victim, C.L., date of birth [in 2008], under the age of sixteen. Specifically, that sexual act was digital penetration of her vagina with his finger. That happened more than once during that time frame, and the multiple times were a part of his common scheme and plan.
>
> THE COURT: All right. Mr. Pickard.
>
> THE DEFENDANT: Yes.
>
> THE COURT: You heard—did you hear what [the state's attorney] said the facts would be to prove at trial?
>
> THE DEFENDANT: I heard him.
>
> THE COURT: Is that what happened?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Okay. So that's true—
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: —in terms of me being able to find a factual basis?
>
> THE DEFENDANT: Yup.
>
> THE COURT: Okay. Do you have any questions that you would like to ask [defense counsel]?
>
> THE DEFENDANT: No.

Defendant then pled guilty to the charge of aggravated sexual assault.

The court ordered a pre-sentence investigation and a psychosexual evaluation and scheduled a sentencing hearing for April 2020. Sentencing was continued twice for reasons related to the COVID-19 pandemic and was eventually set for October 2020. In September 2020, defendant moved to withdraw his plea, arguing that he did not remember pleading guilty and therefore could not understand the consequences. The court held a hearing on the motion on the date scheduled for sentencing. Defendant submitted an affidavit but did not testify. He claimed in the affidavit and motion that he had experienced a panic attack on the day he changed his plea due to the stress of the impending trial and presence in the courthouse of media and

members of his family, and that he answered the judge's questions in the affirmative "automatically" out of respect for the court.

The court denied the motion in a written order. The court did not find defendant's claim that he had a panic attack on the day of the change-of-plea hearing to be credible, noting that it was not supported by any medical evidence or testimony. The court stated it had reviewed the transcript and listened to the audio recording of the hearing and they did not support defendant's claim. Although defendant was subdued, his answers were clear, and he answered without hesitation. He displayed no difficulty in understanding questions and did not ask for any breaks or indicate that he was suffering from a medical condition that made it hard for him to comprehend the nature of the proceeding. The court found that defendant's plea was voluntary and had a factual basis, and that defendant understood that the charge carried a mandatory minimum sentence of twenty-five years. The court reasoned that defendant raised this issue for the first time ten months after the hearing, indicating that he had simply changed his mind about his plea. The court found that this was not a sufficient reason to withdraw the plea. Defendant was subsequently sentenced to serve twenty-five years to life.

We first consider defendant's claim that the plea colloquy violated Rule 11(f). Whether in a direct appeal or a post-conviction-relief proceeding, the standard of review for Rule 11(f) challenges is the same: defendant "must show, by a preponderance of the evidence, that fundamental errors rendered the conviction defective." State v. Rillo, 2020 VT 82, ¶ 8 (quotation and alteration omitted). Defendant is not required to show prejudice "because a defendant's understanding of the elements of an offense as they relate to the facts goes directly to the voluntariness of his plea." State v. Bowen, 2018 VT 87, ¶ 7, 208 Vt. 164 (quotation omitted).

Rule 11(f) requires the trial court to determine whether there is a factual basis for a plea before entering judgment for a plea. "[A]n 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." In re Bridger, 2017 VT 79, ¶ 21, 205 Vt. 380 (quotation omitted). "There is no particular formula to satisfy this standard . . . [b]ut a defendant must, in some manner, personally admit to the factual basis for the charges." In re Gabree, 2017 VT 84, ¶ 10, 205 Vt. 478.

On appeal, defendant argues that his plea lacked a factual basis because in reciting the facts, the State's attorney did not explain how defendant's conduct satisfied the aggravating element of the charge. Section 3253a(a) of Title 13 lists eight circumstances which can support a charge of aggravated sexual assault of a child, including proof that "[t]he victim is subjected to repeated nonconsensual sexual acts" as part of a single occurrence or, as charged here, "as part of the actor's common scheme and plan." 13 V.S.A. § 3253a(a)(8); see State v. Bellanger, 2018 VT 13, ¶ 7, 206 Vt. 489. Defendant argues that the meaning of "common scheme or plan" is not simple or self-evident because it requires proof of a common method, objective, or pattern of conduct, and intent to commit more than one sexual assault, and the prosecutor did not explain how defendant's conduct met this element.

We conclude that Rule 11(f) was satisfied here. The prosecutor recited the essential facts of the charge and defendant personally admitted that they were true. "Although the . . . explanation was not an overly detailed recitation of all of the facts in the information, the charge was not complex and the facts set forth established all of the elements of the crime." In re Barber, 2018 VT 78, ¶¶ 32-34, 208 Vt. 77 (concluding that factual basis for guilty plea to

aggravated assault was established when court asked defendant "do you admit that on January 23rd of 2010 at Rutland, you knowingly caused bodily injury to another, that being [the victim], with a deadly weapon," and defendant answered "yes").

We disagree with defendant's contention that we have construed the term "common scheme and plan" to have a special meaning that is not evident from the plain language. While the common-scheme-and-plan element may be satisfied in a specific case by proof of an intent to commit a series of specific acts or the use of a particular method, as in the cases cited by defendant, it extends more broadly to any "assaultive course of conduct or series of exertions of power." State v. Deyo, 2006 VT 120, ¶ 17, 181 Vt. 89 (explaining legislative intent behind related provision in 13 V.S.A. § 3253(a)(9)). Here, the prosecutor explained that defendant had engaged in a common scheme and plan by repeatedly penetrating the victim's vagina with his finger over several years. Cf. State v. Anderson, 2005 VT 17, ¶ 10, 178 Vt. 467 (holding that evidence of defendant's uncharged sexualized conduct toward niece, which took place after sexual assault for which he was charged, was admissible because probative of common scheme or plan in defendant's relationship with niece); see also State v. Freeman, 2017 VT 95, ¶ 23, 206 Vt. 37 (holding common-scheme-or-plan element to be satisfied where defendant "followed a similar pattern" when engaging in repeated sexual acts with a minor). Defendant admitted that he had engaged in this behavior, which involved both a series of exertions of power and a similar method of assault on the same victim. We therefore reject defendant's argument that the plea lacked a factual basis.

For similar reasons, we reject defendant's argument that his plea was involuntary because the trial court failed to properly explain the common-scheme-or-plan element to him. To ensure the voluntariness of a guilty plea, Rule 11(c) requires the court accepting the plea to "explain the elements of the charged offense to the defendant." In re Pinheiro, 2018 VT 50, ¶¶ 10-11, 207 Vt. 466. We apply a "substantial compliance" standard in Rule 11(c) challenges. Id. ¶ 15. If the record demonstrates that the defendant made a knowing and voluntary plea as to the elements of the offense, "then the trial court's failure to explain the nature of the charges or to outline the minimum and maximum penalties of the charged offenses does not require reversal of the conviction or sentence." In re Thompson, 166 Vt. 471, 475 (1997).

Here, the court explained to defendant as follows:

> THE COURT: [I]n this case, what the State would have to prove would be that you, on or between August 21, 2014 and October 17 of 2018, were at least eighteen years of age and you engaged in a sexual act with a child under the age of sixteen and the victim was subjected to repeated nonconsensual sexual acts as part of the same occurrence, or the victim was subjected to repeated nonconsensual acts as part of a common scheme and plan in violation of the law. So you understand all those elements?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand that in order for you to be found guilty, the State would have to prove each of those elements beyond a reasonable doubt, and you understand that?
>
> THE DEFENDANT: Yes, sir.

The above exchange demonstrates that the court did explain the elements of the charge, and defendant indicated that he understood them. Nothing in the transcript of the plea colloquy suggests that defendant did not understand the elements of the charge or that his plea was otherwise involuntary.

Defendant argues that he subsequently denied ever planning or thinking about touching his granddaughter inappropriately during an interview in July 2020 with the psychologist who conducted the psychosexual evaluation. According to defendant, his statements to the psychologist demonstrate that he did not understand the aggravating factor to which he pled guilty. We are unpersuaded by this argument. As explained above, we have not held that the common-scheme-and-plan element contains an implied intent requirement or a meaning that is not apparent from the plain language. Even if that were the case, "omission of the implied element from the charge is generally not plain error." State v. Gabert, 152 Vt. 83, 88 (1989). Furthermore, defendant admitted that he repeatedly subjected the same victim to nonconsensual sexual acts by a particular method, namely, digitally penetrating her vagina. These acts do not suggest that defendant's mental state was ambiguous at the time of his acts; "[l]ack of wrongful intent would not have been a plausible defense." Id. at 87.

In sum, this is not a case where the court completely failed to discuss an essential element of the charge, or where the record does not support an inference that the defendant understood the charge. Cf. Pinheiro, 2018 VT 50, ¶¶ 16-17 (reversing conviction for noncompliance with Rule 11(c) where court failed to review mental element of aggravated domestic-assault charge and defendant described facts inconsistent with required intent). We therefore conclude that the colloquy complied with Rule 11(c).

Defendant's final claim is that the trial court abused its discretion in denying his motion to withdraw his plea. The court may permit a defendant to withdraw a guilty plea prior to sentencing "if the defendant shows any fair and just reason and that reason substantially outweighs any prejudice which would result to the state from the withdrawal of the plea." V.R.Cr.P. 32(d). "Implicit in the rule is a balancing between important State interests in expediting criminal proceedings and the harm suffered by the defendant in foregoing a trial on the merits." State v. Hamlin, 143 Vt. 477, 480 (1983). "The weight given these factors in motions to withdraw guilty pleas under V.R.Cr.P. 32(d) is within the sound discretion of the court." Id. (quotation omitted). "In determining whether the court abused its discretion, it is the duty of this Court to inquire into the circumstances surrounding the taking of a guilty plea to ensure that it was knowingly and voluntarily given." State v. Merchant, 173 Vt. 249, 256 (2001) (quotation omitted).

The trial court did not abuse its discretion here. As discussed above, the record demonstrates that defendant entered his plea knowingly and voluntarily. The court found defendant's affidavit, in which he claimed to have suffered a panic attack or similar symptoms on the day he changed his plea and automatically answered "yes" to the judge's questions "out of respect," to be self-serving and not credible due to the lack of corroborating evidence. As the court reasoned, nothing in the record of the plea hearing supported defendant's claim that he was suffering from a panic attack or other condition. While a state of panic rendering a defendant incapable of meaningfully consulting with his attorney at the change of plea hearing would justify withdrawing the plea, "the court is not compelled to accept defendant's characterization of his own state of mind." Id. at 257 (affirming denial of motion to withdraw plea where sole evidence supporting defendant's claim of incompetence was his description of his mental state and court did not find defendant's testimony credible). The court concluded that defendant had

simply changed his mind, which was not a sufficient reason to grant the motion. This was not an abuse of discretion. See id.

Defendant argues that the court erred in dismissing his claim that he responded affirmatively "automatically" to questions during the plea colloquy as uncorroborated, because the psychosexual evaluation shows that he claimed never to have planned or thought about touching his granddaughter inappropriately. It was defendant's burden to establish the facts in support of his motion. See State v. Scelza, 134 Vt. 385, 385 (1976). Defendant did not refer to the psychosexual evaluation report or his statements to the psychologist in his motion or at the hearing on the motion. The court cannot be faulted for failing to consider information that defendant did not present in support of the motion. In any event, as discussed above, we are not persuaded that defendant's statements in the July 2020 psychosexual evaluation demonstrated that defendant's December 2019 plea was involuntary.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice