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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-226

FEBRUARY TERM, 2007

In re Louis F. Medina	}	APPEALED FROM:
	}	
	}	
	}	Windham Superior Court
	}	
	}	
	}	DOCKET NO. 280-6-04 Wmcv

Trial Judge: Katherine A. Hayes

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

Petitioner appeals an order of the superior court denying post conviction relief. We reverse.

Petitioner pled guilty to domestic assault and first-degree aggravated domestic assault in 2003. In 2004, petitioner sought post-conviction relief pro se, and was appointed an attorney. In his amended filing, petitioner argued that his conviction was invalid because the district court failed to comply with the requirements of Vermont Rule of Criminal Procedure 11(f) (providing that Athe court should not enter a judgment upon [a] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea@).

At the change-of-plea hearing, the district court engaged in the following colloquy with petitioner:

> THE COURT: Okay, in the first Count the State would have to prove if it had got to trial that on January 26th of this year at Bellows Falls, you attempted to cause serious bodily injury to a family or household member, and that is alleged to be Karen Jordan. Do you understand that=s what the State would have to prove?
>
> MR. MEDINA: Yes.
>
> THE COURT: You understand the possible penalty The Court could impose is imprisonment of not more than fifty years or a fine of not more than $25,000 or both?
>
> MR. MEDINA: Yes.
>
> THE COURT: Okay, what is your plea?
>
> MR. MEDINA: Guilty.
>
> THE COURT: And that on count two the State would have to prove that on January 25th of 2003 at Brattleboro, you were a person who Cexcuse me, at Bellows FallsCyou were a person who recklessly caused bodily injury to a household

member, and that was Karen Jordan. Do you understand that=s what the state would have to prove?

MR. MEDINA: Yes.

THE COURT: And the possible penalty The Court could impose is imprisonment of not more than one year or a fine of not more than $5,000 or both. Do you understand that?

MR. MEDINA: Yes.

THE COURT: Okay, what is your plea?

MR. MEDINA: Guilty.

In reviewing petitioner=s claim, the superior court concluded that the above plea colloquy was sufficient because A[t]he nature of these charges was not complex, and the judge=s recitation of the nature of the charges sufficiently set forth the elements of each one.@ Accordingly, the superior court granted summary judgment in favor of the State.

Petitioner appeals, arguing that the issue is not whether the elements of the offense were properly recitedCa requirement addressed by Rule 11(c)Cbut whether a factual basis was established. In reviewing a ruling on motions for summary judgment, we apply the same standard as the trial court: A[s]ummary judgment is appropriate when there are no genuine issues of material fact and, viewing the evidence in a light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law.@ In re Carter, 2004 VT 21, &6, 176 Vt. 322. Further, in the specific context of alleged violations of Rule 11, we require only Asubstantial compliance@ with the rule, rather than strict, technical adherence to a particular formula. See State v. Marku, 2004 VT 31, & 22, 176 Vt. 607 (mem.). Here, there are no factual disputes; rather, the appeal presents a

pure question of law: did the plea colloquy substantially comply with the requirements of Rule 11(f)?

We conclude that the plea colloquy was insufficient. As we explained in State v. Yates, 169 Vt. 20, 24 (1999), Rule 11(f) requires that Athe court=s inquiry into the accuracy of the plea must be addressed personally to the defendant. . . . because the factual basis for the plea may consist only of facts that defendant has admitted during the proceedings at which the plea is entered.@ Further, we have Aconsistently require[d] that the defendant admit to and possess an understanding of the facts as they relate to the law for all elements of the charge or charges to which the defendant has pleaded.@ Id. Unlike in State v. Blish, 172 Vt. 265, 274 (2001), the transcript of the plea colloquy does not demonstrate that defendant Aunderstood the[] elements [of the crime pled to] and believed the State could prove these elements at trial.@ This standard was not met by the plea colloquy in the instant case.

First, we disagree with the superior court=s statement that Athe nature of these charges was not complex.@ The defendant was charged with domestic assault and first-degree aggravated domestic assault. The charge of domestic assault required a showing that the defendant A recklessly caused bodily injury@ to a household member. See 13 V.S.A. ' 1042. Recklessness is further defined by law to require a particular mental state, an appreciation of risk and objective unreasonableness. See, e.g., State v. Harrington, 174 Vt. 584, 585 (2002) (mem.) (holding that defendant=s action was reckless where he consciously disregarded substantial and unjustifiable risk of bodily injury). The charge of aggravated domestic assault alleged that defendant Aattempted to cause serious bodily injury@ to a household member. See 13 V.S.A. ' 1043. The Aattempt@ required specific intent and Aserious bodily injury@ is statutorily defined to mean injury Awhich creates . . . : (i) a substantial risk of death; (ii) a substantial loss or impairment of the function of any bodily member or organ; (iii) a substantial impairment of health; or (iv) substantial disfigurement.@ 13 V.S.A.' 1021(2). See also State v. Baron, 2004 VT 20, & 7, 176 Vt. 314 (discussing statutory definitions of Abodily injury@ and Aserious bodily injury@). These elements of the crimes charged were neither simple nor self-evident. Cf. State v. Morrissette, 170 Vt. 569, 570-571 (1999) (mem.) (ruling that substantial compliance with Rule 11(f) defeated collateral attack on a plea of guilty to DUI, despite the lack of defendant=s verbal admission to the facts, Agiven the straightforward nature of the charge@ together with defendant=s written waiver of rights,

acknowledgment of complaint and probable cause affidavit, and his counsel=s stipulation to a factual basis for the charge based on the affidavit).

Second, while the district court=s recitation of elements included some specific facts, such as the date, place and victim of the assault, the court did not state or garner an admission from defendant regarding what actually happened. Nothing described the reckless and intentional action. Nor was there any description of bodily injury, serious or otherwise.

Third, we do not find persuasive the State=s argument that the factual basis was stipulated to Ain effect.@ At most, defendant=s attorney stated that she reviewed deposition transcripts with defendant, and that this was the backdrop to his decision to plead guilty. This is not comparable to the process validated in Marku, where defense counsel stipulated to the factual basis of the crime. 2004 VT 31, & 24; accord Morrisette, 170 Vt. at 570-571. In short, assuming the underlying facts were set forth in the depositions, there is no affirmative indication by defendant that his guilty plea was based on an agreement with, or admission to, the facts as represented in the deposition transcripts.

The State also cites two federal cases for the proposition that the purpose of Rule 11(f) is to Aprotect a defendant [from] pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within that charge.@ Carreon v. United States, 578 F.2d 176, 178 (7th Cir. 1978) (citation omitted); see also Rizzo v. United States, 516 F.2d 789, 794 (2d Cir. 1975). The State argues, however, that this concern applies only when there are special concerns regarding a defendant=s comprehension. This is not, however, our objective expressed in Yates that defendants know the underlying facts alleged, and acknowledge responsibility for same, when pleading guilty to a charge. 169 Vt. at 24. Nothing in the record suggests any cognitive difficulty or confusion on defendant=s part, but nothing in the record describes, or shows that defendant acknowledged, any underlying facts amounting to reckless and intentional assaultive conduct resulting in any described injury. Defendant did not admit to such facts, or agree, even, that the state could prove the allegation against him beyond a reasonable doubt.[1]

Reversed and remanded for further proceedings consistent with the decision.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice

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[1] There was, in the transcript of a bail review hearing some four months prior to the change of plea, testimony by an investigating officer that the victim Aindicated that she had been strangled and had been threatened, her life had been threatened.@ Assuming that this was the basis for the aggravated assault charge, nothing demonstrates that defendant acknowledged or admitted the allegation that he choked the victim, or stipulated to the allegation as a factual basis for the charge. Nothing in the transcript appears to relate to the charge of misdemeanor domestic assault.