STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0383

Gary Steven Boelter, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 27, 2009
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CR-06-010091

Lawrence Hammerling, Chief Appellate Public Defender, Ngoc Nguyen, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Considered and decided by Larkin, Presiding Judge; Hudson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal from the district court's denial of postconviction relief, appellant argues that there is an insufficient factual basis in the record to show that his convictions were not based upon a single behavioral incident. Because the factual basis in the record establishes that appellant's convictions are based upon separate and distinct acts, we affirm.

FACTS

For multiple sexual acts with his minor daughter that occurred between 1996 and 2005, appellant Gary S. Boelter (appellant) was charged with two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2004); two counts of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2004); and one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(b) (2004). Appellant pleaded guilty to one count of first-degree criminal sexual conduct for an act of sexual penetration that occurred in 2001, and to one count of second-degree criminal sexual conduct for multiple acts of sexual contact that occurred over an extended period of time in 2001. The specific times and dates of the offenses, other than the year in which they occurred, were not established during the plea colloquy.

After he was sentenced, appellant petitioned the district court for postconviction relief, arguing that he should be allowed to withdraw his guilty plea because his plea was not supported by an adequate factual basis. Specifically, appellant claimed that he could

not be convicted of and sentenced for both first- and second-degree criminal sexual conduct if both offenses were based on the same course of conduct, and that the factual basis he gave during the plea colloquy was insufficient to show that his offenses were based on separate and distinct acts.

The district court denied appellant's petition, holding that "[a]lthough the factual basis itself is not specific about the exact timing of [appellant's] conduct, the transcript of the plea hearing makes it clear that [appellant] has not been sentenced twice for the same conduct." In reaching its decision, the district court stated that appellant pleaded guilty to first-degree criminal sexual conduct for one act of sexual penetration in 2001, whereas appellant's guilty plea for second-degree criminal sexual conduct was based upon "repeated" acts of sexual contact in 2001. The district court also noted that at the plea hearing, appellant's trial counsel stated that the conduct underlying the first-degree charge—the sexual penetration—occurred at a different time from the sexual contact underlying the second-degree charge.

This appeal follows.

D E C I S I O N

Appellant challenges the district court's denial of his petition for postconviction relief. We review a postconviction court's factual findings for clear error. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). Whether multiple offenses arise from a single behavioral incident is generally a question of fact. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). But where the facts are undisputed, as they are here, the determination is a question of law subject to de novo review. *Id.* We will not disturb the

district court's denial of postconviction relief absent an abuse of discretion. *Doppler v. State*, 660 N.W.2d 797, 801 (Minn. 2003).

The rules of criminal procedure permit a defendant to withdraw a guilty plea at any time, even after sentencing, if "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs if the plea is not accurate, voluntary, and intelligent. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). A plea is accurately made if it is supported by a factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). "A guilty plea may not be accepted unless there exists a factual basis for concluding that the defendant actually committed an offense at least as serious as that to which he is pleading guilty." *State v. Misquadace*, 629 N.W.2d 487, 491 (Minn. App. 2001), *aff'd*, 644 N.W.2d 65 (Minn. May 9, 2002). The purpose of requiring an accurate factual basis for accepting a guilty plea is to ensure that the defendant does not plead guilty to a greater charge than he could be convicted of at trial. *Ecker*, 524 N.W.2d at 716. The district court is responsible for establishing a sufficient factual basis in the record. *Id.*

Appellant argues, as he did before the district court, that he cannot be convicted of and sentenced for both first- and second-degree criminal sexual conduct if both offenses were based on a single behavioral incident, and that there is an insufficient factual basis in the record to show that his offenses were based on separate and distinct acts. Appellant therefore claims that he should be permitted to withdraw his guilty plea. We disagree.

The single-behavioral-incident statute, Minn. Stat. § 609.035 (2004), "protects criminal defendants from both multiple prosecutions and multiple sentences for offenses resulting from the same behavioral incident." *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). The single-act statute, Minn. Stat. § 609.04 (2004), "bars the conviction of a defendant twice for the same offense against the same victim on the basis of the same act." *State v. Ture*, 353 N.W.2d 502, 517 (Minn. 1984). Sections 609.035 and 609.04 limit the state's ability to prosecute, sentence, or obtain a separate conviction for criminal acts that arise out of the same set of facts.

In order for a defendant's actions to be part of a single behavioral incident or a single act under the criminal sexual conduct statutes, (1) "[t]he conduct involved must be motivated by a desire to obtain a single criminal objective" and (2) "[t]he offenses must occur at substantially the same time and place, arise in a continuous and uninterrupted course of conduct, and manifest an indivisible state of mind." *State v. Secrest*, 437 N.W.2d 683, 685 (Minn. App. 1989), *review denied* (Minn. May 24, 1989).

Minn. Stat § 609.342, subd. 1(a) (2004), states that "[a] person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the complainant is under 13 years of age and the actor is more than 36 months older than the complainant." At the plea hearing, appellant provided the following factual basis for his plea to first-degree criminal sexual conduct:

> Q: [by appellant's trial counsel] Mr. Boelter, you've had a chance to review the complaint?
> A: Yes.
> Q: Okay. You agree that as to count 2, that in approximately 2001, in the City of Crystal, which is

located in Hennepin County, Minnesota, that you engaged in sexual penetration with [C.B.]; that is she had put your penis in her mouth; is that right?

A: Yes.
Q: Right?
A: Yes.
Q: And at the time she was under the age of 13 years; is that right?
A: Yes.
Q: And you were more than 36 months older than her?
A: Yes.
Q: [by the prosecutor] Mr. Boelter, you put your penis in her mouth?
A: Yes.

In regard to appellant's conviction for second-degree criminal sexual contact, Minn. Stat. § 609.343, subd. 1(h)(iii) (2004), provides that

> [a] person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if . . . the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of sexual contact, and . . . the sexual abuse involved multiple acts committed over an extended period of time.

Appellant gave the following factual basis for his plea to second-degree criminal sexual conduct:

Q: [by appellant's trial counsel] Mr. Boelter, you agree that several times in approximately 2001, in the city of Crystal, which is located in Hennepin County, Minnesota, that you engaged in sexual contact with [C.B.], who at that time was under the age of 16 years old; is that correct?
A: Yes.
Q: You agree that you were her father?
A: Yes.
Q: And are her father. And you agree that, as I indicated at the beginning, that the sexual contact involved multiple acts and was committed over an extended period of time?

A: Yes.

Because appellant admitted to *several* acts of sexual contact over an extended period of time, we hold that the factual basis in the record is sufficient to establish that appellant's two convictions are not based upon a single behavioral incident. The word "several," in its plain meaning and use, means more than two. *See The American Heritage Dictionary of the English Language* 1652 (3d ed. 1992) (defining "several" as "[b]eing of a number more than two or three but not many"). We can thus infer that appellant, by admitting to *several* acts of sexual contact, admitted to at least three acts of sexual contact.

Accordingly, even if the single act of sexual penetration underlying appellant's first-degree conviction is included as one of appellant's three or more acts of sexual contact, at least two acts of sexual contact remain that are separate and distinct from the single act of penetration. The two or more remaining acts of sexual contact are, by themselves, sufficient to support appellant's conviction for second-degree criminal sexual conduct. Appellant therefore cannot establish that his conviction for second-degree criminal sexual conduct is based upon the same conduct that underlies his conviction for first-degree criminal sexual conduct.

As a result, the district court did not abuse its discretion by denying appellant's petition for postconviction relief. The better practice would have been to require appellant to plead more specifically so that the record unequivocally established that appellant's convictions were based on separate and distinct acts. But because we can infer from appellant's factual basis that his convictions are not based upon a single

behavioral incident, any lack of specificity here is not fatal. *See State v. Bryant*, 378 N.W.2d 108, 110 (Minn. App. 1985) (holding that omissions in the defendant's factual basis were not fatal in light of the evidence of appellant's guilt), *review denied* (Minn. Jan. 23, 1986).

Appellant also claims that it was error for the district court to consider the statements his trial counsel made about the timing of the conduct underlying the two convictions. Because we have determined that the factual basis, by itself, establishes that appellant's convictions are not based upon a single behavioral incident, any error in the district court's consideration of counsel's statements was harmless. *See* Minn. R. Crim. P. 31.01 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Affirmed.