STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0875

State of Minnesota,
Respondent,

vs.

Eugene Ryan Boos,
Appellant.

Filed April 17, 2017
Affirmed
Hooten, Judge

Anoka County District Court
File No. 02-CR-15-143

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

HOOTEN, Judge

In his appeal from his convictions of one count of first-degree assault against a peace officer and two counts of second-degree assault, appellant argues that his first-degree

assault conviction is legally invalid, that Minn. Stat. § 609.221, subd. 2 (2014), is unconstitutionally vague as applied to him, and that he must be allowed to withdraw his guilty pleas because they are invalid. We affirm.

FACTS

On December 30, 2014, members of a multi-jurisdictional law enforcement team, including the Hennepin County Violent Offender Task Force, were surveilling an apartment in Fridley in which they believed appellant Eugene Ryan Boos was hiding. The officers were attempting to locate Boos for suspected violations of his supervised release.[1] Law enforcement had previously seized multiple firearms, 141 grams of methamphetamine, and a methamphetamine lab from Boos' residence, but Boos remained at large.

During the surveillance, police received a child welfare call from a father who had not heard from his child in several days. The call was for the same apartment where officers suspected Boos was hiding. Officers knocked on the door and learned that Boos was in the back bedroom of the apartment with his girlfriend. All other residents, including the subject of the child welfare call, were evacuated from the apartment.

Police, while standing in the doorway of the apartment, commanded Boos to reveal himself, but Boos refused to come out of the bedroom. Instead, he told police that he was

[1] Boos was convicted of second-degree murder in 1994 and sentenced to 306 months in prison. He had been on supervised release for approximately 18 months at the time of this incident.

armed and would shoot anyone who entered. Police remained in the doorway and attempted to negotiate Boos' surrender.

As the confrontation escalated, Boos used his girlfriend's cellphone to call into a local news station, identifying himself as "Larry from Las Vegas." Boos provided an ongoing commentary of the standoff to the news station, which the news station recorded. Throughout the at least 50 minutes of attempted negotiations, Boos repeatedly threatened to kill the officers and shouted profanities at them. At one point during the standoff, Boos told his girlfriend to get down on the ground because "it's going down here in about 15 seconds." Boos then opened the door, crouched, extended his arm out the doorway, and aimed a loaded revolver at the officers, yelling at the officers that he was "going to kill one of [them]."

Unable to see Boos' body and unwilling to risk firing through the wall and hitting Boos' girlfriend, an officer fired four shots at Boos' extended hand. The shots disabled the revolver and struck Boos' hand, severing two fingers.

Officers were not certain if Boos had returned fire, so they immediately retreated. While officers were retreating, Boos directed his girlfriend to apply a tourniquet on his arm to control the bleeding from his hand. Shortly thereafter, Anoka County SWAT forces arrived at the scene. The standoff continued for several hours before Boos finally surrendered.

Boos was charged with three counts of first-degree assault of a peace officer, three counts of second-degree assault, and three counts of being a prohibited person in possession of a firearm. Boos pleaded guilty to one count of first-degree assault of a peace

officer and two counts of second-degree assault. As part of the plea arrangement, the state dropped all other charges and agreed not to prosecute Boos' girlfriend for her role in the standoff. Boos was sentenced to 120 months in prison. This appeal follows.

D E C I S I O N

Boos makes several arguments on appeal. First, he argues that his conviction for first-degree assault of a peace officer is legally invalid because he was convicted of attempting to engage in negligent deadly force, and a person cannot attempt to commit a crime with a mens rea of negligence under Minnesota law. Second, he argues that the first degree assault of a peace officer statute is unconstitutional as applied to him, based on the same mens rea arguments. Third, he argues that his pleas were legally invalid, based on the same mens rea arguments, but also because there was an insufficient factual basis to support the pleas, and because his plea arrangement was a "package deal" which the district court failed to properly scrutinize.

Pertinent to his mens rea arguments, Minn. Stat. § 609.221, subd. 2, provides that "[w]hoever assaults a peace officer . . . by using or attempting to use deadly force against the officer . . . while the person is engaged in the performance of a duty imposed by law" commits first-degree assault of a peace officer. Relevant to our analysis of this section, assault includes "an act done with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.02, subd. 10(1) (2014). Also relevant to our analysis, deadly force means "force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm." Minn. Stat. §§ 609.066, subd. 1, .221, subd. 2(c)(2) (2014). "The intentional discharge of

a firearm . . . in the direction of another person . . . constitutes deadly force." Minn. Stat. § 609.066, subd. 1.

In interpreting section 609.221, subdivision 2, this court has stated that "[t]o be guilty of using deadly force against a peace officer or correctional employee, a defendant must have the requisite mental state." *State v. Lindsey*, 654 N.W.2d 718, 722 (Minn. App. 2002). Because the use or attempted use of deadly force is required for culpability under the first-degree assault statute, there are two different possible applicable mens reas, both gleaned from the deadly force definition. *Id*. at 722–23. First, an actor is culpable if he uses force "with the purpose of causing" death or great bodily harm; this is specific intent. *Id*. Second, an actor is culpable if he uses force which the actor "should reasonably know" creates a substantial risk of death or great bodily harm; we referred to this mental state as "imputed knowledge." *Id*. at 723.

All of Boos' mens rea arguments rest on the foundation that this second mental state described in *Lindsey*, imputed knowledge, actually describes a mens rea of negligence or recklessness, and one cannot attempt an act with a negligence or recklessness mens rea. *See State v. Moore*, 458 N.W.2d 90, 94 (Minn. 1990) (noting that "[a]n attempted crime is a specific intent crime" and that "one cannot attempt to commit negligent or reckless acts."). While Boos' argument that attempt under the first-degree assault statute is incompatible with the imputed knowledge mens rea from *Lindsey* may have merit, we need not address it here.

Boos' plea arrangement was a hybrid *Norgaard* plea,[2] where Boos admitted the facts he could remember and stipulated to the state's offer of proof on the remaining facts. The state's offer of proof was that Boos pointed the revolver at the officers in his doorway with the specific intent to shoot at the officers. If the record contains a sufficient factual basis to demonstrate or from which to infer Boos' specific intent to use deadly force, the second mental state described in *Lindsey*, imputed knowledge, is not implicated here. Therefore, the first two of Boos' arguments relating to his first-degree assault plea collapse into his third argument, that his pleas are invalid and he must be allowed to withdraw them.

Absent manifest injustice, a defendant does not have an absolute right to withdraw a guilty plea. *See State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). "[M]anifest injustice exists where a guilty plea is invalid." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). A guilty plea is invalid if it is not "accurate, voluntary, and intelligent." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). The validity of a plea presents a question of law, which an appellate court reviews de novo. *Raleigh*, 778 N.W.2d at 94.

[2] Though the district court and the parties refer to the proceeding as a hybrid *Alford* plea hearing, Boos specifically stated on the record that he was not claiming he was innocent. Instead, Boos claimed he could not remember what happened. Therefore, the plea arrangement would more properly be described as a hybrid *Norgaard* plea. *See State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 110 N.W.2d 867 (1961). However, the sufficiency standards for a *Norgaard* plea do not differ from the sufficiency standards for an *Alford* plea, so this mischaracterization does not materially affect our analysis. *See Williams v. State*, 760 N.W.2d 8, 12–13 (Minn. App. 2009), *review denied* (Minn. Apr. 21, 2009).

a. Accuracy of Boos' first-degree assault of a peace officer plea

"A proper factual basis must be established for a guilty plea to be accurate." *Theis*, 742 N.W.2d at 647 (quotation omitted). "Ordinarily, an adequate factual basis is established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime." *Williams*, 760 N.W.2d at 12 (quotation omitted). However, in a *Norgaard* plea situation, "the defendant asserts an absence of memory on the essential elements of the offense but pleads guilty because the record establishes, and the defendant reasonably believes, that the state has sufficient evidence to obtain a conviction." *Id*. A district court must ensure that "the record clearly shows that in all likelihood the defendant committed the offense" and that the defendant acknowledges "that the evidence would be sufficient for a jury to find the defendant guilty beyond a reasonable doubt." *Id*. at 12–13.

Regarding the first requirement, during the plea hearing, Boos admitted that he did not surrender peacefully when police arrived. Though he did not remember specifically what he said during the incident, Boos admitted that he threatened officers with the intent to scare them. Boos also remembered being armed, but did not remember whether the revolver police recovered from the scene was the gun he was carrying that day.

When the plea hearing transitioned into a *Norgaard* hearing, the state supplemented Boos' admissions with evidence that there were three officers in the hallway, two behind shields who Boos could not see directly, and one officer who was in Boos' direct line of sight. The state pointed to evidence in the record from the taped recording of Boos' phone call to the news station. During this call, Boos told his girlfriend to get as far away from

him as possible because "it's going down here in about 15 seconds." In the 20 seconds between telling his girlfriend to get down and the time police fired on Boos, Boos told officers he was armed and had his weapon trained on one of them, and told officers twice that he was "going to kill one of [them]."

The state also referenced contemporaneous accounts of the officers in the hallway. In his post-incident interview, the officer who shot Boos recalled stating seconds after firing that Boos had "pointed a gun" at him. The officer stated that Boos was holding a gun for some time, but that immediately before the officer fired at Boos, he saw Boos' arm raise up to Boos' shoulder level in a motion indicative of pointing a gun. The officer stated that he fired at Boos because he felt he was in "grave danger."

The officer also identified the weapon in Boos' hand as some kind of revolver. The state offered into evidence a revolver recovered at the scene. The revolver was rendered inoperable by the officer's shots, but it was discovered cocked and fully loaded.

Boos admitted that he intended to use the revolver to scare the officers in his doorway. As part of the *Norgaard* plea, he claimed that he could not remember if he pointed the gun at the officer who shot him. However, "[i]ntent can be inferred from . . . the defendant's conduct, the nature of the assault, and the events leading up to and immediately following the crime." *State v. Barshaw*, 879 N.W.2d 356, 367 (Minn. 2016). Further, Boos' statement that he was "going to kill" one of the officers is direct evidence of his specific intent to kill. *See State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). The totality of the evidence offered by the state is sufficient to support the inference that when

he pointed a cocked and loaded revolver at an officer he had just threatened to kill, Boos had the specific intent to use force with the purpose of causing death or great bodily harm.

This conclusion is further supported by *Barshaw*. In *Barshaw*, the supreme court affirmed a conviction of first-degree assault of a police officer where the defendant, who was in a building surrounded by law enforcement, refused to surrender and was shot when he raised a loaded gun in the direction of an officer. *Id.* at 367–68. Given the similarity of the circumstances surrounding the assault in *Barshaw* and the assault here, we conclude that the record demonstrates a strong factual basis for Boos' first-degree assault plea.

The second requirement, that Boos acknowledge the evidence was sufficient for a jury to find him guilty beyond a reasonable doubt, is easily met. During the plea hearing, the district court confirmed that Boos understood his right to a jury trial and that a jury would have to find him guilty beyond a reasonable doubt. Boos was asked by the district court if Boos believed there was "a substantial likelihood a jury would find [him] guilty beyond a reasonable doubt if they believed the evidence that the police have." Boos responded, "Yes, sir." Over the course of the plea hearing, Boos was asked at least seven times by either the prosecutor or the district court if he believed that a jury would find him guilty of first-degree assault of a peace officer based on the evidence the state would present. Boos answered in the affirmative all seven times.

Given that the record demonstrates a strong factual basis showing that in all likelihood Boos did commit the first-degree assault crime to which he pleaded guilty, and that Boos repeatedly acknowledged that he believed a jury would find him guilty based on

the evidence the state was likely to present at trial, we conclude that Boos' first-degree assault plea was accurate.

b. Voluntariness of Boos' pleas

Boos also argues that all three of his pleas were not voluntary because a condition of his pleas was the state's promise not to prosecute his girlfriend for her role in the standoff, and the district court did not conduct further inquiry into the voluntariness of his pleas. We disagree.

While "package deal" plea agreements, such as the one agreed to by Boos, are not "per se invalid," they are "fraught with danger." *State v. Danh*, 516 N.W.2d 539, 542 (Minn. 1994). This is because "package deal" plea agreements generally pose a higher risk of coercion, whereby a defendant pleads guilty out of a sense of loyalty to the third party. *Id*. In order to protect against this danger, the state must "fully inform" the district court when a defendant is entering into a plea as part of a package deal, and the district court must "conduct further inquiries to determine whether the plea is voluntarily made." *Id*. Though the Minnesota Supreme Court has not specified precisely what further inquiries must be made, *Danh* instructs that voluntariness should be determined by examining "the totality of the circumstances" surrounding the guilty plea. *Id*. at 543 (quotation omitted). The central question is whether the promise not to prosecute the third party was a "significant factor" in the defendant's decision to enter a guilty plea. *Id*.

At the outset of the plea hearing, the state informed the district court that the state's agreement not to prosecute Boos' girlfriend was a part of Boos' plea arrangement. Shortly thereafter, Boos' attorney asked him if he was entering into the plea freely and voluntarily,

to which Boos replied in the affirmative. The district court then also asked Boos if anyone had made any promise or threats to coerce him to plead guilty, and Boos replied in the negative. The district court then remarked that Boos "appears to me clearly to understand what's going on. He's clearly a smart man, understands what we're talking about. He's answered all of the questions I think clearly and unequivocally."

Additionally, a review of the record indicates that the state was not seriously inclined to charge Boos' girlfriend, and investigating officers informed Boos that his girlfriend was being treated as a witness, not a suspect. The state's lack of intent to prosecute Boos' girlfriend is a factor that weighs against a finding of coercion. *See Butala v. State*, 664 N.W.2d 333, 340 (Minn. 2003) (determining that where state promised not to prosecute defendant's family member, but never intended to do so, "the coercive effect of offers of leniency . . . was absent").

In sum, the totality of the circumstances, including Boos' unequivocal responses to the district court's questions regarding whether he was coerced to plead guilty and evidence that the state was not seriously inclined to charge Boos' girlfriend, leads us to the conclusion that the state's representation that it would not prosecute Boos' girlfriend was not a significant factor in Boos' decision to enter a guilty plea. We conclude that because Boos' pleas were both accurate and voluntary, they were not invalid, and Boos is not entitled to withdraw his pleas.

Affirmed.