STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0314

State of Minnesota,
Respondent,

vs.

Ozell Ellis Lashaun Hardy,
Appellant.

Filed December 24, 2018
Affirmed
Florey, Judge

Stearns County District Court
File No. 73-CR-17-5498

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

FLOREY, Judge

Appellant Ozell Ellis Lashaun Hardy appeals one of his convictions of second-degree assault with a dangerous weapon, arguing there was an insufficient factual basis

supporting his plea. He argues that he must be permitted to withdraw his plea because the record does not establish that he intended to cause the bystander, R.O., to fear immediate bodily harm or death. We affirm.

FACTS

In June 2017, appellant spotted a previous acquaintance of his, K.W., at a laundromat. Appellant was upset with K.W. because he believed that K.W. had broken into his home the prior winter and stolen some of his belongings. Upon seeing K.W., appellant grabbed a baseball bat and bandana from his vehicle, entered the laundromat, and walked over to where K.W. was seated. Appellant struck K.W. numerous times with the bat in the presence of bystanders, some of whom were children. K.W.'s girlfriend, D.P., reported that their 10-month old child was sitting in a car seat immediately next to K.W. as he was being assaulted.

When R.O., an employee of the business, tried to intervene, appellant pointed the baseball bat at her and told her not to come any closer or she would "get this too." R.O. reported to law enforcement that "she was afraid that she was about to be assaulted." Appellant eventually lost control of the baseball bat and thereafter fled the scene.

A few days later, the state charged appellant with two counts of second-degree assault with a dangerous weapon, pursuant to Minn. Stat. § 609.222, subd. 1 (2016). The first count concerned K.W., and the second count R.O. The state also filed a *Blakely* motion seeking an upward durational departure on the grounds that (1) K.W. was particularly vulnerable because he was trying to protect his 10-month old son during the assault and (2) the offense was committed in the presence of two children. The next month,

the state filed a second *Blakely* motion notifying appellant of its intent to seek an aggravated durational departure in the event that appellant was convicted and the jury determined appellant qualified as a "dangerous offender" due to his prior criminal convictions.

In October 2017, a plea hearing was held before the district court. Appellant pleaded guilty to both counts of second-degree assault with a dangerous weapon in exchange for the parties' agreement that the state would dismiss both *Blakely* motions. The state indicated its intention to ask for consecutive sentences, given there were two victims, and the parties understood they would be arguing the sentencing disposition to the court.

At the plea hearing, the factual basis for appellant's guilty plea consisted of the following:

> State: And on this date you did see [K.W.] at the cleaners and you did acquire a baseball bat and then had a bandana on and entered the cleaners and went over to where he was seated; is that correct?
>
> Appellant: Correct.
>
> State: And you would agree that you did then strike him numerous times with the baseball bat in the head and body area?
>
> Appellant: Correct.
>
> State: Now, it's also true that there was a worker there indicated with the initials R.O. You would agree that a female employee did come over to your location, I think tried to kind of get the situation to stop. You agree that you did raise the baseball bat and told her that she shouldn't come any

closer or she would get it too or something like that; is that fair to say?

Appellant: I will plead guilty to that.

State: And it's fair to say that based on you having the bat, stopping and saying those things to her, she was in fear and then backed away?

Appellant: Okay.

State: Is that accurate?

Appellant: Correct.

The district court then asked appellant's counsel to inquire of his client "so some of it's more in his own words rather than just answering questions from the prosecutor." During the defense's inquiry, the district court judge jumped in and had the following exchange with appellant:

Court: So you saw [K.W.] in the laundromat—or you saw him at the cleaners?

Appellant: Yeah.

Court: So what did you do then that makes you guilty of—

Appellant: Yeah. Then I went and I had a bat in the car and bandana.

Court: So then what did you do?

Appellant: That's when I went in and I assaulted [K.W.].

Court: When you say you assaulted him, what did you do?

Appellant: Hit him with the baseball bat multiple times.

Court: Multiple times?

Appellant: Yeah.

Court: And was there—there was another person present and, in fact, there was a small child present?

Appellant: Correct.

Court: Fair to say that they would have been afraid?

Appellant: Yes.

The district court found that appellant had provided the court with a sufficient factual basis to allow it to accept his guilty pleas to the two counts of second-degree assault. The following month, a sentencing hearing was held wherein the district court denied appellant's request for a downward departure and sentenced appellant to 54 months for the count concerning K.W., and 21 months for the count concerning R.O., to be served consecutively, for a total 75-month sentence. This appeal followed.

D E C I S I O N

Appellant asks this court to reverse one of his convictions for second-degree assault, arguing that his guilty plea was invalid for lack of a factual basis establishing that he intended to cause fear of immediate bodily harm or death to R.O.

There is no absolute right to withdraw a guilty plea after it has been entered. *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997). However, "a court must allow withdrawal of a guilty plea if withdrawal is necessary to correct a 'manifest injustice.'" *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010) (quoting Minn. R. Crim. P. 15.05, subd. 1). Manifest injustice occurs if a plea is not valid. *Id.* at 94. A constitutionally valid plea must be

voluntary, intelligent, and accurate. *Id.*; *see also Perkins*, 559 N.W.2d at 688. The defendant bears the burden of showing that his plea was invalid. *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012). The validity of a guilty plea is a question of law we review de novo. *Raleigh*, 778 N.W.2d at 94.

A plea must be accurate to ensure that a defendant is not pleading guilty to a more serious crime than that for which he could be convicted if his case went to trial. *Id.* An accurate plea must be established on a proper factual basis. *Lussier*, 821 N.W.2d at 588. A proper factual basis exists "if the record contains a showing that there is credible evidence available which would support a jury verdict that defendant is guilty of at least as great a crime as that to which he pled guilty." *Nelson v. State*, 880 N.W.2d 852, 859 (Minn. 2016) (quotation omitted). If the defendant makes statements that negate an essential element of the charged crime, the factual basis is rendered inadequate because such statements are inconsistent with a guilty plea. *Id.* In addition to the defendant's statement, there are other ways to establish a factual basis, including "testimony of witnesses and statements summarizing the evidence." *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983).

To evaluate the accuracy of appellant's guilty plea, we must identify the elements required for the charge. The essential elements include (1) assault, defined in Minn. Stat. § 609.02, subd. 10(1) (2016), as "an act done with intent to cause fear in another of immediate bodily harm or death" and (2) acting with a dangerous weapon. Minn. Stat. § 609.222, subd. 1. "'With intent to' . . . means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(4) (2016).

Appellant argues that, at the plea hearing, he never admitted that he intended to cause R.O. fear of immediate bodily harm or death. The state, on the other hand, argues that appellant need not have expressly stated such an intent. Rather, the state argues, the court could infer intent based on appellant's admissions as a whole. Appellant contends that the most the court could infer was "[his] intent to encourage R.O. to stay back, not to cause her fear that he was about to cause her bodily harm or kill her."

We conclude there was a sufficient factual basis to allow the district court to accept appellant's guilty pleas to the two counts of second-degree assault with a dangerous weapon. While it is true that appellant never expressly stated in his plea that he intended to cause R.O. fear of immediate bodily harm or death, the district court was not limited in its finding of a sufficient factual basis to consider only appellant's colloquy. *See Lussier*, 821 N.W.2d at 589 (reiterating that "the plea petition and [the defendant's] colloquy may be supplemented by other evidence" and that the factual basis need not "appear in the plea hearing transcript verbatim").

In addition to appellant's accession that his act (of raising the baseball bat and telling R.O. that she should not come closer or she would "get this too") could cause R.O. fear, he signed a completed plea petition pleading guilty to the offense charged, and, importantly, he never made any statements negating an essential element of the offense. *See Nelson*, 880 N.W.2d at 859 ("[T]he 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." (quotation omitted)).

Further, appellant never denied the allegations in the state's complaint. *See Trott*, 338 N.W.2d at 252 (affirming the record established an adequate factual basis to sustain the defendant's guilty plea to second-degree assault because the record contained, among other things, "a copy of the complaint and defendant, by his plea of guilty, in effect judicially admitted the allegations contained in the complaint"). In the state's complaint, K.W. reported that as his girlfriend, D.P., came to his aid, "he saw [appellant] wind up as if he was going to hit her and R.O., and ultimately the bat came out of his hand and [appellant] fell to the ground. At that point . . . [appellant] got up and ran to the door and ultimately fled." Similarly, R.O. reported that "at one point, [appellant] stopped hitting [K.W.] and held the bat telling her to "Hold on. Don't come any closer or you'll get this too." She reported that "[appellant] was holding the bat and pointing it at her and she was afraid that she was about to be assaulted."

Although a finding of intent generally cannot be based solely on the effect the actor's conduct had on the victim, "[i]ntent may be proved by circumstantial evidence, including drawing inferences from the defendant's conduct, the character of the assault, and the events occurring before and after the crime." *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 769 (Minn. App. 2001); *see also Nelson*, 880 N.W.2d at 860 ("Intent is generally proved by inferences drawn from a person's words or actions in light of all the surrounding circumstances." (quotation omitted)). A fact-finder can also infer that an actor "intends the natural and probable consequences of his actions." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

In the present case, appellant does not dispute having raised the baseball bat at R.O. and warning her to not come any closer. Nor does he dispute striking K.W. multiple times with the bat in front of R.O. and other bystanders. In light of the surrounding circumstances, a fact-finder could reasonably infer that appellant's raising of the bat toward R.O. with the statement, "[d]on't come any closer or you'll get this too," was intended to cause R.O. fear of immediate bodily harm, rather than merely "encourage R.O. to stay back." *See State v. Soine*, 348 N.W.2d 824, 827 (Minn. App. 1984) (affirming the defendant's conviction of second-degree assault against a bystander because the defendant's brandishing of a knife at the bystander and telling the bystander "to shut up" or "I'll use it on you," was intended to cause the bystander fear of immediate bodily harm), *review denied* (Minn. Sept. 12, 1984).[1]

Appellant also challenges the state's use of leading questions at the plea hearing. He argues that because he merely assented to the state's leading questions, the record is insufficient to support a guilty plea. Appellant cites numerous cases to support his contention that the use of leading questions to establish a factual basis has consistently been discouraged by this court and the Minnesota Supreme Court. While true that the supreme court has "repeatedly discouraged the use of leading questions to establish a factual basis," it has never held that the use of leading questions, in and of itself,

[1] In *Soine*, we acknowledged that the defendant, whose intent "was to cause [the bystander] to move," "could have merely requested him to move, but accompanying the 'request' with the phrase, 'I'll use it on you,' while holding a knife is more effective—effective because it tends to cause fear of immediate bodily harm in the person addressed." *Id.*

automatically invalidates a plea of guilty. *Nelson*, 880 N.W.2d at 860. As such, we conclude that appellant's argument on this issue lacks any merit.

Lastly, we note that appellant's plea of guilty to second-degree assault of R.O. was the product of a plea agreement involving pleas to two different offenses wherein the state made significant concessions. Specifically, in exchange for appellant's plea of guilty to the two counts, the state agreed to dismiss both of its *Blakely* motions seeking an upward durational departure. The proper remedy under the circumstances, therefore, would be invalidation of the entire plea agreement—which is not what appellant is requesting here—otherwise, both parties would not receive the benefit of their bargain. *See Beltowski v. State*, 183 N.W.2d 563, 566 (Minn. 1971) ("A defendant, no less than a prosecutor, should not be permitted to . . . use a plea of guilty as a tactical device to frustrate the prosecution of an offense which the evidence would support."); *see also State v. Lewis*, 656 N.W.2d 535, 538-39 (Minn. 2003).

Here, appellant received exactly what he bargained for. Allowing him to withdraw one plea in a multi-count plea agreement would, in effect, permit appellant to use that plea as a "tactical device" to limit the state's prosecution against him. We see no reason to permit appellant, without sufficient cause, to renege on a fully performed plea agreement.

Affirmed.