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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0266**

James Henry Lee Marek, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 19, 2013
Affirmed
Bjorkman, Judge**

Stearns County District Court
File No. 73-CR-10-1784

David W. Merchant, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Klaphake, Judge.*

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

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the district court's denial of postconviction relief, arguing that his guilty pleas to two counts of first-degree criminal sexual conduct are invalid because the factual basis for the pleas was established solely by leading questions. We affirm.

FACTS

Appellant James Marek was charged with four counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct based on allegations that he committed multiple acts of sexual contact and penetration against his four-year-old niece, K.J., and four-year-old nephew, C.M. Marek pleaded guilty to two counts of first-degree criminal sexual conduct in exchange for the state's dismissal of the remaining charges, and the district court imposed concurrent prison sentences of 144 and 153 months. Marek subsequently filed a petition for postconviction relief seeking to withdraw his guilty pleas. Marek argued that his guilty pleas are inaccurate because the factual basis was established through leading questions. The district court denied Marek's petition. This appeal follows.

DECISION

We review a district court's decision to deny postconviction relief for an abuse of discretion. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004). The scope of our review is limited to determining whether there is sufficient evidence to sustain the findings of the postconviction court. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

We review findings of fact for sufficiency of the evidence and issues of law de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

A defendant does not have an absolute right to withdraw a guilty plea. *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997). After sentencing, a defendant may withdraw a guilty plea only if “withdrawal is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs if a guilty plea is invalid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). A guilty plea is valid if it is voluntary, accurate, and intelligent. *Perkins*, 559 N.W.2d at 688. “The defendant bears the burden to establish that his plea was invalid.” *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012). The validity of a guilty plea is a question of law, which we review de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

Marek challenges only the accuracy of his guilty pleas. The accuracy requirement protects the defendant from pleading guilty to a more serious offense than he could be properly convicted of at trial. *Lussier*, 821 N.W.2d at 588. For a guilty plea to be accurate, a factual basis must be established on the record showing that the defendant’s conduct meets all elements of the charge to which he is pleading guilty. *State v. Iverson*, 664 N.W.2d 346, 349 (Minn. 2003).

Marek argues that the factual basis for his pleas is insufficient because it was established solely by leading questions posed by the prosecutor. We disagree. The supreme court has repeatedly criticized the use of leading questions to establish the factual basis for a guilty plea. *See Raleigh*, 778 N.W.2d at 95 (discussing two decades of caselaw that “make[s] clear that we generally discourage the practice of establishing a

guilty plea's factual basis by permitting counsel to ask leading questions of a defendant"). But the failure of the district court to "elicit proper responses" does not require plea withdrawal if the record "contains sufficient evidence to support the conviction." *Id.* at 94. In determining whether that standard is met, we may consider the plea colloquy (including the defendant's responses to leading questions), the plea petition, the complaint, and any evidence of guilt in the record at the time of the guilty plea. *See Lussier*, 821 N.W.2d at 588-89; *see also Raleigh*, 778 N.W.2d at 94 (concluding that defendant's affirmative response to leading question about his state of mind established premeditation); *State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983) (considering complaint and photographs of victim's injuries in addition to defendant's admissions in determining factual basis was sufficient).

Marek pleaded guilty to first-degree criminal sexual conduct. That offense, as charged here, involves (1) the intentional touching of the complainant's bare genitals or anal opening by the actor's bare genitals or anal opening, (2) committed with "sexual or aggressive intent," (3) against a complainant under 13 years of age, (4) by an actor more than 36 months older than the complainant. *See* Minn. Stat. §§ 609.341, subd. 11(c), .342, subd. 1(a) (2008). Our careful independent review of the record at the time of Marek's guilty pleas reveals ample evidence establishing these elements.

During the plea colloquy, Marek responded affirmatively to a series of detailed leading questions establishing that when K.J. and C.M. were four years old, Marek was charged with taking care of both children and while doing so, placed his bare penis against each child's bare anal opening. The complaint details similar admissions that

Marek made in statements to police officers. And Marek’s petition to plead guilty states that he reviewed the complaint and understood the charges against him.¹

Marek contends that this factual basis is insufficient to establish that he acted with sexual or aggressive intent because he never expressly admitted that element. We disagree. A factual basis is sufficient if the defendant admits facts “sufficient to infer” guilt of the offense to which he is pleading guilty. *See Smith v. State*, 596 N.W.2d 661, 665 (Minn. App. 1999) (citing *State v. Neumann*, 262 N.W.2d 426, 430 (Minn. 1978) (other citation omitted)), *review denied* (Minn. Aug. 27, 1999). There being “no other reason” for the admitted contacts, the record amply establishes that Marek acted with sexual or aggressive intent. *See State v. Ness*, 707 N.W.2d 676, 687 (Minn. 2006) (stating that sexual or aggressive intent “can readily be inferred from the contacts themselves”).

Marek also contends that this case is similar to *Shorter v. State*, 511 N.W.2d 743 (Minn. 1994), in which the supreme court concluded that the use of leading questions resulted in an inaccurate guilty plea. We disagree. *Shorter* involved not only reliance on leading questions but also several irregularities, including (1) a plea colloquy that

¹ In addition to these items, the district court considered admissions Marek made in connection with the presentence investigation (PSI). Because the PSI took place after Marek pleaded guilty, the district court erred by relying on those admissions. *Cf. Lussier*, 821 N.W.2d at 589 (concluding that the factual basis supporting the guilty plea “may be based on the grand jury transcript” because the transcript was “properly admitted into the record . . . during [the] plea hearing”); *State v. Lyle*, 409 N.W.2d 549, 552-53 (Minn. App. 1987) (stating that PSI available at the time of the guilty plea “may be assumed to have been considered by the trial court prior to its acceptance of the plea and to have fulfilled the accurateness requirement”). But because the admissions largely duplicated Marek’s admissions during the plea colloquy and the record at the time of Marek’s guilty plea establishes a sufficient factual basis, the error is harmless.

“required only that [the defendant] acknowledge the state’s evidence, rather than admit the elements of the crime,” (2) the defendant asserting a claim of actual innocence within days of the guilty plea, and (3) a reopened police investigation that revealed evidence consistent with that claim. *Shorter*, 511 N.W.2d at 745-47. This case does not present any of those unique circumstances. Marek affirmatively agreed to facts establishing the elements of the offense. And while Marek points to his family’s expressions of doubt that the offenses occurred, he has never claimed innocence. He also asserts that questions about his intellectual ability undermine the guilty plea, but the district court considered this issue and found that these concerns were not significant upon consideration of Marek’s educational background as a whole.

We conclude that the use of leading questions to establish the factual basis for Marek’s guilty plea does not justify withdrawal of his guilty plea because the record at the time of his guilty plea, including those questions and his responses, amply establishes all of the elements of the offenses to which he pleaded guilty.

Affirmed.