

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

SUPREME COURT DOCKET NO. 2018-364

NOVEMBER TERM, 2019

State of Vermont v. Brian E. Butler*	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Criminal Division
	}	
	}	DOCKET NOS. 1-1-16 Wrcr &
	}	331-4-16 Wrcr

Trial Judge: Timothy B. Tomasi

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

Defendant pled guilty to numerous crimes pursuant to a plea agreement. He now appeals, arguing that his guilty pleas did not satisfy Vermont Rule of Criminal Procedure 11. He also asserts that the court erred in relying on certain information at sentencing. We affirm.

In April 2016, defendant was charged with attempted first-degree murder, first-degree aggravated domestic assault with a habitual criminal enhancement, assault with a deadly weapon, obstructing justice, second-degree aggravated domestic assault, aggravated sexual assault, and five counts of violating conditions of release (VCRs). In May 2018, the parties executed a seven-page plea agreement. Defendant agreed to plead guilty to first-degree aggravated domestic assault, three counts of violating conditions of release, and second-degree aggravated domestic assault, and the State agreed to dismiss the remaining charges. As part of their agreement, the parties stipulated that, although the aggravated sexual assault charge would be dismissed, the State could prove certain specified sentencing facts related to this crime by a preponderance of the evidence. The parties did not agree on a sentence, and they did not agree whether the sentences should run concurrently or consecutively.

The court conducted a change-of-plea hearing in June 2018. At the outset, defendant's attorney explained the terms of the plea agreement to the court. The court asked defendant if he understood the terms of the proposed deal and if he wanted to take the deal. Defendant replied affirmatively to both questions. Defendant said that he had had time to discuss the deal with his attorney, that he had not been induced to agree by threats or promises, and that he was not under the influence of anything that would cloud his judgment. The court explained that, while there would be a contested sentencing hearing, defendant faced the possibility of up to life in prison. Defendant indicated that he understood and that he still wanted to "do the deal."

The court then engaged in a longer colloquy with defendant about the specific charges to which he would be pleading guilty. It began with count two of the information, which provided that in April 2016, defendant inflicted bodily injuries on B.G., a family or household member, in violation of the law. After reciting the statutory maximum sentence, the court made clear that,

because defendant was subject to a habitual criminal enhancement with respect to this count, he was exposed to a sentence of up to life imprisonment. Defendant indicated that he understood. Defendant pled guilty to this crime and to being a habitual offender. The State recited the factual basis for the charge, including that defendant went to B.G.'s residence with a folding hunting-style knife; he entered the residence and argued with B.G.; he then raised the knife over his head with the blade facing down at B.G. and forcefully stabbed B.G. in her abdomen and then in her hand as she tried to protect herself; and B.G. suffered serious bodily injury as a result. The State also recited a factual basis for the habitual criminal charge. Defendant indicated that he heard the facts and he agreed that the facts were true with respect to both. The court accepted the plea and reiterated that defendant's sentence could be up to life imprisonment.

The court next engaged in a colloquy with defendant as to the VCR counts. It then discussed the charge that, in January 2016, defendant recklessly caused bodily injury to a family or household member and that he had a prior conviction for domestic assault. The court identified the maximum statutory penalty. Defendant indicated that he understood the charge and he pled guilty. The State recited the factual basis for the charge, stating that defendant was cohabitating with B.G. at the time of the assault in January 2016, and when B.G. told defendant that she intended to move out, he threw a model airplane at her, striking her leg and causing her pain. Again, defendant stated that he understood the facts as described and he agreed that those facts were true. The court accepted defendant's guilty plea.

The court also explained to defendant that, as part of his plea agreement, he had agreed that the State could prove by a preponderance of the evidence that in December 2015, he subjected B.G. to a nonconsensual act, specifically, penetrating her vagina with his hands by force and repeatedly moving his hands in and out of her vagina without her consent. This event caused B.G. pain and ended when B.G. tried to escape and fell off the bed. The court asked defendant if he understood that, through the plea agreement, he was agreeing that the State could prove these facts by a preponderance of the evidence and that the court could consider them at sentencing. Defendant replied, "For the best part of it, yes, Your Honor." The court asked for clarification and whether defendant understood, and defendant stated, "I'll stipulate to that, Your Honor." The court replied, "Very good." Finally, the court asked defendant if he understood that there was no agreement regarding concurrent or consecutive sentences and that the court had the power to have the sentences all run consecutively to one another and he would face up to life imprisonment. Defendant said he understood and had no questions. He stated that he understood that he did not have to enter into the plea agreement and expressed that he wanted to do so. The court provided additional information to defendant concerning his right to a jury trial and the possibility of collateral consequences from his convictions.

After obtaining a presentence investigation report (PSI), the court held a two-day contested sentencing hearing. B.G. testified, as did others. The court found that the stabbing of B.G. was premeditated and that defendant had acted with intent to kill B.G. Defendant knew that he was prohibited by his conditions of release from possessing any deadly weapons, drinking alcohol, and seeing B.G. On the day of the stabbing, defendant armed himself, drank alcohol, and went to B.G.'s apartment. He grabbed her by the neck and plunged a knife into her body five times. He knew the stabbing would likely cause serious injury and he chose to stab B.G. anyway. He then fled. The court then described in detail defendant's other past acts of violence and his victims' ongoing fear of him, which the State had proved by a preponderance of the evidence. These included a forced sexual encounter with someone other than B.G., a stabbing of his neighbor, an attack on another woman where he choked her until she could not breathe, and several other incidents. The court also considered the sexual assault on B.G. As part of the sentencing process, it had examined B.G.'s deposition testimony regarding the assault and observed B.G. during her

testimony at the sentencing hearing regarding the incident, and it found her largely credible with respect to the alleged rape. The court thus found convincing evidence to show that in 2015 defendant inserted his fingers into B.G.'s vagina, attempted to do more, and also tried to penetrate B.G.'s anal cavity despite B.G.'s protests to stop. The State also proved that defendant had a history of threats and extreme violence if someone confronted or disagreed with him, even over minor things.

Based on these and other findings, the court considered the sentencing factors. Based on its analysis, it found that a to-serve sentence was appropriate given defendant's record of violence and his demonstrated inability to follow court orders. It considered a maximum sentence of life to be warranted to ensure that defendant remained under some form of supervision after release. In determining an appropriate minimum sentence, the court cited defendant's criminal record that reflected repeated violence and intimidation. It explained that defendant had used or threatened to use deadly force on family, wives, lovers, neighbors, and strangers. He nearly killed B.G. His past victims remained fearful of him. He had violated court orders multiple times and he was at a high risk to reoffend. The court credited B.G.'s testimony that defendant took joy out of hurting people. It found that defendant presented a clear and present danger to others. He was also a habitual offender. Based on the record, the court concluded that a lengthy period of incapacitation was warranted to protect the public and the victims. It thus imposed a to-serve sentence of twenty-eight years to life for first-degree aggravated domestic assault; five to six months for each of the VCRs to run concurrently; and a six-to-twelve-month sentence on the second-degree aggravated domestic assault to run concurrently. This appeal followed.

Defendant challenges the adequacy of the plea colloquy on appeal. He asserts that the court failed to explain the elements of the first- and second-degree aggravated sexual assault charges to him. In support of this assertion, he notes that the court did not specifically use the words "first-degree aggravated sexual assault" before describing the elements of that charge; he raises the same argument with respect to the second-degree charge. He suggests that this created confusion. Defendant also asserts that the court did not accurately recite the maximum sentence he faced for the first-degree aggravated domestic assault charge. He further argues that because the court did not inform him of the elements of the habitual offender charge, the record does not show if he understood the significance of admitting to his prior felony convictions. Defendant also asserts that the court did not explain the State's burden of proof to him regarding each element of the first-degree aggravated domestic assault charge. He argues that this crime was complex and the court needed to do more than read the elements of the crime. Defendant raises similar arguments with respect to the second-degree aggravated domestic assault charge. Finally, defendant argues that he equivocated on whether the State could use the facts underlying the sexual assault of B.G. at sentencing and, thus, the court should not have accepted his stipulation on this point.

Notwithstanding defendant's assertion to the contrary in his reply brief, we consider this a challenge to the court's compliance with Vermont Rule of Criminal Procedure 11(c), not a challenge to the factual basis for the charges under Rule 11(f). Rule 11(c) requires a court to provide certain advice to a defendant prior to accepting a guilty plea and determine that the defendant understands that advice. As relevant here, the court must advise a defendant of "the nature of the charge to which the plea is offered" and "the maximum possible penalty provided by law for the offense to which the plea is offered." V.R.Cr.P. 11(c)(1), (2).

“We have applied a ‘substantial compliance’ standard to Rule 11(c), driven by the purpose of the rule—to ensure knowing and voluntary waivers—rather than any formulaic recitation of elements.” In re Pinheiro, 2018 VT 50, ¶ 15, 207 Vt. 466; see also State v. Mutwale, 2013 VT 61, ¶ 8, 194 Vt. 258 (“[S]ubstantial compliance with the requirements of Rule 11 is sufficient to withstand a challenge to the sufficiency of a plea hearing.”); State v. Riefenstahl, 172 Vt. 597, 599 (2001) (mem.) (“[W]e require only a practical application of the rule ensuring fairness, rather than a technical formula to be followed.” (quotation omitted)). Thus, for example, “[i]f the record of the plea hearing, including the trial court’s colloquy with the defendant, establishes that the defendant made a knowing and voluntary plea with full understanding of its consequences, then the trial court’s failure to explain the nature of the charges . . . does not require reversal of the conviction or sentence.” In re Thompson, 166 Vt. 471, 475 (1997). If, however, “the record does not reflect that the defendant pled guilty with an understanding of the nature of the charge, the conviction based upon the guilty plea cannot stand.” In re Pinheiro, 2018 VT 50, ¶ 9.

Because defendant raised no challenge to the colloquy below, our review is for plain error. See State v. Blish, 172 Vt. 265, 268 (2001) (“It is well established in Vermont that an issue under Rule 11(c), alleging violations in taking a plea, absent plain error, demands a factual record and opportunity for the trial court to grant relief before this Court may properly review it.” (quotation omitted)); State v. Thompson, 162 Vt. 532, 534 (1994) (same). We did not hold otherwise in State v. Lizotte, 2018 VT 92, ¶ 40 (stating that “in Rule 11(f) direct-appeal challenges, the defendant need not demonstrate the typical plain-error elements”). The record here shows that the court substantially complied with Rule 11(c) and that defendant’s pleas were entered knowingly and voluntarily. There was no error, let alone plain error.

We begin with defendant’s challenge to his guilty plea to first-degree aggravated domestic assault and the habitual criminal enhancement with respect to this count. Defendant argues that the court misstated the maximum penalty for first-degree aggravated assault and provided an inadequate explanation of the habitual offender enhancement.

We reject these arguments. The court did not discuss the habitual offender enhancement in a “confusing, inaccurate, and incomplete” way, as defendant asserts. It repeatedly explained to defendant that the maximum penalty he faced on the first-degree aggravated domestic assault count, by virtue of the habitual criminal enhancement, was life imprisonment. See State v. Ingerson, 2004 VT 36, ¶ 3, 176 Vt. 428 (explaining that “Vermont’s habitual offender statute, 13 V.S.A. § 11, provides an enhanced penalty for a defendant’s fourth or subsequent felony conviction”; it “does not . . . define a separate or new offense,” but instead “provides an enhanced penalty for repeat offenders”). Defendant repeatedly acknowledged that he understood and that he still wanted to go forward with the plea agreement. The court substantially complied with Rule 11(c)’s requirement that defendant be informed, and understand, “the maximum possible penalty provided by law for the offense to which the plea is offered.” V.R.Cr.P. 11(c)(2). We reject defendant’s arguments to the contrary.

It is equally apparent from the record that defendant understood that the State needed to prove that he had three prior felonies in order to subject defendant to an enhanced penalty and that defendant understood the legal significance of his admission to his prior felony convictions. The court explained to defendant that, “just to be clear, the habitual criminal notice in [the first-degree aggravated domestic assault] count is what gets you to the life imprisonment opportunity.” Defendant replied that he understood. The State subsequently recited the factual basis for the first-degree aggravated domestic assault count and for the habitual criminal enhancement. The State explained that, at the time of the stabbing, defendant was a habitual criminal as defined by Vermont law. It then described his three prior felony convictions, concluding that “[b]ased upon the

foregoing, [defendant] [was] a habitual criminal, as defined under Vermont law.” This record demonstrates that the court ensured that defendant’s plea was knowing and voluntary even if it did not technically conform “to a particular script.” Pinheiro, 2018 VT 50, ¶ 9.

The fact that the court did not explicitly use the title of the offense “first-degree aggravated domestic assault” does not show that defendant lacked an understanding of the elements of first-degree aggravated domestic assault. Those elements were expressly stated to him and defendant acknowledged that he understood them. The record does not support defendant’s contention that the failure to use the title of the offense would have caused such confusion that he would be unsure as to the offense to which he was actually pleading. The court identified the charge as count two in the information. The elements and the factual basis for the charge were provided and defendant agreed that the stated facts were true. The court discussed the three VCR charges next and concluded with the second-degree aggravated domestic assault charge. The aggravated domestic assault charges involved significantly different facts. The first-degree charge, as explained to defendant, involved his acts of repeatedly stabbing the victim with a hunting knife; the second-degree charge involved acts that occurred months earlier, while defendant and B.G. were living together, and they involved his act of throwing a model airplane at her. The two counts did not involve a similar “account of prior convictions” as defendant appears to suggest. Instead, the second charge had as an element that defendant had been previously convicted of domestic assault. See 13 V.S.A. § 1044(a)(2)(B). The habitual offender enhancement with respect to the first-degree aggravated domestic assault charge involved three different felony convictions. The record here shows that the court substantially complied with the rule and conveyed to defendant “the nature of the charge to which his plea [was] offered.” V.R.Cr.P. 11(c)(1).

Defendant next argues that there was no evidence to show that he was aware that the State would have to prove each element of each charge beyond a reasonable doubt. We find no error. The court provided a general explanation of this issue and defendant agreed that he understood. The court stated to defendant that he would “be considered innocent of the charges, unless and until the State could prove beyond a reasonable doubt you were guilty.” This statement sufficed to inform defendant of the State’s burden. We note, in any event, that the rule does not explicitly require the court to refer to the State’s burden of proof, let alone require the court to recite that the burden of proof applies to each element of each charge to which a defendant enters a guilty plea.

Finally, as to this charge, we reject defendant’s assertion that the charge was so complex that it required the court to provide a more detailed explanation than it did. Specifically, he contends that the court should have defined the term “household member” for defendant and inquired if defendant understood its legal meaning. We reject the premise of defendant’s argument that this charge was so “complex” and incorporated “esoteric terms of concepts unfamiliar to the lay mind” that it required an explanation beyond what the court provided. Cf. United States v. James, 210 F.3d 1342, 1345 (11th Cir. 2000) (per curiam) (explaining that, in considering if court adequately ensured that defendant understood charge, “for simple charges a reading of the indictment, followed by an opportunity given the defendant to ask questions about it, will usually suffice,” but “[c]harges of a more complex nature, incorporating esoteric terms or concepts unfamiliar to the lay mind, may require more explication” (quotation and alterations omitted)). The court stated the elements of this crime and defendant agreed, as set forth by the State, that he cohabitated with B.G. for a period of months ending in January 2016 and that they had a sexual and romantic relationship during that time. We are unpersuaded that the court’s failure to further define the “household member” element of the crime created any confusion or rendered defendant’s plea unknowing or involuntary.

We reject defendant’s challenges to the colloquy involving his guilty plea to the second-degree aggravated domestic assault charge for essentially the same reasons. Based on this record, the court substantially complied with Rule 11(c) even though it did not specifically name the crime as “second-degree aggravated domestic assault.” No reasonable person would have been confused about the crime he was pleading guilty to, the elements of which were described to defendant, particularly given the significantly different bodily harm at issue and the fact that the second-degree charge carried a five-year maximum penalty as opposed to life imprisonment. The failure to define the term “household member” did not render the plea involuntary or unknowing, particularly given defendant’s acknowledgment that he was cohabitating with B.G. at the time of this offense.

Finally, we reject defendant’s challenge to the court’s use of evidence regarding his sexual assault of B.G. during sentencing. First, defendant’s statement during the plea colloquy that he would “stipulate” to the use of this evidence at sentencing was not equivocal, as defendant argues. In any event, the court did not rely on the stipulation at sentencing. Instead, it relied on B.G.’s hearing testimony and a transcript of her deposition testimony. It found her testimony credible, and we will not disturb that assessment on appeal. See State v. Sullivan, 2018 VT 112, ¶ 17 (explaining that this Court leaves it to factfinder to “determine[] the credibility of the witnesses and weigh[] the persuasiveness of the evidence” (quotation omitted)). We find no error.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice