STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0286

State of Minnesota,
Respondent,

vs.

Bobby Joe Houle,
Appellant.

Filed November 27, 2017
Affirmed
Reilly, Judge

Cass County District Court
File No. 11-CR-16-804

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

Barbara Harrington, Acting Cass County Attorney, Benjamin T. Lindstrom, Assistant County Attorney, Walker, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Reilly, Judge; and Reyes, Judge.

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

REILLY, Judge

On appeal from his convictions of domestic assault and threats of violence, appellant Bobby Joe Houle, argues that his conviction of threats of violence must be reversed because

the factual basis established during his guilty plea was insufficient to prove his guilt. Because we conclude that the plea colloquy and petition, along with the record evidence as a whole, established a sufficient factual basis for appellant's guilty plea to the threats-of-violence charge, we affirm.

FACTS

Appellant was charged with (1) domestic assault, (2) second-degree assault with a dangerous weapon, (3) threats of violence, (4) obstructing legal process with force, and (5) fleeing a peace officer for an incident that occurred the morning of May 4, 2016, involving a report by C.M.C. of domestic assault and suicidal threats.

Appellant challenged law enforcement's initial entry into his residence at a contested omnibus hearing. At that hearing, three officers involved testified about the events that led to their entry into the residence, and one officer's body-camera video was admitted into evidence. The officer testimony, body-camera video,[1] and criminal complaint reveal the following.

The morning of May 4, 2016, law enforcement were dispatched to a residence in Cass Lake on a report of domestic violence and a possible suicidal person. C.M.C. spoke to officers while at a different location. She said that appellant, her boyfriend, assaulted her while their two children were present. An officer observed a recent cut on C.M.C's forehead, bruising around her nose, and a "knot" on the left side of her eyebrow. C.M.C.

[1] Only the portion of the body-camera video leading up to the entry of the residence was considered by the district court for the purposes of appellant's motion to suppress evidence. On review, we also consider only that portion of the video.

said that appellant hit her with closed fists, held her in a headlock with her head to the floor, and threatened to further assault her. C.M.C. also said that appellant threatened to kill himself. She wanted the children back because they were still with appellant at the Cass Lake residence that morning.

Officers attempted to make contact with appellant at the Cass Lake residence. Officers knocked on the residence's door and windows a number of times, identifying themselves, but no one came to the door. Officers observed window coverings moving and a bathroom light turn on and off, but they could not see anyone inside. One officer could hear children inside. Officers later testified at a hearing that they were concerned that appellant had already harmed or would harm himself or the children.

Officers attempted to kick down the residence's door, but were unsuccessful. They ultimately entered the home through a window, and appellant ran into the bathroom and locked the door. As one officer was attempting to enter the bathroom, appellant said, "Don't do it, I have a knife." According to the criminal complaint, appellant stated that he was willing to use the knife to protect himself from the officers.

After officers gained entry into the bathroom, appellant retreated to the bathtub behind a shower curtain. Officers observed appellant holding a knife to his neck. Officers asked appellant to drop the knife. One officer used a Taser against appellant. When the Taser failed to maintain contact, appellant cut his wrists with the knife he was holding. Appellant dropped the knife and was provided medical attention. He was taken to the hospital, and after surgery he was transported to the jail.

On October 6, 2016, without the district court's ruling on his challenge to the officers' initial entry into the Cass Lake residence, appellant pleaded guilty to an amended count 1, domestic assault as a gross misdemeanor, and to count 3, felony threats of violence. At the plea hearing appellant signed a plea petition with the assistance of counsel. He admitted to assaulting C.M.C. and recounted the events leading up to locking himself in the bathroom. The following is the plea colloquy for the threats-of-violence charge:

> PROSECUTOR: And what kind of things did you say to the officer that makes you guilty of the threats of violence charge?
> APPELLANT: I told them I had a knife.
> PROSECUTOR: Okay. And did you suggest that you might use that knife against them?
> APPELLANT: Yes, I did.
> PROSECUTOR: Okay. And did you have a knife?
> APPELLANT: Yes, I did.
> PROSECUTOR: And you'd agree that threatening to use a knife against somebody is essentially threatening to commit a second-degree assault?
> APPELLANT: Yes.
> . . . .
> PROSECUTOR: And you'd agree that under the circumstances that was, at a minimum, in reckless disregard of the risk that it might cause terror in someone?
> APPELLANT: I do.

The district court accepted appellant's guilty plea. On November 21, 2016, appellant was sentenced to serve one year in local confinement.

Appellant now appeals the judgment of conviction.

D E C I S I O N

Appellant argues that the factual basis established during his guilty plea to the threats-of-violence charge was insufficient to prove his guilt. While appellant did not move to withdraw his guilty plea before the district court, a defendant may appeal directly from

a judgment of conviction contending that the record made at the time the plea was entered is inadequate. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989).

Assessing the validity of a guilty plea presents a question of law that appellate courts review de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). To withdraw a guilty plea after sentencing, a defendant must show withdrawal is necessary to correct a manifest injustice. *Id*. at 94 (citing Minn. R. Crim. P. 15.05, subd. 1). A manifest injustice exists when a court accepts an invalid guilty plea. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent. *Raleigh*, 778 N.W.2d at 94 (citation omitted). To satisfy the accuracy requirement, a guilty plea must be established on a "proper factual basis." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). The main purpose of the accuracy requirement is to "protect a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial." *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983).

The usual way a district court establishes a proper factual basis is to ask the defendant to express in his or her own words what happened. *Trott*, 338 N.W.2d at 251 (citation omitted). Defense counsel or the prosecutor may also inquire. *Ecker*, 524 N.W.2d at 716. Upon questioning, the defendant's statement will usually "suggest questions to the court which then, with the assistance of counsel, can interrogate the defendant in further detail." *Trott*, 338 N.W.2d at 251. A district court "must be particularly attentive to situations in which a defendant is pleading guilty and is asked only leading questions by counsel." *Ecker*, 524 N.W.2d at 716.

As a preliminary matter, appellant asserts that his guilty plea cannot be supplemented by evidence outside of the plea petition and colloquy to assess its validity. Appellant's assertion is not supported by caselaw. "[A] defendant may not withdraw his plea simply because the court failed to elicit proper responses if the record contains sufficient evidence to support the conviction." *Raleigh*, 778 N.W.2d at 94 (citation omitted). By pleading guilty and "freely admit[ting]" the charges, a defendant "judicially admit[s] the allegations contained in the complaint." *Trott*, 338 N.W.2d at 252. A plea petition and colloquy may be supplemented by such things as written statements by witnesses, transcripts of grand jury proceedings, facts alleged in a criminal complaint, and photographs. *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012); *Trott*, 338 N.W.2d at 252; *State v. Eller*, 780 N.W.2d 375, 381 (Minn. App. 2010), *review denied* (Minn. June 15, 2010). In *Lussier*, the supreme court upheld a district court ruling that there was an adequate factual basis for a guilty plea to the crime of first-degree murder based on facts in a grand-jury transcript admitted into evidence without objection. 821 N.W.2d at 589. Part of the record before the district court in *Lussier* was a body microphone recording from an officer that was played for the grand jury. *Id*. at 584.

Appellant argues that the rule in *Trott* does not apply here because appellant was not "carefully interrogated" by the district court judge, and only admitted to a statement that would "suggest" that he "might" use a knife against the officers. Further, appellant argues that the probable-cause standard for a criminal complaint is distinct from the higher standard in establishing an adequate factual basis for a guilty plea. But appellant misstates the standard: if admissions to each detailed fact on each element of a crime were the standard to allow

examination of the outside record, then there would be no need to consult any such record outside of the plea hearing. Further, appellant's argument regarding the probable-cause standard is unavailing because the court in *Trott* held that courts may supplement the plea hearing with a criminal complaint, which, by its nature, would only amount to probable cause unless a defendant freely admits to the charges. 338 N.W.2d at 252.

Appellant is correct that courts cannot *always* look to the record evidence to supplement a plea petition and colloquy. Cases suggest that a defendant must first willingly make admissions to the basic elements of the crime. *Lussier*, 821 N.W.2d at 585; *Trott*, 338 N.W.2d at 252. For example, in one recent unpublished opinion, this court would not consider a portion of the criminal complaint when assessing the factual basis for a guilty plea because the defendant failed to acknowledge certain allegations in the complaint. But here, appellant did not equivocate or make contradicting statements in conflict with the record during the plea colloquy because he admitted to speaking words that constituted a threat, and that his acts were reckless. Like in *Trott*, appellant "freely admitted" that he committed each element of the crime. 338 N.W.2d at 252. Accordingly, evidence in the record may supplement the plea petition and colloquy.

An adequate factual basis establishes all of the elements of the crime. *Barnslater v. State*, 805 N.W.2d 910, 914 (Minn. App. 2011). In order for appellant to be found guilty of threats of violence, the record must show that appellant (1) threatened, directly or indirectly, to commit a crime of violence, and (2) acted either (a) with a purpose to terrorize another, or (b) in reckless disregard of the risk of causing such terror. Minn. Stat. § 609.713, subd. 1 (2016). A "threat" is a declaration of an intention to injure another by some unlawful

act. *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). A threat need not be explicit, and the test is "whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Id*. (quotation omitted).

The facts in the record as a whole, in addition to the plea petition and colloquy, are sufficient to conclude that appellant's plea was accurate. In accordance with the requirement in *Trott*, the prosecutor asked appellant an open-ended question: "[W]hat kind of things did you say to the officer that makes you guilty of the threats of violence?" 338 N.W.2d at 251. Appellant said in his own words, "I told them I had a knife." This suggested further follow-up questions, and the prosecutor asked the leading question: "[D]id you suggest that you might use that knife against them?" Appellant replied in the affirmative.

Although the additional questions were leading, the factual basis is sufficient to establish the first element of threats of violence when the plea petition and colloquy are viewed in the context of the whole record. Before pleading guilty to threats of violence, appellant had just pleaded guilty to domestic assault. He stated that he assaulted his girlfriend on the same day as the threats-of-violence charge. The criminal complaint, the contested omnibus-hearing transcript, and the body-camera video admitted into evidence during that hearing, show that prior to the incident, appellant caused physical injuries to C.M.C.'s face, had threatened suicide, and locked himself in his house with two children. Under these circumstances, appellant's statement "Don't do it, I have a knife," is a communication that would have a tendency to create a reasonable apprehension that appellant would act and use the knife against the police officers if they entered the bathroom.

Appellant relies on *State v. Olson*, where this court held that offensive expressions of hope that someone would kill a police officer were not enough to establish the threat element in a threats-of-violence charge. 887 N.W.2d 692, 698-99 (Minn. App. 2016). Olson was drunk, had recently hit his head, and expressed a hope that someone "puts a slug" in an officer's head. *Id*. at 695-96. Appellant argues that this case is like *Olson* because he was suffering from a mental-health crisis and only admitted that his words "suggested" that he "might" use the knife against the officers. But, as the state argues, unlike *Olson*, appellant was not merely hoping that a third person in the future might harm the officers. Instead, appellant's statement "I have a knife," was an implied threat that appellant himself would harm the officers if they entered the bathroom. *Olson* is inapposite.

The second element—an intent to terrorize or an action in reckless disregard of terrorizing—was established at the plea hearing solely by appellant answering in the affirmative the prosecutor's conclusory and leading question about whether appellant acted "in reckless disregard of the risk that [his actions] might cause terror in someone." While the prosecutor used leading questions, when the plea colloquy here is viewed in the context of the whole record, there is an adequate factual basis to show that appellant acted with recklessness. While the element of recklessness "requires deliberate action in disregard of a known, substantial risk," the crime requires no specific intent. *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009). Appellant's actions of assaulting his girlfriend, threatening suicide, not answering the door to the house when his two children were inside, and then running into the bathroom and stating he had a knife when police tried

to enter, all created a substantial risk that he would cause terror in the officers, and appellant disregarded this risk.

Appellant relies on several cases that are distinguishable. First, appellant relies on *Raleigh*, where the supreme court strongly discouraged the use of leading questions when establishing a factual basis for a plea. 778 N.W.2d at 95. But in *Raleigh*, the supreme court, nevertheless, found the guilty plea was accurate when the defendant affirmatively answered a long leading question establishing the premeditation element in a murder charge. *Id.* at 95-96. Second, appellant relies on *Ecker*, 524 N.W.2d at 717, for the proposition that leading questions invalidated the plea. But in *Ecker*, the issue about the accuracy of the plea arose because of a lapse in the defendant's memory, and the supreme court noted that even though Ecker claimed he could not remember shooting the victim, Ecker believed the state's evidence was overwhelming and that he would be convicted. *Id*. Third, appellant also relies on *Shorter v. State*, where the supreme court allowed the defendant to withdraw his plea to correct a manifest injustice because the court had misgivings about the district court's acceptance of a plea when the defense counsel asked only leading questions during the plea hearing. 511 N.W.2d 743, 746 (Minn. 1994). However, in *Shorter*, the defendant did not admit to specific facts making up essential elements of the crime and only acknowledged the fact that the alleged victim made certain claims. *Id*. at 744-75.

Appellant also cites to two unpublished opinions from this court where the factual basis for a guilty plea was found insufficient. Unpublished opinions, although not binding precedent, may have persuasive authority. *State v. Zais*, 790 N.W.2d 853, 861 (Minn. App. 2010), *aff'd*, 805 N.W.2d 32 (Minn. 2011). Nonetheless, we have reviewed those cases and

conclude that they are distinguishable because appellant used his own words to describe the conduct that made him guilty.

In sum, while the plea colloquy in this case contained leading questions, the record—which includes the criminal complaint, the witness testimony during the contested omnibus hearing, and the body-camera video—"contains a showing that there is credible evidence available which would support a jury verdict that [the] defendant is guilty of at least as great a crime as that to which he pled guilty." *Lussier*, 821 N.W.2d at 588-89. Accordingly, the factual basis for appellant's guilty plea was sufficient.

Affirmed.