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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2142**

State of Minnesota,
Respondent,

vs.

Timothy Terrill Chandler,
Appellant.

**Filed October 15, 2013
Affirmed
Stauber, Judge**

Hennepin County District Court
File No. 27CR1138328

Lori Swanson, Minnesota Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stauber, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Appellant argues that he is entitled to withdraw his guilty plea to second-degree criminal sexual conduct because the factual basis for the plea did not establish that he

intended to contact the victim's intimate parts and because his conduct was more properly characterized as the offense of malicious punishment of a child or third-degree assault. We affirm.

FACTS

According to a criminal complaint, appellant Timothy Chandler was caring for his three-year-old step-son when he struck the child repeatedly on his bottom with a belt, resulting in severe injuries to the child. The child was not yet toilet trained and had developmental delays and sensory integration disorder. Earlier in the day, appellant became angry at the child and struck him with a belt because the child had defecated and smeared feces on the wall. The child's mother asked appellant not to punish the child like that. Later, the child's mother left the child in appellant's care while she went to pick up another child from school. When she returned, another child noticed a blood-soaked towel in the bathroom, whereupon appellant admitted that he struck the child again with the belt because the child again smeared feces on the walls. The mother woke the child and discovered blood in his diaper. She took the child to the emergency room, and doctors discovered a 3-centimeter-long laceration on the child's scrotum, a 1-centimeter-long laceration on the child's penis, severe swelling of the penis and scrotum, and severe contusions on the child's thighs, abdomen, buttocks, and back. The lacerations required twelve stitches. Appellant later admitted to the police that he "whooped" the child "6 times with a belt while the [child] was standing in the bathtub."

Appellant was charged with second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(e)(i) (2010). Appellant signed a guilty plea petition and

acknowledged that he went over it with his attorney and understood the rights he was waiving. At the plea hearing, appellant expressed concern that the wording of the statute did not fit the crime he committed because he did not act with sexual intent. The court explained that “it’s the language of the statute in the eyes of the law that controls,” and discussed *Ahmed*, stating that “although technically the offense you’re pleading guilty to was labeled sexual—with sexual intent, you’re not pleading guilty to that You’re pleading guilty to the touching of this child’s private parts in a hostile manner.”

Appellant’s counsel elicited the following factual basis:

Q: Now, [appellant], is it true that on December 7th of 2011 you were in the city of Minneapolis here in Hennepin County?

A: Yes.

Q: And, you were essentially taking care of your wife’s adopted son?

A: Yes.

. . . .

Q: And, you were going to discipline the child.

A: Correct.

Q: And what you did is that you hit him with a belt.

A: Correct.

Q: And you hit him with a belt in the buttocks as well as the belt went around and hit him in the genitals?

A: Correct.

Q: And, as a result of that, the child had numerous stitches in his testicles.

A: Correct.

Q: And, you understand that the intent you were using when you were hitting him with a belt was aggressive. You intended to hit him with the belt.

A: Yes.

Q: And you were doing so in an aggressive manner.

A: Yes.

Appellant was sentenced to 60 months in prison, ten years' conditional release, and required to register as a sex offender. This appeal followed.

D E C I S I O N

Appellant argues that he is entitled to withdraw his guilty plea because the factual basis does not support his conviction. Appellant did not raise this issue to the district court, but because there is no dispute as to the material facts of this case, this direct appeal is properly before us. *See State v. Anyanwu*, 681 N.W.2d 411, 413 n.1 (Minn. App. 2004) (stating that “a direct appeal is appropriate when the record contains factual support for the defendant’s claim and when no disputes of material fact must be resolved to evaluate the claim on the merits”).

There is no absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). Appellant bears the burden of showing his plea was invalid. *Id.* at 94. “Assessing the validity of a plea presents a question of law that we review de novo.” *Id.*

“To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent.” *Id.* “An accurate plea protects the defendant from pleading guilty to a charge more serious than he or she could be convicted of were the defendant to go to trial.” *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). “Accuracy requires that the plea be supported by a proper factual basis, that there must be sufficient facts on the record to support a conclusion that defendant’s conduct falls within the charge to which he desires to plead guilty.” *State v. Iverson*, 664 N.W.2d 346, 349 (Minn. 2003) (quotation omitted).

A conviction of second-degree criminal sexual conduct requires proof of the following: (1) that the actor engaged in sexual contact with another; (2) that the actor's contact resulted in personal injury to the victim; (3) and that the actor used force or coercion to accomplish the sexual contact. Minn. Stat. § 609.343, subd. 1(e)(i). "Sexual contact" is defined as "the intentional touching by the actor of the complainant's intimate parts" that is "committed with sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(a)(i) (2010). "Intimate parts" includes "the primary genital area, groin, inner thigh, [and] buttocks." *Id.*, subd. 5 (2010). "Because 'sexual' and 'aggressive' are stated as alternatives, either is sufficient." *State v. Austin*, 788 N.W.2d 788, 792 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010). Second-degree criminal sexual conduct is a "specific intent crime." *Id.* at 792-93. "[S]exual contact does not include conduct that is merely reckless or negligent and sexual contact requires that the defendant intend the specific result of touching intimate body parts." *Id.* at 793.

Appellant argues that the factual basis elicited at his plea hearing shows that he "indiscriminately disciplined the child with a belt," and that therefore he did not commit "intentional touching" of the victim's "intimate parts" as required by statute. Such "discipline," appellant argues, does not "rise to the level of criminal sexual conduct." Appellant seeks to distinguish *State v. Ahmed*, which sustained a conviction of second-degree criminal sexual conduct where the defendant abused a three-year-old child, resulting in severe pattern burns on the child's face, back, shoulder, abdomen, and penis. 782 N.W.2d 253, 257-57, 262 (Minn. App. 2010). Appellant asserts that *Ahmed* is distinguishable because, in this case, the abuse constituted "discipline" in response to the

victim's behavior. We disagree. The statute does not provide an exception in cases of discipline or provocation on the part of the victim.

Appellant also relies on *State v. Austin*, asserting that the specific intent requirement indicates that the statute is not intended to criminalize “conduct such as appellant’s.” *Austin* held that second-degree criminal sexual conduct requires the state to prove that the defendant acted with sexual or aggressive intent, and that “[a]bsent any allegation of aggressive intent,” “[s]exual intent must be established to avoid criminalizing contact that is accidental or that serves an innocuous, nonsexual purpose.” *Austin*, 788 N.W.2d at 792. The state concedes that appellant did not act with sexual intent, but rather insists that he acted with aggressive intent; therefore, the state did not need to establish that appellant acted with sexual intent. And, appellant admitted that he acted with aggressive intent and does not argue that his conduct was innocuous.

But, appellant argues that he did not admit that he intended to touch the child’s intimate parts. Appellant concedes that he “hit [the child] with a belt in the buttocks as well as . . . the genitals,” and that he “intended to hit him with the belt,” and that his intent was “aggressive.” Specific intent may be inferred “from the nature of the conduct itself.” *Austin*, 788 N.W.2d at 792. The record makes clear that appellant hit the child with the belt on his buttocks and genitals, and that his conduct was intentional and aggressive. Moreover, appellant admitted in the signed plea petition that he “intentionally touched [the child’s] genitals and buttocks with aggressive intent causing him injury.” Based on these facts, the record amply establishes that appellant intended to touch the victim’s intimate parts.

Appellant also argues that the factual basis was insufficient because his conduct could also have been charged as malicious punishment of a child¹ or third-degree assault.² However, a prosecutor has broad discretion to select the charging offense. *See State v. Suhon*, 742 N.W.2d 16, 23 (Minn. App. 2008), *review denied* (Minn. Feb. 19, 2008). “Judicial interference should be rare and occur only when an injustice results because the prosecutor has clearly abused her discretion in exercising the charging function.” *Id.* “[A]bsent legislative intent to the contrary, and absent discrimination against a particular class of defendants, a prosecutor may charge under any statute which is violated.” *State v. Walker*, 319 N.W.2d 414, 416 (Minn. 1982). Appellant does not argue that the prosecution abused its discretion or applied the criminal statute in a discriminatory manner. Therefore, we conclude that it was not an abuse of discretion to charge appellant with second-degree criminal sexual conduct instead of malicious punishment or third-degree assault.

1

A parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment of a child and may be sentenced as provided in subdivisions 2 to 6.

Minn. Stat. § 609.377, subd. 1 (2010). The maximum penalty is five years’ prison and/or a fine of \$10,000. *Id.*, subd. 4 (2010).

2

Whoever assaults a victim under the age of four, and causes bodily harm to the child’s head, eyes, or neck, or otherwise causes multiple bruises to the body, is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.

Minn. Stat. § 609.223, subd. 3 (2010).

Finally, appellant argues that his conviction creates an absurd result that would subject “[a]lmost any parent” to prosecution if, in the course of disciplining a child, the parent’s “blow happened to land on the child’s intimate parts.” However, this result is not implicated by the facts of this case. Appellant admitted that he intentionally struck the victim’s intimate parts and that he did so with aggressive intent. A parent who spansks a child without aggressive intent, or a parent who strikes a child without intending to contact the child’s intimate parts could not be prosecuted under the second-degree criminal sexual conduct statute under the statute’s plain language. Given the severity of the injuries and the vulnerability of the victim in this case, it was not a clear abuse of discretion to charge appellant with second-degree criminal sexual conduct.

Affirmed.