STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0548

State of Minnesota,
Respondent,

vs.

Nicholas Joseph Trombley,
Appellant.

Filed April 25, 2022
Affirmed
Wheelock, Judge

Hennepin County District Court
File Nos. 27-CR-20-12556, 27-CR-20-12588

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Bryan, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

In this direct appeal from final judgments of conviction for two counts of aggravated harassment, each from separate district court cases and involving different victims, appellant seeks to withdraw his two guilty pleas. He argues that both guilty pleas are

invalid because they lack a sufficient factual basis. Because both pleas had a sufficient factual basis, we affirm.

FACTS

This appeal arises from two district court cases involving appellant Nicholas Joseph Trombley. In May 2020, respondent State of Minnesota charged Trombley with one count of aggravated harassment; the state later amended the complaint to add a second count of aggravated harassment. The state alleged that then-36-year-old Trombley had repeatedly sent child 1 sexually explicit messages on social media over several months, starting when she was 16 years old. It further alleged that Trombley had posted photographs of child 1 on social media, contacted child 1's friend and mother, and left a card for child 1 outside her neighbor's house. Also in May 2020, the state charged Trombley in a separate complaint with one count of solicitation of a child to engage in sexual conduct. The second complaint alleged similar conduct—that Trombley had repeatedly sent child 2, a 14-year-old female, social-media messages over two months, shared photographs of child 2 on social media, and contacted child 2's friends. Both complaints alleged that the conduct occurred "in Hennepin County, Minnesota."

Before either case proceeded to trial, the parties reached a plea agreement that involved both cases. In the first case, Trombley pleaded guilty to one count of aggravated harassment "occurring . . . in Plymouth." He admitted that he sent multiple messages to child 1, that child 1 was under 18 years old, that the messages were sexual in nature, that child 1 asked Trombley to stop contacting her but that he did not, that he posted pictures of child 1 online, and that he left a card for child 1 at her neighbor's house. The state also

asked the district court to supplement the record with a copy of the complaint "to support the guilty plea"; Trombley did not object, and the district court granted the request.

In the case involving child 2, Trombley entered a *Norgaard* plea[1] to one count of aggravated harassment "occurring . . . in Brooklyn Park."[2] Trombley asserted that he did not remember the circumstances of the offense but acknowledged that he had reviewed the evidence the state would offer against him and that he believed there was a substantial likelihood that he would be found guilty of aggravated harassment beyond a reasonable doubt at trial. Trombley specifically acknowledged that, according to the complaint, a 14-year-old victim had received sexually explicit messages from a man she believed to be Trombley and that he posted pictures of her on social media and contacted her friends. As in the first case, the district court agreed to add the complaint to the record "to supplement the guilty plea" pursuant to the state's request, and Trombley did not object.

The district court accepted both guilty pleas. It then sentenced Trombley to one year and one day of prison on the first conviction and 15 months on the second, and it stayed both sentences for three years. Trombley appeals.

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[1] A defendant may enter a *Norgaard* plea when the defendant "claims a loss of memory . . . regarding the circumstances of the offense," but the record "establish[es] that the evidence against the defendant is sufficient to persuade the defendant and his or her counsel that the defendant is guilty or likely to be convicted of the crime charged." *State v. Ecker*, 524 N.W.2d 712, 716-17 (Minn. 1994) (citations omitted); *see also State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871-72 (Minn. 1961)).

[2] Trombley was not originally charged with aggravated harassment in the second case. The state moved to add one count of aggravated harassment to the complaint at the time of the plea agreement.

DECISION

On appeal, Trombley argues that both of his guilty pleas are invalid because they lack a sufficient factual basis. A defendant may withdraw a guilty plea if "withdrawal is necessary to correct a manifest injustice," such as when a guilty plea is invalid. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010) (quoting Minn. R. Crim. P. 15.05, subd. 1). A guilty plea "must be accurate, voluntary, and intelligent" to be valid. *Id.* An accurate guilty plea requires a factual basis "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). This requirement "is satisfied if the record contains a showing that there is credible evidence available which would support a jury verdict that [a] defendant is guilty of at least as great a crime as that to which he [pleaded] guilty." *Nelson v. State*, 880 N.W.2d 852, 859 (Minn. 2016) (quotation omitted). "Assessing the validity of a plea presents a question of law that we review de novo." *Raleigh*, 778 N.W.2d at 94. We address each of Trombley's guilty pleas in turn.

I. Trombley's guilty plea to aggravated harassment against child 1 was valid because there was a sufficient factual basis to establish venue.

Trombley argues that his first guilty plea was invalid because the state failed to establish venue for his aggravated-harassment offense against child 1. Venue is an element of every criminal offense; thus, "the state must prove beyond a reasonable doubt that the charged offense occurred in the charging county." *State v. Bahri*, 514 N.W.2d 580, 582 (Minn. App. 1994), *rev. denied* (Minn. June 15, 1994); *see also* Minn. Const. art. I, § 6 ("In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by

an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law."). Venue "may be proven by circumstantial rather than direct evidence" and "is determined by all the reasonable inferences arising from the totality of the surrounding circumstances." *Bahri*, 514 N.W.2d at 582. For the aggravated-harassment offense of which Trombley was convicted, venue is proper where the harassing acts were committed or where the defendant or victim resided at the time of the offense. Minn. Stat. § 609.749, subds. 1b, 2(2), 3(b) (2018).[3]

Trombley argues that the record does not contain a sufficient factual basis for venue because (1) Trombley did not testify as to where he was when he sent the online communications to child 1; (2) the record does not indicate the location of the neighbor's house where he left a card for child 1; and (3) the record does not establish where Trombley or child 1 lived at the time of the communications. Trombley acknowledges that the complaint alleges child 1 reported the harassment to the Plymouth Police Department but argues that this alone is insufficient to establish venue. He also argues that a district court may not consider the allegations in the complaint except to the extent that Trombley testified to their accuracy. *See Rosendahl v. State*, 955 N.W.2d 294, 300-02 (Minn. App. 2021). We are not persuaded.

[3] Section 609.749 was amended in 2019 to change the term "stalking" to "harassment," but there was no other substantive change to the subparts relevant here. 2019 Minn. Laws ch. 5, art. 2, § 17-21, at 20-24. The 2018 version of the statute applies to the offense committed against child 1, and the 2019 version of the statute applies to the offense committed against child 2. However, we use the term "harassment" throughout this opinion in referring to both offenses.

Trombley's argument ignores that he expressly admitted to venue during the plea colloquy. When asked how he pleaded "[t]o the charge of aggravated harassment with victim under 18, a felony, occurring on and between June 1st, 2019, and May 24, 2020, in Plymouth . . . regarding [child 1]," Trombley responded, "I plead guilty." Testimony during the plea colloquy is part of the record and may be used to establish the factual basis for a guilty plea. *See*, *e.g.*, *Lussier v. State*, 821 N.W.2d 581, 588-89 (Minn. 2012).[4] Here, Trombley acknowledged that the offense occurred "in Plymouth." A court may take notice of the fact that Plymouth is within Hennepin County. *See State v. Larsen*, 442 N.W.2d 840, 842 (Minn. App. 1989) ("When indirect evidence such as a street address or town name is offered during trial, a judge may take judicial notice of venue."). Trombley's testimony supports the factual basis for the venue element of the offense against child 1.

Trombley's reliance on our decision in *Rosendahl* is also misplaced. In *Rosendahl*, we held that when "addressing the accuracy of a 'typical' guilty plea [as distinguished from an *Alford* or *Norgaard* plea], documents such as a complaint may only be considered by a reviewing court if the truthfulness and accuracy of the evidence is expressly admitted to by the defendant." 955 N.W.2d at 301. In *Rosendahl*, however, the district court did not ask the defendant about, and the defendant did not admit to, an element of his offense, and "no record was made involving the allegations in the complaint in order to supplement [the defendant's] testimony." *Id.* In contrast, here the state asked the court to "supplement the

[4] While the supreme court has "repeatedly discouraged the use of leading questions to establish a factual basis," the use of leading questions does not automatically invalidate a guilty plea. *Nelson*, 880 N.W.2d at 860.

record with a copy of the corrected amended criminal complaint in this matter, simply to support the guilty plea," and Trombley did not object. Thus, this case is more similar to *Lussier*, in which the supreme court held that a grand jury transcript could support the factual basis for an offense when it had been "properly admitted into the record without objection during [the defendant's] plea hearing." 821 N.W.2d at 589. Additionally, unlike in *Rosendahl*, Trombley admitted that the offense occurred in Hennepin County by pleading guilty to an offense "in Plymouth" during the plea hearing. *See Rosendahl*, 955 N.W.2d at 301-02 (noting that Rosendahl "was not carefully interrogated about his conduct, nor did he admit an element necessary to establish his guilt" (quotation omitted)).

Here, because the complaint alleges venue, because the complaint was admitted into the record, and because Trombley pleaded guilty to an offense occurring in Plymouth, we conclude that the allegations of venue in the complaint also support the factual basis for Trombley's offense against child 1.[5] The "totality of the surrounding circumstances," including these allegations and Trombley's admission to an offense in Plymouth, provides sufficient factual basis to establish venue was proper in Hennepin County. *Bahri*, 514 N.W.2d at 582.

[5] The complaint alleges that Trombley harassed child 1 "in Hennepin County, Minnesota." It also identifies three reports that child 1 and her mother made to the Plymouth Police Department and states that on May 24, 2020, child 1 and her mother believed that Trombley was in Maple Grove based on recent messages he had sent. *Cf. State v. Wenneson*, No. A10-675, 2011 WL 1364245, at *3 (Minn. App. Apr. 12, 2011) (nonprecedential decision cited here for its persuasive value, stating that the fact that Hibbing Police investigated an offense supported venue being in St. Louis County, where Hibbing is located). Maple Grove and Plymouth are both within Hennepin County.

II. Trombley's guilty plea to aggravated harassment against child 2 was valid because there was a sufficient factual basis to establish venue and that child 2 felt frightened, threatened, or intimidated by Trombley's conduct.

Trombley argues that his second guilty plea was invalid for two reasons. First, he argues that the state failed to establish venue for his aggravated-harassment offense against child 2. Second, he argues that the state failed to establish that child 2 felt frightened, threatened, oppressed, persecuted, or intimidated by Trombley's conduct. Because Trombley asserted that he did not remember the alleged offense against child 2, his plea in this case was 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), *rev. denied* (Minn. Apr. 21, 2009). A *Norgaard* plea must be accurate, voluntary, and intelligent, and the validity of a *Norgaard* plea is reviewed de novo. *Id.* at 11-12.

Because a *Norgaard* plea does not rely on an admission of guilt, "it is particularly important that a factual basis for the plea be established," and this basis must be "strong." *Id.* at 12-13. "The strong factual basis and the defendant's agreement that the evidence is sufficient to support his conviction provide the court with a basis to independently conclude that there is a *strong* probability that the defendant would be found guilty of the charge to which he pleaded guilty." *Id.* at 13 (quoting *State v. Theis*, 742 N.W.2d 643, 649 (Minn. 2007)). Establishing the factual basis for the plea in the record is crucial in cases involving a *Norgaard* plea. *See Ecker*, 524 N.W.2d at 716-17 (noting that in cases with *Norgaard* pleas, "the record must establish that the evidence against the defendant is sufficient" and

"the trial court must affirmatively ensure an adequate factual basis has been established in the record").

A. Venue

Trombley again argues that his guilty plea was invalid because the state failed to establish venue for his aggravated-harassment offense against child 2. Trombley specifically asserts that the record does not contain a sufficient factual basis for venue because (1) the complaint does not specify where he committed the offense; (2) the complaint did not establish where Trombley or child 2 lived at the time the offense was committed; and (3) he did not admit to any of those facts. *See* Minn. Stat. § 609.749, subds. 1b, 2(2), 3(b) (2018 & Supp. 2019) (stating that venue is proper where the harassing acts were committed or where the defendant or victim resided at the time of the offense). We disagree.

As with his other guilty plea, Trombley expressly addressed the venue element of this offense during the plea colloquy. The district court asked Trombley how he pleaded to "aggravated harassment, a felony, but this one occurring between April 1st, 2020, and May 26, 2020, in Brooklyn Park," and he responded, "I plead guilty." Trombley also agreed during the plea colloquy that he had reviewed the evidence the state would offer against him at trial and acknowledged that according to the complaint, "the Brooklyn [sic] Police Department made contact with a minor victim." Brooklyn Park is within Hennepin County. As noted above, a court may take notice of the fact that a city is located in a specific county; here, Brooklyn Park is located within Hennepin County. *See Larsen*, 442 N.W.2d at 842.

Further, the complaint alleged that Trombley committed an offense "in Hennepin County, Minnesota," and that the Brooklyn Park Police Department received a report of harassment that led to the criminal case. As with Trombley's plea in the first case, the state requested that the complaint in this case be added to the record to supplement the guilty plea. Trombley did not object, and the court again granted the request. Moreover, during the plea hearing, Trombley's attorney also asked the district court to "take judicial notice of the complaint in this case, as we do believe that provides a sufficient factual basis and summary of the evidence that would come in." Based on these facts, we conclude that the record contains a sufficiently strong factual basis to support the venue element of Trombley's offense against child 2.

B. Harassment

Trombley also argues that there is "almost no factual basis" to establish that child 2 felt "frightened, threatened, oppressed, persecuted, or intimidated" by Trombley's conduct. *See* Minn. Stat. § 609.749, subd. 1 (Supp. 2019) (defining "harass" in part as conduct that causes the victim to "feel frightened, threatened, oppressed, persecuted, or intimidated"). Trombley argues that "the only facts that arguably relate" to this element in the record are the following: (1) that child 2 denied Trombley's Instagram request; (2) that child 2 "saw" a message Trombley sent to her friend; and (3) that child 2 was "generally aware" of Trombley's attempts to contact her. He argues that this leads, at most, to an inference that child 2 did not want Trombley to communicate with her and that this is an insufficient basis for showing the "intense emotions" required by the statute. We are not persuaded.

The complaint here summarizes evidence that is more than sufficient to support the element that child 2 felt frightened, threatened, or intimidated. A sufficient factual basis is composed of facts "from which the defendant's guilt of the crime charged can be reasonably inferred." *Nelson*, 880 N.W.2d at 861 (quotation omitted). The complaint alleges that Trombley repeatedly sent obscene and sexually explicit messages to 14-year-old child 2 and one of her friends over a two-month period on multiple social-media platforms. It also alleges that he posted a picture of child 2 and two of her friends on social media with an obscene and disturbing caption. The complaint states that the Brooklyn Center Police Department received a report of this conduct. During the plea colloquy, Trombley acknowledged these allegations, the fact that child 2 told the police about these messages, and the fact that child 2 would testify at trial to having seen the messages.

The age of the victim, the content and context of these messages, and child 2's report to the police regarding the messages all support a reasonable inference that child 2 felt frightened, threatened, or intimidated. *See State v. Hall*, 887 N.W.2d 847, 858 (Minn. App. 2016) (noting that "all the attributes of the [communications] are considered" in determining their impact on a harassment victim and reasoning that in that case, "the content of the calls . . . appropriately demonstrate[d] that the calls induced fear or intimidation on the part of the victim"), *rev. denied* (Minn. Feb. 22, 2017), *overruled on*

other grounds by State v. Peterson, 936 N.W.2d 912 (Minn. App. 2019);[6] *see also State v. Easter*, No. A07-1686, 2009 WL 65179, at *5 (Minn. App. Jan. 13, 2009) (nonprecedential opinion cited for its persuasive value, reasoning that a victim's keeping of message logs and reporting incidents to the police were relevant to determining the impact on the victim), *rev. denied* (Minn. Mar. 17, 2009). We conclude that the record contains a sufficient factual basis to support Trombley's guilty plea for the offense against child 2.

Affirmed.

[6] In *Peterson*, this court held that a stalking-by-telephone statute, Minn. Stat. § 609.749, subd. 2(4) (2016), was unconstitutionally overbroad; Trombley was convicted under a different subdivision, 2(2). Thus, the analysis in *Hall* as to the impact of the communications remains applicable.