STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2046

State of Minnesota,
Respondent,

vs.

Anthony Arthur Rathbun,
Appellant.

Filed November 13, 2017
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-15-20241

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Christopher P. Rosengren, Rosengren, Kohlmeyer & Hagen, Chtd., Mankato, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

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

BJORKMAN, Judge

Appellant challenges his first-degree criminal-sexual-conduct conviction, arguing that the district court erred in denying his motion to withdraw his guilty plea. We affirm.

FACTS

Appellant Anthony Arthur Rathbun lived in a home that included his girlfriend and her two young children, child A and child B. During an investigation following child A's July 2015 report of sexual abuse by Rathbun, child A disclosed numerous instances of sexual penetration and child B disclosed one instance of sexual penetration. Rathbun was charged with four counts of first-degree criminal sexual conduct.

Under the terms of a plea agreement, Rathbun pleaded guilty to one count of first-degree criminal sexual conduct involving child A in exchange for the state's dismissal of the other charges, and imposition of a sentence between 156 and 234 months. At his first plea hearing, Rathbun waived his trial and other constitutional rights, acknowledged his signed plea petition, and agreed that he had sufficient time to meet with his attorney, was not coerced to plead guilty, and had no questions. When providing the factual basis for the plea, Rathbun answered leading questions asked by both defense counsel and the prosecutor to establish that he engaged in sexual penetration with child A from August 2014 to July 2015. He agreed that he "put [his] penis into [child] A's mouth or butt" with sexual intent. The district court accepted Rathbun's plea.

A month later, Rathbun retained a different attorney and moved to withdraw his guilty plea under the fair-and-just and manifest-injustice standards of Minn. R. Crim. P. 15.05, subds. 1, 2. He argued that his first attorney had provided poor representation and coerced him to plead guilty. During his requested hearing, Rathbun withdrew the motion and expressed his intent to plead guilty to two first-degree offenses, involving both children, in exchange for concurrent 160-month sentences. Rathbun's attorney elicited the

factual bases for both offenses. At one point Rathbun corrected his attorney's statement regarding how he sexually penetrated child B, saying, "I didn't think it [was] with the mouth. I thought it was the anus." He also agreed that his first attorney "did a pretty good job." The district court directed Rathbun to complete a new plea petition before the next hearing. Rathbun subsequently withdrew from the second plea agreement after learning that he would be subject to a lifetime conditional-release period.

When Rathbun next appeared in court, he renewed his motion to withdraw his original guilty plea. At the evidentiary hearing on the plea-withdrawal motion, Rathbun testified that he met with his first attorney seven or eight times before trial, insisted that he wanted to go to trial, and met with her three times on the date he entered his first guilty plea. During these meetings, counsel told him that he could "get 560 months in prison" because of a sentence-enhancing provision and could be subject to consecutive sentencing on a separate probation violation. And, contrary to Rathbun's suggestions, counsel did not attempt to exclude interviews of the victims, refused to seek a continuance of the trial, and did not try to correct his criminal-history score, which he believed was exaggerated because of his probation violation. Rathbun stated that he ultimately pleaded guilty because he felt he had no other choice, was rushed, and was "scared" by "the possible outcome if [he] went to trial."

During cross-examination, Rathbun conceded that jail logs show he met with his attorney and an investigator numerous times before entering the plea, his case had been properly investigated, and his testimony at the first plea hearing established the voluntariness of his plea. Rathbun also agreed that he had twice pleaded guilty and

admitted committing the charged offenses, was not coerced to plead guilty the second time, and admitted, in detail, during the guilty-plea hearings and the presentence investigation interview, that he sexually penetrated child A 10 to 15 times. When pushed, Rathbun said that he had wanted more time to consider whether to take the negotiated plea, but he ultimately "decided to take the deal so I didn't get 560 months."

The district court denied Rathbun's motion to withdraw his original guilty plea and imposed a 199-month executed sentence, consistent with the agreed-upon sentencing range. Rathbun appeals, arguing that plea withdrawal is necessary to correct a manifest injustice and is fair and just.

D E C I S I O N

I. Withdrawal of Rathbun's guilty plea is not necessary to correct a manifest injustice.

"A defendant does not have an absolute right to withdraw a valid guilty plea." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). A district court may permit plea withdrawal at any time if the defendant can show manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. "Manifest injustice occurs if a guilty plea is not accurate, voluntary, and intelligent." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). "A defendant bears the burden of showing his plea was invalid." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). We review the validity of a guilty plea de novo. *Id*. Rathbun challenges all three elements of the manifest-injustice standard.

First, Rathbun argues that his plea was inaccurate because it lacked a proper factual basis. "A proper factual basis must be established for a guilty plea to be accurate." *State*

v. Ecker, 524 N.W.2d 712, 716 (Minn. 1994). This requirement can be satisfied by having the defendant describe the facts constituting the offense, or by other methods, such as "testimony of witnesses and statements summarizing the evidence." *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). While the law disfavors the use of leading questions to establish the factual basis for a plea, such a plea will nevertheless be upheld "if the record contains sufficient evidence to support the conviction." *Lussier v. State*, 821 N.W.2d 581, 589 (Minn. 2012) (quotation omitted).

Based on our careful review of the record, we conclude that Rathbun provided a sufficient factual basis to establish the essential elements of first-degree criminal sexual conduct. He agreed that he "put [his] penis into [child] A's mouth or butt" and that his conduct was consistent with the allegations of the complaint. Rathbun ratified these statements during his second guilty-plea hearing, and confirmed them during the presentence investigation. While Rathbun's plea was established by use of a discouraged trial practice, we are satisfied that the record as a whole supports the accuracy of his plea. *See id.* (noting that the district court should not permit the use of only leading questions to establish a plea, but upholding the plea when the record as a whole, including a grand jury transcript, supported the plea).

Second, Rathbun asserts that his plea was not intelligently made.

> An intelligent plea is one that is knowingly and understandingly made. To be intelligently made, a guilty plea must be entered after a defendant has been informed of and understands the charges and direct consequences of a plea. The intelligence requirement is meant to ensure that the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty.

State v. Batchelor, 786 N.W.2d 319, 324 (Minn. App. 2010) (quotations and citations omitted), *review denied* (Minn. Oct. 19, 2010). The direct consequences of a plea "are those which flow definitely, immediately, and automatically from the guilty plea." *Kaiser v. State*, 641 N.W.2d 900, 904 (Minn. 2002) (quotation omitted).

Rathbun argues that he did not understand the consequences of his plea because he did not "fully understand the meaning of dispositional departure, durational departure, triple upward departure," or the meaning of "Blakely," a purported sentencing reference. We are not persuaded. Because Rathbun expressly agreed to and received a discretionary sentence within the presumptive range, the terms about which Rathbun expresses confusion were inconsequential to the plea. The record shows that Rathbun understood the direct consequences of his plea; he expressly noted and agreed to them in his plea petition and upon entry of his plea. His significant criminal history and experience with the criminal-justice system further demonstrates that his plea was knowingly made.

Third, Rathbun contends that his plea was not voluntary because his attorney coerced him to plead guilty. A plea is not voluntary if it relies on "improper pressures or inducements." *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). "Whether a plea is voluntary is determined by considering all relevant circumstances." *Raleigh*, 778 N.W.2d at 96. Apart from Rathbun's bald allegations, the record contains no evidence that Rathbun was coerced to plead guilty. Indeed, Rathbun's testimony at his two guilty-plea hearings and his two plea petitions indicate that his decisions to plead guilty were his own—free from compulsion. The district court was required to assess Rathbun's credibility in

deciding whether to allow him to withdraw his plea. *See State v. Aviles-Alvarez*, 561 N.W.2d 523, 527 (Minn. App. 1997) (stating that the district court is "entitled to make credibility assessments" in determining whether a defendant understood the consequences of his plea), *review denied* (Minn. June 11, 1997). The same district court judge presided at all of Rathbun's hearings and had the opportunity to observe him closely over the course of a year. And while Rathbun may have felt stressed when deciding whether to plead guilty, as noted by the district court, this sort of stress does not amount to coercion. *See Raleigh*, 778 N.W.2d at 96 (rejecting claim of coerced plea due to "extreme stress" when other facts "show[ed] acceptance and understanding of the plea, not improper pressure or coercion").

Finally, Rathbun argues that his plea should be withdrawn for manifest injustice because his first attorney was ineffective and coercive. To establish ineffective assistance of counsel, a defendant must demonstrate that "counsel's performance fell below an objective standard of reasonableness, and . . . that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Failure to satisfy either prong of this test is determinative. *Id.* In deciding the prejudice prong, this court considers "the totality of the evidence before the judge." *Id.*

Rathbun asserts that his attorney "advised him to lie under oath" and coerced him to accept a guilty plea. While such conduct by an attorney is a serious offense, we have rejected such an allegation as a basis for an ineffective-assistance-of-counsel claim, reasoning that such advice would be "rejected by even the least enlightened defendant in

the face of [the defendant's] fundamental duty to tell the truth under oath," and that the defendant would suffer no prejudice from such advice when the lie served its intended purpose of facilitating the defendant's preferred outcome. *Anderson v. State*, 746 N.W.2d 901, 907-08 (Minn. App. 2008).

As noted above, the record and district court's findings defeat Rathbun's contention that his attorney coerced him to plead guilty. Indeed, Rathbun agreed that he had sufficient time to speak with his attorney, had no questions about his plea, and was not forced to accept the plea agreement. And Rathbun testified at the second plea hearing that his first attorney did a "pretty good job" of representing him.

Moreover, even if Rathbun could establish that his first attorney was ineffective, he cannot show that but for his counsel's performance the outcome of his case would have been different. The state's case was strong. Child A and child B were prepared to testify about Rathbun's criminal sexual conduct toward child A. Their individual statements, as detailed in the complaint, were specific, internally consistent, consistent with each other, and demonstrated strong evidence of first-degree criminal sexual conduct.

In sum, we observe no abuse of discretion in the district court's denial of Rathbun's motion to withdraw his guilty plea under the manifest-injustice standard.

II. Withdrawal of Rathbun's guilty plea is not mandated under the fair and just standard.

Before sentencing, a district court may permit a defendant to withdraw a guilty plea "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2. The district court must consider the defendant's reason for seeking withdrawal and the prejudice to the state that

would result from granting the motion. *Id*. The defendant bears the burden to show grounds for withdrawal, and the state bears the burden to show prejudice. *Raleigh*, 778 N.W.2d at 97. The district court's decision is discretionary and will be reversed only for abuse of discretion. *Id*.

The arguments Rathbun advances to support his request for plea withdrawal are the same as those he advanced under the manifest-injustice standard—that his plea "was not accurate, voluntary, or intelligent." Essentially, he contends that his plea was coerced, and he felt "rushed." The record defeats Rathbun's arguments. We therefore conclude that the district court did not abuse its discretion by rejecting Rathbun's claims under the fair and just standard.[1]

Affirmed.

[1] Rathbun also argues that the state would suffer no prejudice because he moved to withdraw his plea within a month after entering it. Rathbun overlooks the significant delay that already occurred—the abuse of the six- and eight-year-old children began in August 2014, the criminal complaint was filed in July 2015, and another year passed before the district court ruled on the plea-withdrawal motion. It would prejudice the state to require its key witnesses—children—to remember events that transpired up to two years earlier.