*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. 2019-260

APRIL TERM, 2020

| | | |
|---|---|---|
| In re Ronald A. Beaudoin* | } | APPEALED FROM: |
| | } | |
| | } | Superior Court, Chittenden Unit, |
| | } | Civil Division |
| | } | |
| | } | DOCKET NO. 1006-10-17 Cncv |
| | | Trial Judge: Helen M. Toor |

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

Petitioner in this post-conviction relief (PCR) action appeals the trial court's order granting summary judgment to the State. We affirm.

In 2007, petitioner was sentenced to serve twenty-five years to life for lewd and lascivious conduct with a child. The sentence was based on a habitual offender enhancement under 13 V.S.A. § 11. Without the enhancement, the maximum possible sentence would have been fifteen years. The enhancement was based in part on three prior felony convictions, two of which petitioner challenges in this appeal.

In 1996, petitioner pleaded no contest to a charge of aggravated assault under 13 V.S.A. § 1024(a)(1). During the plea colloquy, the court explained to petitioner that the charge included the facts that petitioner struck the victim, causing serious bodily injury, and in so doing was "careless and showed extreme indifference to . . . the value of her life. In other words, that did something dangerous to her." Petitioner denied the allegation but stated that he understood that it was an element of the offense that he was pleading to and that it was part of what the State would have to prove at trial. Defense counsel stated that petitioner was pleading no contest because he believed that if the State were to go to trial, the jury could believe the victim and he could be convicted. The facts the State recited to support the charge included that petitioner struck the victim "in the area of her eye," which caused blurred vision for approximately three days.

In 2001, petitioner pleaded guilty to an amended charge of lewd and lascivious conduct in violation of 13 V.S.A. § 2601. The judge conducted a lengthy plea colloquy but failed to specifically ask petitioner whether his plea was voluntary and did not make any finding that the plea was entered knowingly and voluntarily.

Petitioner filed this action in 2017. In a motion for summary judgment, he sought to vacate the 2007 habitual-offender enhancement on the grounds that the 1996 and 2001 convictions were invalid. He claimed his 1996 aggravated-assault conviction was invalid because, in its plea colloquy, the court incorrectly defined the required element of extreme indifference to the value of human life and because petitioner did not acknowledge that the State had evidence to support

the facts of the crime charged. He argued that the State had to show, and he had to admit, that there was a very high degree of risk that death would result from his conduct. He further claimed that his 2001 lewd-and-lascivious-conduct conviction was invalid because the court did not ask him whether his plea was voluntary. The State argued that both convictions were valid and sought summary judgment in its favor.

With regard to the 1996 conviction, the PCR court held that a high risk of death was not required to support the charge of aggravated assault, and that a jury could find that hitting someone near the eye so hard that it caused blurred vision for several days rose to the level of extreme indifference to the value of human life. The PCR court further held that the record of the 2001 plea colloquy indicated that petitioner's plea was voluntary, even though the judge did not expressly inquire into voluntariness. The PCR court therefore denied petitioner's motion for summary judgment and granted the State's motion.

We review the trial court's summary-judgment decision without deference to its reasoning, using the same standard as the lower court. In re Pinheiro, 2018 VT 50, ¶ 8, 207 Vt. 466. That is, summary judgment is appropriate when the material facts are not genuinely disputed and show that the moving party is entitled to judgment as a matter of law. Id.; V.R.C.P. 56(a).

On appeal, petitioner argues that his 1996 plea was involuntary because the court incorrectly defined the mental element of the charge and thus failed to ensure that he understood the nature of the charge to which he was pleading. Petitioner pleaded no contest to aggravated assault under 13 V.S.A. § 1024(a)(1), which provides that "[a] person is guilty of aggravated assault if the person: . . . attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life." Petitioner argues that the court incorrectly restated the extreme-indifference element as meaning that petitioner did "something dangerous to [the complainant]," suggesting a lower standard of proof than is required.

To ensure that a plea is knowing and voluntary, the court accepting the plea must explain the elements of the charged offense to the defendant. In re Pinheiro, 2018 VT 50, ¶ 10, 207 Vt. 466. This requirement is incorporated into Vermont Rule of Criminal Procedure 11(c)(1), which requires the court to advise the defendant of "the nature of the charge to which the plea is offered." In the context of Rule 11(c) we have held that "substantial compliance with the requirements of Rule 11 is sufficient to withstand a challenge to the sufficiency of a plea hearing." State v. Mutwale, 2013 VT 61, ¶ 8, 194 Vt. 258.

Here, the trial court explained to petitioner twice during the colloquy that he was charged with striking the complainant, causing her serious bodily injury, in a manner that demonstrated extreme indifference to the value of her life. There is no indication from the record that the court's subsequent statement that this meant that petitioner did "something dangerous to" the complainant undermined petitioner's understanding of the charge. Although petitioner argues that his competence has been questioned at various times, his replies during the colloquy do not indicate confusion about the nature of the charge in general or the intent element more specifically. Nor has petitioner alleged or shown that he would not have entered the plea but for the court's statement. See In re Hemingway, 2014 VT 42, ¶ 21, 196 Vt. 384 (explaining that where petitioner claimed court failed to explain nature of charges, petitioner had to show actual prejudice as result of error). Rather, the record as a whole indicates that petitioner made a knowing and voluntary plea. See In re Thompson, 166 Vt. 471, 475 (1997) (explaining that trial court's failure to explain nature of charges does not require reversal of conviction if record of plea hearing indicates defendant made knowing and voluntary plea with full understanding of its consequences). While

petitioner denied that he engaged in the conduct alleged by the State, petitioner's trial counsel explained that he was pleading no contest to the charge because he believed a jury would find the complainant credible. See In re Barber, 2018 VT 78, ¶ 23, 208 Vt. 77 (explaining that defendant is not required to admit to factual basis for charge when entering no contest plea). Petitioner did not disagree with this assertion. He agreed that the State would have to prove the extreme-indifference element if the case went to trial. He indicated that he wanted to go forward with his plea. The State described the evidence supporting the charge, and petitioner agreed that he was satisfied that the State could present that evidence at trial if the trial were held. Under these circumstances, petitioner has failed to demonstrate that his plea was rendered involuntary by the court's statement.

Furthermore, to the extent that petitioner argues that the facts alleged by the State did not support the charge, we disagree. We examined the extreme-indifference element of aggravated assault in State v. Joseph, 157 Vt. 651 (1991) (mem.). In that decision, we rejected the argument that 13 V.S.A. § 1024(a)(1) requires the State to show "a 'probability' of death resulting" from the defendant's act. Id. at 652. Instead, we held that "rather than focus on the probability of death resulting, the trier of fact must determine whether the 'circumstances' of the attack demonstrate such a blatant disregard for life that one could conclude beyond a reasonable doubt that the defendant intended to inflict serious bodily injury on the victim." Id. We held that a reasonable jury could conclude that the defendant's act of striking a police officer on the side of her head "with such force that she was knocked unconscious for seven or eight minutes" demonstrated extreme indifference to the value of her life. Id. In this case, we have no trouble concluding that petitioner's act of striking the complainant in the area of her eye with such force that she had blurred vision for the next three days was sufficient for a reasonable jury to conclude that he intended to inflict serious bodily injury on her.

Petitioner next argues that his 2001 guilty plea to lewd and lascivious conduct must be vacated because the court in that case did not specifically inquire if petitioner's plea was voluntary. Rule 11(d) provides that a court shall not accept a plea of guilty "without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." V.R.Cr.P. 11(d). When a plea is challenged for failure to comply with Rule 11(d), "we may examine the record, including the court's colloquy, to ensure the totality of the circumstances reveal substantial compliance with" that rule. In re Bridger, 2017 VT 79, ¶ 20, 205 Vt. 380. "Indicia of voluntariness include petitioner's affirmative responses during the colloquy, his acquiescence to the court's expressed finding of voluntariness, his representation by counsel throughout the proceedings, counsel's confirmation of petitioner's negotiation with the prosecution, and petitioner's own subsequent effort to enforce the plea agreement." In re Hemingway, 2014 VT 42, ¶ 15, 196 Vt. 384.

The record here shows similar indicia of voluntariness. Petitioner was originally charged with attempted sexual assault in violation of 13 V.S.A. § 3252(a)(1), which is punishable by at least three years and up to life imprisonment. See 13 V.S.A. § 3252(f)(1). Following negotiations between defense counsel and the State's attorney, his charge was amended to lewd and lascivious conduct, which has no minimum sentence and a much lower maximum sentence of five years. See 13 V.S.A. § 2601. During the colloquy, the court informed petitioner of the nature of the charge and the maximum possible penalty. The court established, and petitioner admitted, a factual basis for the plea. The court explained the rights that petitioner was giving up by entering a guilty plea and informed him of the sentencing consequences. Petitioner repeatedly stated that he understood. He acknowledged that the conviction could cause him to be sentenced as a habitual offender in the future. The court asked petitioner if he had an opportunity to discuss the plea agreement with his attorney and if he was satisfied with the attorney's representation. Petitioner answered

affirmatively to both questions. The court asked petitioner if he knew what he was doing that day, and petitioner stated, "Yes." After sentencing, petitioner did not challenge the plea for sixteen years. All of these factors support a conclusion that petitioner's plea was voluntary. There is no indication in the record that the plea was in fact coerced or induced by a secret promise.

Moreover, petitioner has not alleged or shown that he would not have entered his plea if the court had inquired directly about voluntariness. See Hemingway, 2014 VT 42, ¶ 21 (holding that court's failure to explicitly inquire as to threats or promises "was not so fundamental as to command reversal without proof of prejudice," and therefore petitioner "needed to show that but for the error, petitioner would not have pleaded guilty"). Absent such a showing of actual prejudice, petitioner is not entitled to post-conviction relief.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice