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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-911

State of Minnesota,
Respondent,

vs.

Rufus Brown, Jr.,
Appellant.

Filed April 9, 2012
Affirmed
Ross, Judge

Wright County District Court
File No. 86-CR-10-1725

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

Thomas N. Kelly, Wright County Attorney, Anne L. Mohaupt, Assistant County Attorney, Buffalo, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, 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

ROSS, Judge

Forty-year-old Rufus Brown Jr. picked up a 14-year-old girl, bought her vodka and urged her to drink excessively to an alcoholic stupor, then he sexually assaulted her. Nine days after pleading guilty to criminal sexual conduct in the third degree, Brown unsuccessfully moved the district court to allow him to withdraw the plea. Brown appeals, arguing that the district court was bound to allow the withdrawal because he was confused about the plea agreement, the district court did not adequately develop a factual basis for his plea, and the state did not establish that it would be prejudiced by withdrawal. Because the district court acted within its discretion by denying Brown's motion, we affirm.

FACTS

In November 2009, Wright County Sheriff's Deputy Kuhlman went to Buffalo Hospital responding to a call that a 14-year-old girl, K.P.V., was highly intoxicated and nearing alcohol poisoning. The girl's alcohol content was greater than .30 percent; she could not speak, was unconscious, and had been intubated. She had been brought into the hospital with dirt covering her back and buttocks, and the hospital staff was informed that she may have been sexually assaulted.

The following day, K.P.V.'s friends B.K. and A.A. told police that the three of them had been picked up in a car driven by a man named Konopatski, who was carrying two other men, one later identified as Rufus Brown. Konopatski stopped, and Brown bought vodka. They drove further and parked on the roadside. Brown encouraged K.P.V.

to drink excessively. She became so intoxicated that she could hardly walk, but Brown took her from the car and walked her behind a house. One of the other men later found Brown and K.P.V., with K.P.V. lying on the ground and Brown pulling her pants off. K.P.V. ended up in the hospital and BCA testing of a swab of her vagina indicated semen that matched Brown's DNA.

The state charged Brown with criminal sexual conduct in the third degree for sexually penetrating a person whom he knew was incapacitated or helpless, under Minn. Stat. § 609.344, subd. 1(d) (2010); criminal sexual conduct in the third degree for sexually penetrating a victim between the ages of 13 and 15 when he was more than 24 months older, under Minn. Stat. § 609.344, subd. 1(b); and unlawfully furnishing alcoholic beverages to a minor, under Minn. Stat. § 340A.503, subd. 2(1) (2010). Brown pleaded guilty to criminal sexual conduct for having sex with a victim between 13 and 15 years old and the remaining counts were dismissed. Brown's plea was an *Alford* and *Norgaard* plea because he believed there was a substantial likelihood that he would be convicted at trial and he could not clearly recall the events because he was intoxicated. *See North Carolina v. Alford*, 400 U.S. 25, 37–38, 91 S. Ct. 160, 167–68 (1970) (holding that a court may constitutionally accept a defendant's guilty plea even though he maintained his innocence if the defendant reasonably believes and the record establishes that the state has evidence to obtain a conviction); *State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 111–12, 110 N.W.2d 867, 871 (1961) (a defendant may plead guilty even though he claims a loss of memory).

Nine days later Brown moved the district court to allow him to withdraw his guilty plea. The district court denied the motion, noting that Brown had the assistance of competent attorneys and knew what rights he was waiving. Brown appeals.

D E C I S I O N

Brown argues that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. A criminal defendant does not have an absolute right to withdraw his guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). This court reviews a district court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998). The district court has discretion to allow a defendant to withdraw his guilty plea before sentencing if the defendant establishes that "it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2. It must consider the defendant's reasons supporting his motion and any prejudice the state would suffer if the motion were granted. *Id.*

Brown argues unconvincingly that his guilty plea was not intelligently made because he was confused by the plea agreement, he felt pressure to sign it because one of his attorneys told him he might otherwise face more jail time, and he panicked and misunderstood some of the things said at the hearing because of a traumatic brain injury. The record does not support the argument. During the plea hearing Brown was permitted more than two hours of extra time to speak with his attorney before pleading guilty. He acknowledged that he understood that he was waiving his right to a trial, that he had thought much about the plea agreement, and that he did not have any questions about it. He stated that no one was forcing him to plead guilty and that he understood what was

taking place. Brown also has had extensive experience with the criminal justice system from other convictions, making it unlikely that he did not understand the consequences of his plea. His attorney did later speculate, without any cited evidentiary support, that Brown had a head injury that could have caused him to be in a panic and to misunderstand some of the plea hearing. But unsubstantiated reasons for plea withdrawal are not sufficient to meet the fair-and-just standard. *See Raleigh*, 778 N.W.2d at 97.

Brown also argues that the district court did not sufficiently develop the factual basis for his plea because the prosecutor's questions were leading. A proper factual basis for the crime must be established for a guilty plea to be accurate. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). Although the use of leading questions to establish a factual basis is disfavored, leading questions do not invalidate a guilty plea. *Id.* at 717. Brown's prosecutor developed a sufficient factual basis for Brown's guilty plea through numerous questions drawing Brown's answers about the evidence supporting the charge of criminal sexual conduct. Although the questions were mostly leading in nature, the answers validate Brown's guilty plea.

Brown contends that the state never established that it would be unfairly prejudiced by his plea withdrawal. But we do not address whether the state was prejudiced because Brown has failed to establish that it would have been fair and just for the district court to have allowed him to withdraw his guilty plea. *See Raleigh*, 778 N.W.2d at 98 (affirming district court's decision to deny motion to withdraw when district court would have denied the motion even if there was no prejudice).

Affirmed.