STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0008

Brian Allen Barthel, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent

Filed August 14, 2017
Reversed and remanded; motion denied
Worke, Judge

Stearns County District Court
File No. 73-CR-15-3785

Kelly Martinez, John Kaschins, Martinez and Kaschins, LLC, Minneapolis, Minnesota (for appellant)

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Ross, Judge.

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

WORKE, Judge

Appellant challenges his conviction for interfering with an emergency call, arguing that he is entitled to withdraw his guilty plea because it lacked an accurate factual basis. Appellant also moves to strike portions of the state's brief as referencing matters outside

the record on appeal. Because the state's brief did not reference matters outside the record, we deny appellant's motion. But because the factual basis for appellant's plea fails to establish the existence of an emergency, we reverse and remand.

FACTS

In May 2015, appellant Brian Allen Barthel was charged with interference with an emergency call and domestic assault. The complaint alleged that on April 29, 2015, officers were dispatched to the home of Barthel and his wife D.B. D.B. told the officers that she and Barthel had an argument in their kitchen. During the argument, she told Barthel she was leaving. When she went to get her purse, Barthel picked it up, turned it upside down, and dumped out D.B.'s cellphone. D.B. reached for the phone, and Barthel grabbed her arm and twisted it. She told Barthel that she was going to call the police because Barthel would not let go of her arm. Barthel then grabbed D.B.'s phone and "snapped it in half."

In July 2015, Barthel pleaded guilty to interference with an emergency call, a gross misdemeanor. *See* Minn. Stat. § 609.78, subd. 2(1) (2014). The plea agreement called for the offense to be sentenced as a misdemeanor and the domestic-assault charge to be dismissed. The district court questioned Barthel about the facts underlying his plea:

THE COURT:	And in order for me to accept that guilty plea I need you to tell me what happened on or about April 29, 2015, just with regard to that count.
BARTHEL:	Sure. Um - - just my wife and myself got in a simple argument and I didn't want her to call 911 so I just snapped the phone.

THE COURT:	Okay. And did you - - when you say you snapped the phone, did you take it away from her?
BARTHEL:	It was - - it was in her purse with my truck keys I was getting as well. So I didn't - -
THE COURT:	(Interjecting) And did she tell you she was planning on calling 911?
BARTHEL:	Correct, she did.
THE COURT:	And where did that argument happen?
BARTHEL:	In my living room in my home.
THE COURT:	And where - - is that located here in Stearns County?
BARTHEL:	Yes.

Following this exchange, the district court found a sufficient factual basis for Barthel's plea, dismissed the domestic-assault charge, and sentenced Barthel to 90 days in jail. That sentence was stayed, and Barthel was placed on probation for one year.

More than a year later, Barthel filed a petition for postconviction relief seeking to withdraw his guilty plea. He argued that his plea was not supported by an accurate factual basis because the exchange at his plea hearing failed to establish that an emergency existed when he broke the phone. The district court denied Barthel's petition.

This appeal followed. After briefing was completed, Barthel moved to strike references in the state's brief to matters he claims are outside the record.

D E C I S I O N

Motion to strike

"The record on appeal consists of the documents filed in the district court, the offered exhibits, and the transcript of the proceedings, if any." Minn. R. Crim. P. 28.02, subd. 8. "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below."

Thiele v. Stich, 425 N.W.2d 580, 582-83 (Minn. 1988). "The court will strike documents included in a party's brief that are not part of the appellate record." *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd* 504 N.W.2d 758 (Minn. 1993).

First, Barthel argues that the state referred to matters outside of the record by mentioning a separate case where he was also charged with assaulting D.B. But in a document filed in district court, the state discussed this other case. Because the other case is referenced in the district court record, it is not outside the record on appeal. *See* Minn. R. Crim. P. 28.02, subd. 8.

Second, Barthel argues that nothing in the record supports the state's assertion that the plea agreement called for the domestic-assault charge to be dismissed. But the district court found in its postconviction order that Barthel pleaded guilty on the condition that the domestic-assault charge would be dismissed. The plea-hearing transcript also shows that the domestic-assault charge was dismissed. The reference to the plea agreement is squarely within the record.

Third, Barthel moves to strike the state's claims that he was "aware of the contents of the complaint at the time of his plea" and "the facts in the complaint were referenced during the [plea] hearing." These statements are fair interpretations of the record. Barthel signed a "statement of rights" form acknowledging that he had been charged with the offenses "described in the complaint." Barthel was also represented by counsel and indicated at his plea hearing that he "had enough time to speak with [his] attorney about all aspects of the case." In his plea colloquy, Barthel admitted that "on or about April 29, 2015," he got into an argument with D.B. and "snapped the phone" after D.B. said that she

was going to call 911. These admissions match at least some of the facts alleged in the complaint.

The state's brief does not reference matters outside of the appellate record. Accordingly, Barthel's motion to strike is denied.

Guilty plea

Barthel argues that he must be allowed to withdraw his guilty plea because it was not supported by an accurate factual basis. A defendant may withdraw his guilty plea after sentencing if "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. "A manifest injustice exists if a guilty plea is not valid." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). To be valid, "a guilty plea must be accurate, voluntary, and intelligent." *Id.* This court reviews a denial of postconviction relief for an abuse of discretion. *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012). In doing so, we review the postconviction court's legal determinations de novo and its factual findings for clear error. *Bonga v. State*, 797 N.W.2d 712, 718 (Minn. 2011). The validity of a guilty plea is a legal issue that is reviewed de novo. *Raleigh*, 778 N.W.2d at 94.

The purpose of the accuracy requirement is to prevent the defendant from pleading guilty to a more serious offense than he could be convicted of at trial. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). A guilty plea is inaccurate if it is not supported by a sufficient factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). A sufficient factual basis exists if there are "facts on the record to support a conclusion that [the] defendant's conduct falls within the charge to which he desires to plead guilty." *State v. Iverson*, 664 N.W.2d 346, 349 (Minn. 2003) (quotation omitted). The factual basis "is

inadequate when the defendant makes statements that negate an essential element of the charged crime because such statements are inconsistent with a plea of guilty." *Id.* at 350.

As an initial matter, the parties disagree on whether the allegations in the complaint are part of the factual basis for Barthel's plea. Barthel argues that we must determine the accuracy of his plea based solely on his exchange with the district court at the plea hearing. The state argues that the allegations in the complaint may be used to supplement Barthel's admissions.

In *Trott*, the supreme court stated that by pleading guilty the defendant "in effect judicially admitted the allegations in the complaint." 338 N.W.2d at 252. This statement is frequently cited as precedent for using the allegations in the complaint to supplement the defendant's admissions at the plea hearing. *See, e.g.*, *Sanchez v. State*, 868 N.W.2d 282, 289 (Minn. App. 2015) ("The complaint may provide a factual basis for a defendant's plea, and we are permitted to examine the complaint to assess whether a defendant's plea was accurate." (citing *Trott*, 338 N.W.2d at 252)), *aff'd*, 890 N.W.2d 716 (Minn. 2017); *Barnslater v. State*, 805 N.W.2d 910, 914 (Minn. App. 2011) ("This court may also look to the whole record, beyond what the defendant said, when evaluating the quality of a guilty plea's factual basis." (citing *Trott*, 338 N.W.2d at 251-52)). But, in *Trott*, the defendant also "freely admitted" to the vital facts at the plea hearing. 338 N.W.2d at 252. Moreover, since *Trott*, we have explained that the factual "basis must be disclosed on the record" at the plea hearing and the defendant must make at least some acknowledgement of the facts underlying his plea. *Vernlund v. State*, 589 N.W.2d 307, 310 (Minn. App. 1999); *State v. Lillemo*, 410 N.W.2d 66, 69 (Minn. App. 1987). Here, the state seeks to supplement

Barthel's admissions at the plea hearing with the allegation in the complaint that he grabbed and twisted D.B.'s arm before breaking her phone. At the plea hearing, Barthel said only that he and D.B. had "a simple argument." Because Barthel did not admit to assaulting D.B. at the plea hearing and, in fact, contradicted that allegation by characterizing the dispute as a "simple argument," this portion of the complaint is not part of the factual basis for Barthel's plea.

An adequate factual basis must establish all of the elements of the crime. *Barnslater*, 805 N.W.2d at 914. The elements of interference with an emergency call are: (1) the defendant "interrupts, disrupts, impedes, or interferes with an emergency call" or "prevents or hinders another from placing an emergency call"; (2) the defendant acted with the intent of interrupting, impeding, interfering, preventing or hindering an emergency call; and (3) "an emergency existed." Minn. Stat. § 609.78, subds. 2(1), 3(a) (2014); 10A *Minnesota Practice*, CRIMJIG 21.30 (2015). "[E]mergency call" means "a 911 call," "any call for emergency medical or ambulance service," or "any call for assistance from a police or fire department or for other assistance needed in an emergency to avoid serious harm to person or property." Minn. Stat. § 609.78, subd. 3(a). To constitute an "emergency call," an emergency must exist at the time of the call or attempted call. *Id.*; *State v. Hersi*, 763 N.W.2d 339, 343-44 (Minn. App. 2009).

Barthel argues that his plea is inaccurate because the record fails to establish the existence of an emergency. We agree. An emergency is defined as a "'serious situation or occurrence that happens unexpectedly and demands immediate action,' or '[a] condition of urgent need for action or assistance.'" *State v. Brandes*, 781 N.W.2d 603, 606 (Minn. App.

2010) (quoting *The American Heritage College Dictionary* 449 (3d ed. 2000)). At his plea hearing, Barthel admitted to arguing with D.B. and admitted to breaking her phone to prevent her from calling 911. But, as stated above, he did not admit to grabbing and twisting her arm. Instead, he testified that he and D.B. had "a simple argument." This statement indicates that there was no emergency at the time Barthel broke the phone. Definitions of "simple" include: "[o]rdinary or common." *American Heritage*, *supra*, at 1270-71. A "simple," ordinary, or common argument is neither a serious situation that requires immediate action nor a "condition of urgent need for action or assistance." *Brandes*, 781 N.W.2d at 606 (quotation omitted). Because Barthel's testimony negated an essential element of the offense, the factual basis is insufficient. *See Iverson*, 664 N.W.2d at 350 ("The factual basis of a plea is inadequate when the defendant makes statements that negate an essential element of the charged crime because such statements are inconsistent with a plea of guilty.").

Citing *Brandes*, the state claims that Barthel's "acknowledgment that he was in an 'argument' with the victim is sufficient on its face to prove that an emergency existed." 781 N.W.2d at 606. In *Brandes*, we explained that "[d]epending on the circumstances, an argument may constitute a serious event that demands immediate action." *Id.* But we stressed that there must be evidence that "the circumstances constituted an emergency as it is understood in its ordinary context." *Id.* *Brandes* does not stand for the principle that every argument is an emergency. In that case, we concluded that there was sufficient evidence of an emergency because the argument was vociferous and lasted a long time, the defendant was asked to leave the victim's home multiple times and refused, the defendant

briefly left the house after an initial 911 call and then came back and continued the argument, and the victim testified that "she did not know what [the defendant] was capable of doing." *Id.* at 606-07. Here, Barthel testified that it was "a simple argument," negating any claim that there were additional circumstances like those in *Brandes* or those alleged in the complaint that would have made the argument a serious situation requiring immediate action.

The district court determined that it could infer that an emergency existed because the "argument escalated to a level where [Barthel]'s wife felt the need to seek police intervention by calling 911" and because Barthel broke the phone she intended to use to call 911. But, again, Barthel's characterization of the situation as "a simple argument" contradicts the district court's determination that the argument escalated into anything more serious. And the fact that D.B. felt the need to call 911 and Barthel prevented her from doing so does not by itself show that an emergency existed. "Every law shall be construed, if possible, to give effect to all its provisions[,]" and courts presume that "the legislature intends the entire statute to be effective." Minn. Stat. §§ 645.16, .17(2) (2016). A call or attempted call for police assistance and intentional interference with that call are elements of the offense. Minn. Stat. § 609.78, subds. 2(1), 3(a). If the 911 call and interference with that call in themselves established the existence of an emergency, then the legislature would not have made the existence of an emergency a separate element. *See Hersi*, 763 N.W.2d at 343 (explaining that "the existence of an emergency" is a "distinct element of the offense of interference with an emergency call").

Furthermore, for a call to constitute an "emergency call" an emergency must exist at the time of the call or attempted call. Minn. Stat. § 609.78, subd. 3(a); *Hersi*, 763 N.W.2d at 343-44. To commit the offense, the defendant must "intentionally" interfere with or prevent the "emergency call." Minn. Stat. § 609.78, subd. 2(1). For an act to be intentional, the defendant "must have knowledge of those facts which are necessary to make [his] conduct criminal and which are set forth after the word 'intentionally.'" Minn. Stat. § 609.02, subd. 9(3) (2014). Therefore, an emergency must exist and the defendant must have knowledge of the facts creating the emergency at the time he interferes with the call. Barthel breaking D.B.'s phone could not have created the requisite emergency because he could not have intentionally interfered with an emergency call if no emergency existed before he broke the phone.

The factual basis for Barthel's guilty plea does not establish the existence of an emergency at the time Barthel broke D.B.'s phone. Accordingly, Barthel's plea is invalid, and the district court abused its discretion by denying his petition for postconviction relief.

Reversed and remanded; motion denied.