NOT DESIGNATED FOR PUBLICATION

No. 125,606

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

NICOLAS PAUL YBARRA,
Appellant.

MEMORANDUM OPINION

Appeal from Harvey District Court; MARILYN M. WILDER, judge. Submitted without oral argument. Opinion filed December 22, 2023. Affirmed.

Charles A. O'Hara, of O'Hara & O'Hara LLC, of Wichita, for appellant.

Ryan J. Ott, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., GARDNER and HURST, JJ.

WARNER, J.: Nicolas Ybarra pleaded guilty to aggravated battery, arising from his forcible sexual penetration of a 15-year-old girl. After sentencing, he sought to withdraw his plea, claiming the facts did not show that he caused the girl great bodily harm—an element necessary to prove aggravated battery. The district court found that there was a sufficient factual basis to support his plea and denied his motion. We affirm that decision.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2019, the State charged Ybarra with one count of rape and two counts of aggravated indecent liberties with a child, alleging that Ybarra had engaged in

nonconsensual intercourse with a 15-year-old girl, committed in May 2018. The details of the events giving rise to these charges were discussed in a probable-cause affidavit filed with the State's complaint.

In the affidavit, a police detective indicated that the girl reported during a forensic interview that Ybarra had raped her during a house party. The girl recalled that Ybarra was at the party with his son and that she had seen Ybarra using methamphetamine. Eventually, the girl got tired and withdrew to her bedroom. She awoke to find Ybarra lying on the bed next to her, stroking his genitals with her hand. Ybarra then pulled the girl's pants off and vaginally penetrated her. The girl stated she was "frozen and paralyzed with fear and disgust" and "didn't move through the ordeal." The girl had never given Ybarra permission to have sex with her, and he had never requested her consent.

The court held a preliminary hearing on the charges, where the girl, Ybarra, and a defense witness testified. The girl's testimony at the preliminary hearing essentially mirrored the account in the affidavit. The district court found there was probable cause to believe Ybarra had committed one count of rape under K.S.A. 2017 Supp. 21-5503(a)(1)(A) and two counts of aggravated indecent liberties with a child under K.S.A. 2017 Supp. 21-5506(b)(1) and (b)(2)(A). The court thus bound Ybarra over for trial.

About two years later, Ybarra entered into a plea agreement with the State. Ybarra agreed to plead guilty to an amended count of aggravated battery under K.S.A. 2017 Supp. 21-5413(b)(1)(A). In exchange, the State would dismiss the remaining charges against him.

The same district judge who had previously presided over Ybarra's preliminary hearing also conducted the hearing on his plea. There, the State recited the main terms of the plea agreement. Ybarra confirmed that the State's recitation was consistent with his understanding of the parties' agreement. The court informed Ybarra of the sentencing

range associated with the crime of aggravated battery and reviewed the rights Ybarra would be relinquishing through his plea.

The court then inquired about the factual basis for Ybarra's guilty plea. The State offered the affidavit filed in connection with Ybarra's original charges. Ybarra, through counsel, indicated that he had no objection to the court's consideration of the affidavit. The district judge noted that he could recall the preliminary hearing but reviewed the affidavit again anyway. The court then found that there was a factual basis for the plea and, determining that the plea was knowingly, voluntarily, and intelligently made, accepted Ybarra's guilty plea to one amended count of aggravated battery. Ybarra was later sentenced to a 71-month prison term, followed by 36 months of postrelease supervision.

After sentencing, Ybarra moved to withdraw his plea. He asserted that there was not a factual basis to convict him of aggravated battery. See K.S.A. 2022 Supp. 22-3210(a)(4). Ybarra asserted that one of the elements of aggravated battery is that a person has inflicted great bodily harm, but the affidavit used to establish the factual basis for his plea did not mention aggravated battery or great bodily harm at all.

The district court—now a different judge than the ones who presided over the earlier hearings—held a hearing on Ybarra's amended plea-withdrawal motion. At the hearing, the court reviewed the plea-hearing transcript. The court asked Ybarra's attorney why he did not object to the factual basis for the plea at the plea hearing, and the attorney had no explanation. The State argued that the affidavit provided a factual basis for great bodily harm even though it did not use that phrase verbatim because the affidavit stated that Ybarra pulled the girl's pants off and vaginally penetrated her.

The court ultimately denied Ybarra's motion, finding that manifest injustice did not require the plea to be withdrawn because the plea court had a factual basis to accept

it. The district court found that the plea court considered both the affidavit and the preliminary-hearing evidence in finding a factual basis for the plea. While the district court acknowledged that there was no mention of the exact phrase "great bodily harm" in the probable-cause affidavit, it found that Ybarra had substantively inflicted great bodily harm to the girl. Ybarra appeals.

DISCUSSION

Ybarra argues that the district court erred in denying his postsentence motion to withdraw his plea. Ybarra points out that the affidavit and preliminary-hearing testimony showed that he had sex with a 15-year-old girl without her consent. He argues that although this may have shown a different crime was committed, "a sex act between a 15 year old and a 39 year old" does not constitute great bodily harm for purposes of showing aggravated battery. We disagree with this false premise and find that there was a sufficient factual basis provided for Ybarra's aggravated-battery conviction.

Once a plea is entered, any effort to withdraw it is governed by K.S.A. 2022 Supp. 22-3210(d). The decision to deny a motion to withdraw a plea lies within the discretion of the district court. *State v. Green*, 283 Kan. 531, 545, 153 P.3d 1216 (2007). On appeal, a person challenging a district court's denial must establish that the court abused its discretion in reaching that decision. *State v. DeAnda*, 307 Kan. 500, 503, 411 P.3d 330 (2018). A judicial action constitutes an abuse of discretion if it is arbitrary, fanciful, or unreasonable; based on an error of law; or based on an error of fact. *State v. Ingham*, 308 Kan. 1466, 1469, 430 P.3d 931 (2018).

K.S.A. 2022 Supp. 22-3210(d) sets forth separate standards for evaluating a motion to withdraw a plea, depending on the timing of the motion. A court may permit a defendant to withdraw a plea "for good cause shown" at any time before they are sentenced. K.S.A. 2022 Supp. 22-3210(d)(1). But when a defendant moves to withdraw a

plea after sentencing—as Ybarra did here—a court may only permit withdrawal "[t]o correct manifest injustice." K.S.A. 2022 Supp. 22-3210(d)(2).

Manifest injustice is something "obviously unfair or shocking to the conscience." *State v. Barahona*, 35 Kan. App. 2d 605, 608-09, 132 P.3d 959, *rev. denied* 282 Kan. 791 (2006). In determining whether a defendant has established manifest injustice warranting withdraw of a postsentence plea, courts generally consider "(1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made." *State v. Fritz*, 299 Kan. 153, 154, 321 P.3d 763 (2014); see also *State v. Schaefer*, 305 Kan. 581, 588, 385 P.3d 918 (2016) (noting that while these factors are "'viable benchmarks for judicial discretion,'" courts may examine other considerations as needs arise in a particular case). The district court found that Ybarra's challenge to the factual basis potentially fell into the third category of cases—whether the plea was fairly and understandably entered—and the parties on appeal do not dispute this conclusion.

K.S.A. 22-3210 allows a district court to accept a guilty plea when, among other things, "the court is satisfied that there is a factual basis for the plea." K.S.A. 2022 Supp. 22-3210(a)(4). This means that a court must "establish a factual basis for the elements of all offenses." *State v. Hill*, 311 Kan. 872, 877, 467 P.3d 473 (2020). The statute leaves it to the court's determination whether evidence is sufficient to establish a factual basis for a plea. *State v. Edgar*, 281 Kan. 30, 44, 127 P.3d 986 (2006) (explaining there is no constitutionally imposed standard for the weight of evidence necessary to establish a factual basis for a plea).

Since Ybarra pleaded guilty to aggravated battery, the plea court had to find a factual basis for that crime. As it applies to Ybarra, aggravated battery is "[k]nowingly causing great bodily harm to another person or disfigurement of another person." K.S.A. 2022 Supp. 21-5413(b)(1)(A). Ybarra does not challenge the type of evidence the district

court considered at the plea hearing—the affidavit and the preliminary-hearing evidence—to determine whether there was a factual basis for his plea. Accord *State v. Ebaben*, 294 Kan. 807, 813, 281 P.3d 129 (2012) (describing the ways a factual basis for a plea may be shown). Instead, he asserts that the evidence itself did not show that his actions caused great bodily harm.

Our legislature has not defined bodily harm. *State v. Ultreras*, 296 Kan. 828, 850, 295 P.3d 1020 (2013) ("[T]he legislature did not include a definition in either the aggravated battery statute, the statute defining terms in the criminal code, or in the many other statutes using the term."). But courts have described bodily harm as "'any touching of the victim against [the victim's] will, with physical force, in an intentional, hostile and aggravated manner.'" 296 Kan. at 851 (quoting *State v. Brown*, 181 Kan. 375, 389, 312 P.2d 832 [1957]). And in general, the Kansas Supreme Court has explained that "the word 'great' distinguishes the bodily harm necessary for aggravated battery from slight, trivial, minor, or moderate harm, and as such it does not include mere bruises, which are likely to be sustained in simple battery." *State v. Kelly*, 262 Kan. 755, Syl. ¶ 2, 942 P.2d 579 (1997).

As the State points out, our Supreme Court has held that rape—which Ybarra was originally charged with—constitutes great bodily harm. *State v. Gideon*, 257 Kan. 591, Syl. ¶ 14, 894 P.2d 850 (1995) ("A conviction of the crime of rape or aggravated criminal sodomy is sufficient to find that the defendant inflicted great bodily harm."). In that case, which challenged the imposition of an aggravated sentence, our Supreme Court reasoned that "rape and aggravated criminal sodomy are extremely invasive offenses constituting great bodily harm." 257 Kan. at 614. It explained that there are not different degrees of rape, meaning there is no need to find that a rape was "worse than 'ordinary'" before it constitutes great bodily harm. 257 Kan. 591, Syl. ¶ 14.

Ybarra does not claim that the affidavit or preliminary-hearing evidence could not support a factual basis for rape, which *Gideon* found was sufficient to show great bodily harm. The evidence here showed Ybarra forcibly penetrated a 15-year-old girl without her consent. Like the district court, we have no difficulty in concluding that this evidence demonstrated that Ybarra's actions caused great bodily harm. Indeed, Ybarra's allegation to the contrary evinces a lack of respect and comprehension about the effect of his actions, bordering on the absurd.

The district court correctly found that there was a sufficient factual basis presented at the plea hearing to accept Ybarra's plea to aggravated battery. The court did not err when it denied his postsentence motion to withdraw his plea.

Affirmed.