STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0256

State of Minnesota,
Respondent,

vs.

Darryl Donail Walker, Sr.,
Appellant.

Filed January 31, 2022
Affirmed
Gaïtas, Judge

Polk County District Court
File No. 60-CR-19-1927

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, First Assistant County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Smith, Tracy M., Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Darryl Donail Walker, Sr., challenges his conviction and sentence for first-degree sale of a controlled substance, arguing that his guilty plea is invalid, he

received ineffective assistance of trial counsel, and the prosecutor committed misconduct during sentencing. We affirm.

FACTS

In 2019, respondent State of Minnesota charged Walker with first-degree sale of methamphetamine, first-degree possession of methamphetamine, and failure to affix a tax stamp. *See* Minn. Stat. §§ 152.021, subds. 1(1), 2(a)(1), 297D.09, subd. 1a (2018). After numerous pretrial proceedings—including two competency evaluations of Walker, the second of which found Walker to be competent—the parties reached a plea agreement. Walker agreed to plead guilty to the sale offense. In exchange, the state agreed to dismiss the additional charges and to recommend a sentence of no more than 240 months' imprisonment.

The agreement was memorialized at a plea hearing held in September 2020. After acknowledging his guilt of first-degree sale of methamphetamine, Walker provided a factual basis for his plea, discussing the underlying facts with both his attorney and the prosecutor. The prosecutor asked Walker a series of questions regarding where he had gotten the methamphetamine and what he had intended to do with it. Walker explained that an acquaintance, S.B., had given him a number for his "uncle" Nate, and suggested that Walker contact Nate. Unbeknownst to Walker, Nate was an undercover officer with the Crookston police department. Walker then delivered the "stuff" to Nate in Erskine at the direction of S.B. and another acquaintance, V.N. The prosecutor asked Walker whether the "stuff" that he was supposed to deliver to Nate was methamphetamine, and Walker agreed that it was. Walker ultimately admitted that he had received three ounces of

methamphetamine in a bag from V.N. and that he was supposed to drop it off at the Win-E-Mac Travel Center in Erskine.

During the factual-basis discussion, there was some confusion about whether Walker had intended to "sell" the methamphetamine he was delivering. The prosecutor asked, "[T]he agreement was that you were supposed to drop off two ounces of methamphetamine to Nate and receive $1,800 in return, does that sound right?" Walker answered, "That's not right, sir. . . . I was supposed to drop it off, but I wasn't supposed to see no money." The prosecutor then further questioned Walker about his intent:

> What I'm getting at is while you may say you were doing a favor for [V.N.] or [S.B.], the reality is you were in possession of approximately three ounces of methamphetamine with the intent to deliver it to another person, whether you were going to get paid for it or not, correct? . . . And, in the State of Minnesota, if you possess methamphetamine with intent to give it to another person, to sell it, deliver it, exchange it, distribute it, whatever, whether or not you're going to get money, you're guilty of possession with intent to sell, do you understand that?

Walker answered both questions affirmatively.

Walker also made inconsistent statements regarding the nature of the substance that he received from V.N. He initially stated that he "didn't even think it was real because someone played a game on [him] in St. Cloud [and] gave [him] some . . . SMG stuff and instead it was methamphetamine." But he later admitted that he knew that what he was "supposed to be delivering was methamphetamine."

Finally, the prosecutor confirmed Walker's understanding of his trial rights, the sentence he faced, and the plea agreement. The district court accepted Walker's guilty plea.

Before sentencing, the prosecutor submitted a memorandum asserting that Walker was a "dangerous offender" under Minnesota Statutes section 609.1095, subdivision 2 (2018), and seeking an upward durational departure from the sentencing guidelines on this basis. Walker's attorney also submitted a sentencing memorandum, which requested the presumptive sentence of 105 months.

At sentencing, the district court determined that Walker is a "dangerous offender" who is "a danger to public safety" due to his history of violent crime. The district court sentenced Walker to 180 months in prison.

Walker appeals.

DECISION

I. Walker's guilty plea is constitutionally valid.

Walker first argues that his guilty plea is constitutionally deficient. To satisfy constitutional requirements, a guilty plea must be intelligent, accurate, and voluntary. *Dikken v. State*, 896 N.W.2d 873, 876 (Minn. 2017) (quotation omitted). A defendant bears the burden of showing that a guilty plea does not comport with these requirements. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

Walker did not challenge the constitutionality of his guilty plea in the district court; he raises this claim for the first time on direct appeal. A defendant may attack the validity of a guilty plea on direct appeal. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). But

once a defendant has been sentenced, plea withdrawal is only permissible "if withdrawal is necessary to correct a 'manifest injustice.'" *Raleigh*, 778 N.W.2d at 93 (quoting Minn. R. Crim. P. 15.05, subd. 1). A manifest injustice occurs if a guilty plea is not intelligent, accurate, and voluntary. *Id.* at 94. We apply de novo review in considering the validity of a guilty plea for the first time on appeal. *State v. Johnson*, 867 N.W.2d 210, 214-15 (Minn. App. 2015), *rev. denied* (Minn. Sept. 29, 2015).[1]

Walker contends that his guilty plea is constitutionally invalid because it is not accurate. A manifest injustice occurs when a guilty plea is not accurate. *Raleigh*, 778 N.W.2d at 94. "For a guilty plea to be accurate, a factual basis must be established showing that the defendant's conduct meets all elements of the offense to which he is pleading guilty." *State v. Jones*, 921 N.W.2d 774, 779 (Minn. App. 2018), *rev. denied* (Minn. Feb. 27, 2019); *see also State v. Iverson*, 664 N.W.2d 346, 349-50 (Minn. 2003). If the defendant negates an essential element of the offense during the plea colloquy, the factual basis is not accurate, and the plea is invalid. *Jones*, 921 N.W.2d at 779. But such

[1] Despite the state's argument to the contrary, review of the validity of a guilty plea, even when performed for the first time on appeal, is de novo. The federal authorities provided by the state, including *Greer v. United States*, 141 S. Ct. 2090 (2021), and its analysis of Federal Rule of Criminal Procedure 52(b), are inapposite. Minnesota courts are not bound by the Federal Rules of Criminal Procedure or by United States Supreme Court caselaw interpreting those rules. *See State ex. rel. Humphrey v. Philip Morris, Inc.*, 606 N.W.2d 676, 686-87 (Minn. App. 2000) (stating federal rules and federal caselaw interpreting those rules are helpful only insofar as they "provide valuable guidelines in understanding [Minnesota rules'] purpose and application" where "there are only minor differences between [the federal and state rules]") (quotation omitted), *rev. denied* (Minn. Apr. 25, 2000).

statements may be "corrected" during the plea hearing. *State v. Mikulak*, 903 N.W.2d 600, 605 (Minn. 2017).

Walker pleaded guilty to first-degree sale of a controlled substance. A person is guilty of that offense if "on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of 17 grams or more containing . . . methamphetamine." Minn. Stat. § 152.021, subd. 1(1). "Sell" is broadly defined as "(1) to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture; or (2) to offer or agree to perform an act listed in clause (1); or (3) to possess with intent to perform an act listed in clause (1)." Minn. Stat. § 152.01, subd. 15a (2018). The complaint charged Walker with possessing methamphetamine with the intent to sell it. And at Walker's guilty plea hearing, the prosecutor stated that the plea was to the offense of "Possession with Intent to Sell."

According to Walker, his guilty plea was not accurate because he made statements that negated two essential elements of the offense in question: (1) *knowledge* that the substance in his possession was a controlled substance and (2) *intent* to sell that substance. We examine Walker's statements relating to each of these elements in turn.

Knowledge of the Nature of the Controlled Substance

To commit a drug-possession offense under Minnesota law, a person must have actual knowledge that the item possessed is a controlled substance. *See State v. Ali*, 775 N.W.2d 914, 918 (Minn. App. 2009) (stating that drug-possession crimes require proof of actual knowledge of the nature of the substance), *rev. denied* (Minn. Feb. 16, 2010).

Walker argues that he negated the knowledge element when he stated that he "didn't even think [the methamphetamine] was real."

Preliminarily, we note that Walker's argument assumes, without accompanying authority, that knowledge of the nature of a substance is an element of a *sale* offense. Given the broad language of the definition of "sell," which includes offers and agreements to sell, this proposition may not be universally correct. *See, e.g.*, *State v. Fugalli*, 967 N.W.2d 74, 78-81 (Minn. 2021) (concluding that defendant's guilty plea to first-degree sale of heroin was accurate where he offered to sell more than the threshold amount of 10 grams of heroin but delivered less than that amount because the plain language of the term "sell" does not require the actual delivery of 10 grams or more). But Walker specifically pleaded guilty to possessing methamphetamine with the intent to sell it. Because the sale offense here is predicated on Walker's act of possession, we assume without deciding that Walker's knowledge of the nature of the substance is an element of the offense.

In support of the argument that his statements negated the knowledge element of the offense, Walker cites *Mikulak*. There, the defendant pleaded guilty to the offense of knowingly violating the predatory-offender-registration statute. *Mikulak*, 903 N.W.2d at 602; *see* Minn. Stat. § 243.166 (2020) (predatory-offender-registration statute). During the plea colloquy, he told the district court that he did not realize that the law required him to register within a certain time period. *Id.* at 604-05. After some additional questioning, the district court asked Mikulak whether he was familiar with the time element of the law, to which Mikulak responded, "Yeah, *now I am*." *Id.* at 605 (emphasis added). The supreme court determined that Mikulak's initial statement to the district court regarding his lack of

knowledge negated the knowledge element of the crime. *Id.* And the court concluded that the second statement did not correct the problem but merely affirmed that he did not have the requisite knowledge at the time of the alleged offense. *Id.* Thus, the supreme court held that Mikulak's plea was inaccurate and invalid. *Id.*

Here, Walker's statement that he "didn't even think [the methamphetamine] was real" suggested that he did not have knowledge that the item in his possession was a controlled substance. But unlike Mikulak, Walker subsequently made multiple statements to the contrary. He admitted telling the police that he was in Erskine to deliver methamphetamine. He stated that V.N. had asked him to deliver methamphetamine. He acknowledged that he possessed methamphetamine with intent to deliver it to another person. He admitted that his intent was to give two ounces of methamphetamine to Nate and one ounce to another person. And he agreed that he fulfilled the intent element of the crime. These statements, which were clear admissions that Walker knew he possessed a controlled substance, corrected Walker's initial statement that he did not believe the methamphetamine was real. Because Walker admitted to knowing possession of methamphetamine, his statements established that he had actual knowledge of the nature of the substance.

Intent to Sell

An intent to sell is an essential element of a first-degree drug sale. Minn. Stat. §§ 152.01, subd. 15a, 152.021, subd. 1; *State v. Heath*, 685 N.W.2d 48, 62-63 (Minn. App. 2004), *rev. denied* (Minn. Nov. 16, 2004). Walker contends that he negated this element during his plea hearing when he repeatedly stated that he did not intend to sell the

methamphetamine, and instead "describe[ed] a situation where he was asked to deliver a truck full of all of V.N.'s property to somebody meeting him outside Erskine." Although he acknowledges that he also admitted to having the requisite intent during the plea hearing, he emphasizes that these statements were only the result of "highly leading questions" and were made "begrudgingly."

As noted, the legislature has broadly defined the term "sell." This definition includes selling, giving away, bartering, delivering, exchanging, distributing, "dispos[ing] of to another," and manufacturing. Minn. Stat. § 152.01, subd. 15a. Under this definition, possessing a controlled substance with the intent to deliver is a sale. Thus, Walker's statements that he merely planned to make a delivery did not negate the intent-to-sell element.

We have carefully reviewed the transcript of Walker's plea hearing. At times, he was reluctant to admit to certain facts. He also made several statements minimizing his culpability. In response, the prosecutor asked Walker multiple leading questions. Our supreme court has emphasized that this is not a best-practice. *See Raleigh*, 778 N.W.2d at 95 ("[W]e generally discourage the practice of establishing a guilty plea's factual basis by permitting counsel to ask leading questions of a defendant, with the court remaining silent.") But the supreme court has also clarified that the aim of the accuracy requirement is to ensure that a defendant "does not plead guilty to a crime more serious than that of which he could be convicted if he elected to go to trial." *Id.*

That concern is not present here. Based on our review of the plea hearing, we are satisfied that Walker's admissions during the plea hearing established his guilt of first-degree sale of methamphetamine. We therefore conclude that his guilty plea is accurate.

II. Walker's trial counsel did not provide ineffective assistance.

In a pro se supplemental brief, Walker argues that his conviction must be reversed because he received ineffective assistance of trial counsel. He alleges that his trial counsel provided deficient representation by failing to request a competency evaluation after he was found competent and by submitting an inadequate sentencing memorandum. "To prove ineffective assistance of counsel, a defendant must show that (1) his attorney's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that the outcome would have been different, but for counsel's errors." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2019) (quotations omitted). Trial counsel is deficient when counsel "does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *White v. State*, 248 N.W.2d 281, 285 (Minn. 1976) (quoting *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976)). We presume that "counsel's performance fell within a wide range of reasonable assistance." *Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006) (quotation omitted).

Walker first argues that his trial attorney should have requested a competency evaluation under Minnesota Rule of Criminal Procedure 20.01 following an evaluation that found him competent. "A defendant has a due process right not to be tried or convicted of a criminal charge if he or she is legally incompetent." *Bonga v. State*, 797 N.W.2d 712,

718 (Minn. 2011). The rule states, "If the prosecutor, defense counsel, or the court, at any time, doubts the defendant's competency, the prosecutor or defense counsel must make a motion challenging competency, or the court on its initiative must raise the issue." Minn. R. Crim. P. 20.01, subd. 3. Upon such a motion in a felony case, the district court must suspend the proceedings, determine whether there is probable cause for the charged offenses, and if so, order a competency evaluation. Minn. R. 20.01, subd. 3(b), (c).

The record shows that Walker initially had a competency evaluation that concluded he may never gain competence to stand trial due to his diagnoses of "Major Neurocognitive disorder due to TBI [traumatic brain injury]" and "Mild Intellectual Disability." But a second evaluation reached the opposite conclusion, finding that Walker was "malingering" and noting his "long history of intentionally exaggerating or feigning cognitive deficits and physical impairment for secondary gain, including delaying legal consequences and obtaining better housing in the DOC." Walker contends that his attorney's failure to request a third evaluation—even after he privately told his attorney that he was concerned about the decision to forego another evaluation—was unreasonable.

We disagree. "The prosecutor, defense attorney, and the court share the duty to protect the right of a defendant not to be tried or convicted while incompetent." *Bonga*, 797 N.W.2d at 718. Neither the prosecutor, the defense attorney, nor the judge raised any concerns about Walker's competence following the second evaluation. Moreover, our review of the plea and sentencing transcripts reveals that Walker was lucid, logical, and responsive. We cannot conclude based on the record that a reasonable defense attorney would have requested a competency evaluation under the circumstances. Finally, Walker

makes no argument that he was *not* competent. Thus, he has not shown that his attorney's decision to forego a third evaluation affected the outcome of the proceedings. *See Martin v. State*, 825 N.W.2d 734, 745 (Minn. 2013) (rejecting the claim that counsel was ineffective for failing to request a competency evaluation where appellant did not contest postconviction court's finding that appellant fully participated in his trial).

Walker also argues that his trial counsel's sentencing memorandum was inadequate. He contends that the memorandum presented "mitigating factors, but cited no caselaw, statutes, or any rulings that would be in favor of Mr. Walker's mitigating factors."

At sentencing, the prosecutor asked the district court to conclude that Walker was a "dangerous offender" under Minnesota Statutes section 609.1095, subdivision 2, and to depart on that basis. In making this determination, the district court was required to consider whether Walker had two qualifying prior convictions and was "a danger to public safety." *Id.* Walker's attorney submitted a memorandum containing facts about Walker as an individual.

The attorney's approach to sentencing and the contents of her sentencing memorandum were matters of strategy. We do not second-guess an attorney's strategic decisions; they are within the discretion of counsel and will not be reviewed for competence. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). Moreover, we cannot conclude that a memorandum containing more legal authority would have changed the

district court's sentencing decision. Thus, we reject Walker's second claim of ineffective assistance of trial counsel.[2]

III. The prosecutor did not commit misconduct sufficient to warrant reversal.

Finally, Walker argues that the prosecutor committed misconduct warranting reversal at sentencing "by intentionally misrepresenting, misleading, and lying to the court about Mr. Walker's criminal record." Specifically, Walker challenges the following statements: (1) "the defendant's got eight prior felony convictions," (2) "of the eight, five were for violent crimes," and (3) Walker is "a violent thug who hurts any and everybody that gets in his way." Walker characterizes these comments as "false, prejudicial, and . . . unwarranted and unfounded."

There was no objection to these statements during the sentencing hearing. We review claims of unobjected-to prosecutorial misconduct under a modified-plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this approach, the defendant must first establish the existence of an error that was plain, and then the burden shifts to the state to establish that the plain error did not affect the defendant's substantial rights. *Id.*

[2] Walker also takes issue with the district court's imposition of an upward durational departure more generally. However, given the district court's conclusion that Walker was a dangerous offender under section 609.1095, subdivision 2—a decision that Walker does not challenge—the district court's sentencing decision was within its broad discretion. *See State v. Barthman*, 938 N.W.2d 257, 269 (Minn. 2020) (holding that a district court abuses its discretion in departing only when its reasons for departure are legally impermissible or the decision is supported by insufficient evidence).

Walker fails to show that the prosecutor's discussion of his criminal history was plain error. It is true that Walker did have numerous prior convictions, including several convictions for violent offenses. And Walker's criminal history was a proper consideration at sentencing. *See* Minn. Sent. Guidelines 2.B.01 (Supp. 2019) (indicating criminal history is, along with severity of the conviction offense, one of two factors to be applied in dispositional decisions).

But we are concerned about some of the prosecutor's other remarks. The prosecutor's sentencing memorandum called Walker "a violent gang-banging drug-dealer – pure and simple" and "a violent gang-banger who decided to sell methamphetamine for profit." And at sentencing, the prosecutor added that Walker is "a drug dealer" and "[a]dmitted gang member, who isn't going to stop committing crime." Certainly, "the state's argument is not required to be colorless." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). But the prosecutor's inflammatory language here—and particularly, the repeated use of the term "gang-banger," which has racial overtones—served no legitimate purpose.[3] While these statements did not amount to plain error here, and we are confident

[3] Minnesota courts have consistently held that prosecutors may not "inject[] irrelevant racial issues" into a matter in an effort to exploit the passions and prejudices of the decisionmaker. *State v. Jackson*, 714 N.W.2d 681, 693 (Minn. 2006); *see also State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005) ("We emphasize . . . the improper injection of race can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible." (quotation omitted)). Indeed, prosecutors have an affirmative obligation to ensure defendants receive a fair trial, free from improper racial considerations. *See State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007) ("The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions.").

they did not affect the district court's sentencing decision, we caution prosecutors to avoid unnecessarily inflammatory language of this nature.

Affirmed.