

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1521-CR

Cir. Ct. No. 2010CF1822

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY TYRONE MCNAIR, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Timothy Tyrone McNair, Jr., appeals a judgment convicting him of armed robbery by threat of use of a dangerous weapon. He also appeals an order denying his postconviction motion to withdraw his plea. The issue is whether there was an adequate factual basis for the plea. We affirm.

¶2 Before accepting a plea, the circuit court must establish that there is an adequate factual basis for the plea. *See* WIS. STAT. § 971.08(1)(b) (2009-10)¹ (The circuit court must “[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged.”). “When we review a circuit court’s determination that a sufficient factual basis exists to support a plea, we look at the totality of the circumstances surrounding the plea to determine whether the [circuit] court’s findings were clearly erroneous.” *State v. Sutton*, 2006 WI App 118, ¶16, 294 Wis. 2d 330, 718 N.W.2d 146. “Generally, the factual basis for a guilty plea may be established by reference to the allegations set forth in the criminal complaint.” *Id.*, ¶17. We will uphold the circuit court’s determination that there is a sufficient factual basis to accept the plea unless it is clearly erroneous. *Id.*, ¶8.

¶3 McNair contends that the factual basis for the plea was inadequate because the victim never articulated any facts to establish that she reasonably believed that he was armed with a dangerous weapon when he robbed her. We reject this argument. The record establishes that the victim reasonably believed that McNair was armed with a dangerous weapon because he implied that he had a weapon in his front pocket. According to the complaint, the victim stated that McNair approached her, implied that he had a weapon in his front pants pocket and demanded money from her, which she gave to him. McNair was placed under oath at the plea hearing and testified that he admitted to the allegations in the criminal complaint, which included “[t]aking property from the person of Ebony C. Horton by using or threatening to use a dangerous weapon against her.”

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Based on the allegations in the complaint and McNair's admission under oath to those allegations at the plea hearing, we conclude that the circuit court's conclusion that there was an adequate factual basis for the plea was not clearly erroneous.

¶4 McNair challenges the reasonableness of the victim's belief that he was armed. He contends that there was no factual basis for the circuit court to determine that the victim's belief was *reasonable* because the victim did not describe the exact actions or words that led her to believe that he had a weapon; she simply said that he implied he had a weapon in his front pocket. We disagree. It does not matter what specific actions or gestures McNair used to convey to the victim that he was armed. What matters is that the victim said that he implied that he was armed and he admitted that he threatened the victim by implying there was a weapon in his front pocket. There was a sufficient factual basis to convict McNair because it was reasonable for the victim to believe that he was armed based on the fact that he implied that there was a weapon in his front pocket.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

