STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1629

State of Minnesota,
Respondent,

vs.

Lawrence Raymond Burns,
Appellant.

Filed August 19, 2019
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CR-17-8159

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Charles S. Gerlach, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Reilly, Judge.

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

REILLY, Judge

In this direct appeal from his conviction for fourth-degree criminal sexual conduct, appellant challenges the validity of his *Norgaard* plea. Because appellant tendered a valid *Norgaard* plea and the record contains a sufficient factual basis to support his plea, we affirm.

FACTS

Respondent State of Minnesota charged appellant Lawrence Raymond Burns with fourth-degree criminal sexual conduct under Minn. Stat. § 609.345, subd. 1(d) (2016), for engaging in sexual contact with a victim, knowing or having reason to know that the victim was physically helpless. Appellant entered a *Norgaard* plea[1] and agreed to plead guilty to the charged offense in exchange for a prison sentence. Appellant also signed a *Norgaard* addendum, acknowledging that he reviewed the evidence the state would offer against him at trial, did not recall the circumstances of the offense, believed there was a substantial likelihood he would be found guilty beyond a reasonable doubt based on the strength of the state's evidence, and did not claim he was innocent. At the plea hearing, appellant

[1] In a *Norgaard* plea, the defendant enters a plea of guilty but "claims a loss of memory, through amnesia or intoxication, regarding the circumstances of the offense but the record establishes that the defendant is guilty or likely to be convicted of the crime charged." *State v. Johnson*, 867 N.W.2d 210, 215 (Minn. App. 2015) (quotations omitted), *review denied* (Minn. Sept. 29, 2015); *see also State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871-72 (Minn. 1961) (affirming district court's acceptance of guilty plea where defendant claimed loss of memory regarding circumstances of offense).

entered a plea of guilty to the charged offense. The district court accepted appellant's *Norgaard* plea and imposed the agreed-upon sentence. This appeal follows.

D E C I S I O N

I. Legal Standard

Appellant challenges the validity of his *Norgaard* plea. A defendant does not have an absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). However, "a court must allow a defendant to withdraw a guilty plea, even after sentencing, if 'withdrawal is necessary to correct a manifest injustice.'" *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (quoting Minn. R. Crim. P. 15.05, subd. 1). A manifest injustice occurs if a plea is not valid. *Raleigh*, 778 N.W.2d at 94. To be valid, a plea must be accurate, voluntary, and intelligent. *Id*. We review the validity of the plea de novo. *Id*.

II. Accuracy of Appellant's *Norgaard* Plea

Appellant does not challenge the voluntary or intelligent nature of his plea, and the sole issue presented on appeal is whether the *Norgaard* plea was accurate. "A guilty plea is inaccurate if it is not supported by a proper factual basis." *Johnson*, 867 N.W.2d 210 at 215. A factual basis is proper if there are sufficient facts on the record to establish that the defendant's conduct was within the charge to which he pleaded guilty. *Id*. If the defendant's statements during his plea negate an essential element of the offense, the factual basis for the plea is inadequate. *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003). The adequacy of the factual basis is usually established by the defendant explaining the circumstances surrounding the crime. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). In a *Norgaard* plea, a factual basis may be established if the defendant "claims a loss of memory, through amnesia or intoxication, regarding the circumstances of the offense" but the record establishes that "the defendant is guilty or likely to be convicted of the crime charged." *Id*.

a. Appellant's Plea Qualifies as a *Norgaard* Plea

Appellant argues that his plea is invalid because it does not qualify as a *Norgaard* plea. "A plea constitutes a *Norgaard* plea if 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." *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009), *review denied* (Minn. Apr. 21, 2009). District courts should accept *Norgaard* pleas "with caution," making certain that the defendant understands his rights, as such a plea is not supported by the defendant's unequivocal admission of guilt. *Ecker*, 524 N.W.2d at 716-17.

Here, the district court stated at the hearing that appellant "would be entering the plea on a *Norgaard* basis." Defense counsel agreed that appellant was entering a *Norgaard* guilty plea, and led appellant through the plea petition. Appellant indicated that he understood the plea petition and waived his right to a jury trial. The district court indicated that appellant provided a "knowing, intelligent, and voluntar[y]" waiver of his rights, and asked counsel to "go through the *Norgaard* portion of this plea" with appellant. Defense counsel explained the *Norgaard* addendum to appellant on the record, and appellant confirmed that his attorney "read through it line by line" with him. Appellant agreed that by entering a *Norgaard* plea, he was stating that he could not "remember all of the detail because of [his] state of intoxication." The exchange continued:

COURT: And do you have any recollection of the events that happened that night?

DEFENDANT: Not in a whole year.

COURT: Okay. And were you intoxicated at the time of those events?

DEFENDANT: Yes. I drank a half a bottle of whiskey.

COURT: And do you have any reason —

DEFENDANT: In a short period of time.

COURT: Do you have any reason to doubt the accuracy of the reports that were compiled?

DEFENDANT: No.

COURT: Do you understand that [if] you went to trial, those reports would be what the State's witnesses would be testifying to?

DEFENDANT: That is correct.

COURT: So you've told the Court that you believe that if there was a trial, the evidence that would be in those reports would be exactly what the witnesses would be testifying to.

DEFENDANT: Correct.

COURT: And you agree that there would be a substantial likelihood that a jury would hear all that and find you guilty beyond a reasonable doubt?

DEFENDANT: Correct.

COURT: And you're not making any claim today that you're innocent of what those reports would say?

DEFENDANT: Not to my knowledge.

COURT: Well — okay.

DEFENDANT: I'm saying the knowledge that I — once I looked at everything, questioned everything, put the reports

> there, questioned it, broke it down, no. The jury would find me guilty.
>
> COURT: Okay.
>
> DEFENDANT: There's no doubt about it.

When entering a *Norgaard* plea, either counsel or the district court should "indicate explicitly on the record" that the defendant is entering such a plea, and "[t]he defendant should be questioned directly regarding whether he or she understands the legal implications of such a plea." *Ecker*, 524 N.W.2d at 717. The exchange between the district court and appellant demonstrates that this occurred. Appellant stated in his own words that he could not remember the events due to intoxication, did not claim to be innocent, and recognized that a jury would find him guilty given the state's evidence. Appellant agreed that by proceeding with the *Norgaard* plea, he would be "just as guilty as [he] would be if [he] otherwise remembered the incident and were able to testify from [his] memory." The record establishes that appellant understood the terms of the plea agreement and the *Norgaard* addendum, and wanted to plead guilty on that basis. Appellant's plea constitutes a valid *Norgaard* plea.

b. A Sufficient Factual Basis Supports the Charge

Appellant argues that even if his plea qualifies as a valid *Norgaard* plea, the factual basis provided by the state did not support the criminal charge. Appellant entered a plea of guilty to fourth-degree criminal sexual conduct, which provides that "[a] person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree if . . . the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." Minn. Stat. § 609.345, subd. 1(d). "Sexual contact" includes "the intentional touching by the actor of the complainant's intimate parts." Minn. Stat. § 609.341, subd. 11(a)(i) (2016). Such acts must be committed without the complainant's consent, and committed with sexual or aggressive intent. *Id.*, subd. 11(a). "Physically helpless" includes a person who is "asleep or not conscious." *Id.*, subd. 9 (2016). "Intimate parts" include the genital area, groin, or inner thigh of another person. *Id.*, subd. 5 (2016).

The record contains ample evidence that the plea was accurate because appellant engaged in prohibited sexual contact with the victim by touching her vagina while she was physically helpless. A 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." *Sanchez v. State*, 868 N.W.2d 282, 289 (Minn. App. 2015) (citation omitted), *aff'd*, 890 N.W.2d 716 (Minn. 2017). According to the complaint and the probable-cause statement, the victim told a police officer that she fell asleep in an empty bedroom during a party and woke up to an unknown male rubbing her vagina. The prosecutor questioned appellant at the plea hearing:

> PROSECUTOR: And would you agree that [the victim] would testify that she felt you touching her down by her vagina?
>
> DEFENDANT: That's what I would have — that's what I believe would be said by the reports and her statement that she gave the police.
>
> PROSECUTOR: Yeah. And based on all of the reports, you would agree that [the victim] was sleeping when the touching started?

> DEFENDANT: That's my understanding, yes. It's —
>
> PROSECUTOR: . . . And that she never gave you permission to do this, to touch her on her — outside of —
>
> DEFENDANT: No.
>
> PROSECUTOR: — her vagina? No. All right.

The state also presented forensic evidence that the victim's DNA was present on appellant's hands. The record evidence demonstrates that appellant engaged in prohibited sexual contact with the victim by touching her vagina, and that she did not consent to the sexual contact because she was asleep.

Appellant acknowledges that the state's evidence "was sufficient to convict him," but claims that the state did not present direct evidence regarding his state of mind at the time of the offense. Appellant offers an alternative explanation for the evidence, claiming that the sexual contact was "a momentary touch involving a mistake." Criminal sexual conduct, however, does not require any specific intent on the part of the actor; all that is required is the general intent to do the prohibited act. *See State v. Lindahl*, 309 N.W.2d 763, 766-67 (Minn. 1981) (noting that only general intent is required for criminal-sexual-conduct offenses and that voluntary intoxication is not a defense to general-intent crimes); *see also State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012) ("[G]eneral intent only requires an intention to make the bodily movement which constitutes the act which the crime requires.").

"[R]egardless of whether an offense is described as a specific- or general-intent crime, a defendant must voluntarily do an act or voluntarily fail to perform an act." *Fleck*, 810 N.W.2d at 309 (quotation omitted). "The volitional requirement is generally expressed in terms of an exercise of the will. A reflex movement is not subject to the control of the will." *Id*. (quotation omitted). Here, the victim reported that appellant touched her vagina while she was asleep. During the plea hearing, appellant acknowledged that the victim would testify that she felt appellant touching her vagina, and there is no indication in the record that appellant's touching of the victim was anything other than a volitional act. In addition, appellant agreed that he was not claiming to be innocent of the charge, acknowledged that the jury would find him guilty, and agreed that the "state's evidence was sufficient to convict him." *Ecker*, 524 N.W.2d at 717. The factual basis established by the state's anticipated evidence, and appellant's admission that there was a substantial likelihood the jury would find him guilty beyond a reasonable doubt, supports each element of the charge.

Lastly, appellant argues that his plea was inaccurate because it was based on leading questions by the prosecutor. "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). As such, the use of leading questions to establish a *Norgaard* plea is discouraged. *Ecker*, 524 N.W.2d at 717. However, a prosecutor's use of leading questions will not invalidate a guilty plea as long as there is a sufficient factual basis in the record. *Raleigh*, 778 N.W.2d at 95-96. Here, appellant testified that he reviewed the evidence, the plea petition, and the *Norgaard* addendum with his attorney, and agreed that the testimony presented by the state would be sufficient to convict him of the charged crime. The district court questioned appellant to ensure that he understood his rights, and determined that an adequate factual basis was established despite the prosecutor's use of leading questions. The record demonstrates that appellant's guilty plea is supported by a sufficient factual basis. Because appellant's *Norgaard* plea was accurate, voluntary, and intelligent, we affirm.

Affirmed.