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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0715

State of Minnesota,
Respondent,

vs.

Justin Matthew King,
Appellant.

Filed March 20, 2017
Affirmed
Smith, Tracy M., Judge

Wadena County District Court
File No. 80-CR-15-523

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

Kyra L. Ladd, Wadena County Attorney, Joseph P. Glasrud, Assistant County Attorney, Wadena, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

On appeal from his conviction of violating a harassment restraining order (HRO), appellant seeks to withdraw his guilty plea on the ground that the plea is constitutionally

invalid because his plea colloquy did not present a sufficient factual basis to establish that he contacted the protected person and that he knew of the HRO. Because appellant's guilty plea was constitutionally valid, we affirm.

FACTS

Appellant Justin Matthew King was charged with violating an HRO. King pleaded guilty pursuant to a plea agreement. To establish the factual basis for the guilty plea, the prosecutor and King had the following exchange at the plea hearing:

> Q. Mr. King, did you have at the time of June 21, 2015, did you have a harassment restraining order that restrained you from having any contact with [the protected person]?
>
> A. Yes.
>
> Q. And were you aware of that?
>
> A. I was—I was not—I was aware of it, but I did not remember that I did have it at that time so—
>
> Q. But you had been made aware of it, you just didn't remember it was there?
>
> A. Yes.
>
> Q. Between the dates of June 21st and June 23rd, did you make phone calls to [the protected person]?
>
> A. Yes.
>
> Q. And what [was] the nature of these phone calls?
>
> A. Just trying to get this cleared up. I had a conversation with an officer prior to the phone calls in Wadena County where he had called me and I had made an incidental call to her and he had called me and he never called me back. I returned several phone calls to him and then I tried to get a hold of her to find out what was going on and get the situation figured out.

> Q. Okay. But you don't dispute that you did in fact have a harassment restraining order that said you were not supposed to make contact with her, and you did attempt to make contact with her?
>
> A. Yes.

The prosecutor asked additional questions to establish the remaining elements of the crime. The district court found that there was "a sufficient factual basis to support the plea."

King was convicted of a felony violation of an HRO under Minn. Stat. § 609.748, subd. 6(d)(1) (2014). The district court sentenced King to 18 months in prison but stayed the execution of the sentence and placed King on probation for five years.

King appeals.

DECISION

King argues that his conviction must be reversed and the matter must be remanded to allow him to withdraw his guilty plea because his plea colloquy did not present a sufficient factual basis to establish two elements of the offense, making his plea inaccurate and therefore constitutionally invalid.

We review the validity of a guilty plea de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). "To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *Id.* For a plea to be accurate, it must be supported by a factual basis sufficient to establish the elements of the offense. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). If the defendant makes statements that negate an essential element of the offense, the factual basis for the plea is inadequate. *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003). If a plea is entered without an adequate factual basis, the district court must

permit the plea to be withdrawn. *State v. Theis*, 742 N.W.2d 643, 650 (Minn. 2007). "[A] defendant may not withdraw his plea 'if the record contains sufficient evidence to support the conviction.'" *Lussier v. State*, 821 N.W.2d 581, 589 (Minn. 2012) (quoting *Raleigh*, 778 N.W.2d at 94). "A defendant bears the burden of showing his plea was invalid." *Raleigh*, 778 N.W.2d at 94.

I. The record establishes that King contacted the protected person.

King asserts that, because he testified at the plea hearing that he made phone calls to the protected person but not that she answered his phone calls, the record establishes merely that he attempted to violate the HRO and not that he actually completed a violation. The state counters that King's conduct, as admitted to in the plea colloquy and as supplemented by the criminal complaint, was sufficient to constitute "contact" in violation of the HRO. We agree with the state.

A plea must be supported by sufficient evidence in the record. *Lussier*, 821 N.W.2d at 589. "[T]he plea petition and colloquy may be supplemented by other evidence to establish the factual basis for a plea." *Id.*; *see State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983) (concluding that the entire record, including the complaint, was sufficient to establish a factual basis for a guilty plea).

At the plea hearing, King admitted that he "ma[d]e phone calls to [the protected person]." The complaint states that the protected person told police that "she has been receiving several calls and voice messages from [King]" and showed an officer her cellphone, which "listed several missed calls from [King's phone number]" as well as "two voice messages that were left by [King] on June 22, 2015." The complaint also states that

an officer listened to the two voice messages, "which indicated that [King] was upset with [the protected person] for filing a harassment restraining order." Together, this evidence demonstrates that even though the protected person did not answer the phone, which would have enabled King to speak to her directly, King nonetheless initiated unwanted contact that ultimately reached the protected person through her cellphone. The complaint, combined with King's admission that he made phone calls to the protected person, presents a sufficient factual basis to establish that King contacted the protected person within the meaning of the HRO and thus that he did not merely attempt but in fact completed a violation.

II. The plea colloquy establishes that King knew of the HRO.

King also argues that he negated the element of knowledge of the HRO by stating in his plea colloquy that, although he had been made aware of the HRO, he momentarily forgot that it existed when he made phone calls to the protected person.

The state argues as a preliminary matter that, because the legislature amended the statute to remove the word "knowingly" from the felony provision in 2013, the defendant's knowledge of the HRO is no longer an element of the crime. *See* 2013 Minn. Laws ch. 47, § 4. We review questions of statutory construction de novo. *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). We must give effect to the plain language of an unambiguous statute. *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012).

Subdivision 6(a) of the restraining-order statute states that "[a] person who violates a restraining order issued under this section is subject to the penalties provided in paragraphs (b) to (d)." Minn. Stat. § 609.748, subd. 6(a) (2014). Paragraph (b) defines the

crime and establishes a misdemeanor-level penalty, stating, "Except as otherwise provided in paragraphs (c) and (d), when a . . . restraining order is granted under this section *and the respondent knows of the order*, violation of the order is a misdemeanor." *Id.*, subd. 6(b) (2014) (emphasis added). Paragraph (c) elevates the crime to a gross misdemeanor if it occurs within ten years of a previous qualified offense. *Id.*, subd. 6(c) (2014). Paragraph (d), under which King was convicted, elevates the crime to a felony if any one of six listed circumstances exists. *Id.*, subd. 6(d) (2014). One circumstance is violating the order within ten years of two or more previous domestic-violence convictions. *Id.*, subd. 6(d)(1).

The state urges the court to interpret paragraphs (b), (c), and (d) as independent provisions creating separate crimes without reference to one another, which would mean the requirement that the person "knows of the order" in (b) does not apply to (d). The state's interpretation would allow a person to be convicted of a felony HRO-violation even if he did not know the HRO existed. But beginning paragraph (b) with "Except as otherwise provided in paragraphs (c) and (d)" indicates that (b) is the general definition of the base-level crime, while paragraphs (c) and (d) contain additional circumstances that, when added to the general violation defined in (b), elevate the seriousness to the gross-misdemeanor or felony level, respectively. "Except as provided in paragraphs (c) and (d)" modifies only the final clause of (b), that "violation of the order is a misdemeanor." The middle segment, "when a . . . restraining order is granted under this section and the respondent knows of the order," announces a knowledge requirement that remains an element of the crime even where paragraph (c) or (d) attaches a more serious penalty. *Id.*,

subd. 6 (2014). Furthermore, paragraph (d) refers to "*the* order," while paragraph (b) refers first to "*a* restraining order" and then refers back to "*the* [same] order." *Id.* (emphasis added). The use of the definite article in paragraph (d) implies that it refers back to an order that has already been identified—that is, the one introduced in paragraph (b). *Id.*

The state argues that the legislature's 2013 removal of the word "knowingly" from the felony provision, which formerly stated that a person is guilty "if the person knowingly violates the order," establishes that the legislature intended to remove the mens rea element from the felony provision. *See* 2013 Minn. Laws ch. 47, § 4. The state's argument incorrectly conflates the phrases "knowingly violates" and "knows of the order." Before the 2013 amendment, this court held that "knowingly" in paragraph (d) required proof that a defendant was aware that his conduct would violate the HRO. *State v. Gunderson*, 812 N.W.2d 156, 161 (Minn. App. 2012). Thus, "knowingly violates" created a knowledge requirement for paragraph (d) that was distinct from and additional to the "knows of the order" requirement in paragraph (b). The 2013 removal of "knowingly" had no effect on the separate "knows of the order" requirement.

We therefore conclude that the defendant's knowledge of the HRO is a required element of a felony violation under Minn. Stat. § 609.748, subd. 6(d).

We next turn to the issue of whether the record contains a sufficient factual basis to establish that King knew of the HRO. When asked if he was aware of the HRO when he called the protected person, King responded, "I was—I was not—I was aware of it, but I did not remember that I did have it at that time so—." When the state asked, "But you had been made aware of it, you just didn't remember it was there?," King answered, "Yes."

Immediately after that testimony, when asked about the nature of the phone calls, King stated that he called the protected person, then received a call from a police officer, and then called the protected person again in an effort "to get this cleared up" and "to find out what was going on and get the situation figured out." In context, King's statements indicate not only that he was aware of the HRO when he made the calls after hearing from the police officer, but also that the HRO itself was the subject King intended to discuss with the protected person. King's plea colloquy presents a sufficient factual basis to establish that King knew of the HRO.

Affirmed.