STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1481

State of Minnesota,
Respondent,

vs.

John Lee Backen,
Appellant.

Filed May 22, 2023
Affirmed
Hooten, Judge[*]

Crow Wing County District Court
File No. 18-CR-20-93

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

Donald F. Ryan, Crow Wing County Attorney, Janine LePage, Assistant County Attorney, Brainerd, Minnesota (for respondent)

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

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

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

Appellant argues he is entitled to withdraw his two pleas of guilty to first-degree criminal sexual conduct because, as to one of the pleas, he did not enter a valid *Norgaard*[1] plea based on lack of memory caused by amnesia or intoxication and because that plea was not supported by an adequate factual basis. He maintains that the defect in the *Norgaard* plea requires our reversal of both pleas, as the purportedly invalid plea implicates the entirety of the plea agreement. Because appellant entered a valid *Norgaard* plea supported by an adequate factual basis, we affirm.

FACTS

Respondent State of Minnesota charged appellant John Lee Backen with eight counts of first-degree criminal sexual conduct. The state alleged that Backen sexually abused his girlfriend's children, child 1 and child 2, over a four-year period. Backen reached an agreement with the state to plead guilty to counts four and eight, with Backen pleading guilty to count four involving child 1 and entering a *Norgaard* plea to count eight due to his inability to recall the sexual penetration of child 2.

During the plea colloquy, Backen maintained that he did not recall digitally penetrating child 2, but he did not state the reason why he could not remember. He

[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)).

acknowledged that although he had used drugs and alcohol extensively during the time period that he abused child 2, he did not expressly attribute his drug and alcohol use as the reason why he could not remember or that his acts of abuse occurred while he was high or intoxicated. Backen acknowledged that he believed the state had enough evidence to convict him of the acts committed against child 2 based on his review of the statements the child made to both the police and a child advocacy center accusing him of sexually penetrating her with his fingers. Backen also asked the district court to take notice of the facts contained in the complaint, describing the abuse of child 2, to supplement his testimony. After additional questioning by the district court confirming Backen's motivations and that he understood that he was entering a *Norgaard* plea, the district court accepted Backen's pleas of guilty to counts four and eight.

Following sentencing, Backen filed a postconviction petition with the district court to withdraw his plea. The district court denied Backen's petition for relief. Backen appeals.

DECISION

Backen asserts that he should be allowed to withdraw his guilty pleas because he did not enter a valid *Norgaard* plea supported by an adequate factual basis for count eight. A defendant may withdraw a guilty plea if "withdrawal is necessary to correct a manifest injustice." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010) (quoting Minn. R. Crim. P. 15.05, subd. 1). "A manifest injustice exists if a guilty plea is not valid." *Barrow v. State*, 862 N.W.2d 686, 691 (Minn. 2015). A guilty plea "must be accurate, voluntary, and intelligent" to be valid. *Raleigh*, 778 N.W.2d at 94. A court must allow the defendant to

withdraw a guilty plea if the defendant proves that the plea was not accurate, voluntary, and intelligent. *See Barrow*, 862 N.W.2d at 689 (placing the burden of proving the invalidity of the plea on the defendant).

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 [appellate courts] review de novo." *Raleigh*, 778 N.W.2d at 94.

Backen entered a *Norgaard* plea of guilty to count eight. "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 still be accurate, voluntary, and intelligent, and the validity of a *Norgaard* plea is reviewed de novo. *Id.* at 11-12.

Backen maintains that a defendant must state the exact reason for their inability to remember their conduct for a *Norgaard* plea to be valid, citing language from *Ecker* stating that a defendant may plead guilty even though he "claims a loss of memory, through amnesia or intoxication, regarding the circumstances of the offense." 524 N.W.2d at 716.

But Backen reads *Ecker* too strictly. *Ecker* cites *State v. Fisher*, 193 N.W.2d 819, 820 (Minn. 1972), as the basis for its rule that amnesia or intoxication can form the basis for a *Norgaard* plea. *Ecker,* 524 N.W.2d at 716. In *Fisher*, the supreme court stated that it has held "in a number of cases that where the defense is based on amnesia, *real or feigned*, [a] defendant may nevertheless plead guilty if the evidence against him is sufficient to persuade him and his counsel that he is guilty or likely to be convicted of the crime." 193 N.W.2d at 820 (emphasis added). The supreme court's acknowledgement in *Fisher* that a defendant's feigned amnesia can support the entry of a *Norgaard* plea undercuts Backen's argument that *Ecker*, a case that cites favorably to *Fisher*'s language, requires a defendant to attribute their lack of memory of the event to a specific cause in order for the plea to be valid. Thus, *Ecker* and its progeny do not support Backen's claim.

Although Backen asserts that a defendant must claim that their memory loss resulted from amnesia or intoxication, our caselaw does not require a defendant to testify to such formal and rigid facts before entering a valid *Norgaard* plea. *See Williams*, 760 N.W.2d. at 12 ("A plea constitutes a *Norgaard* plea if the defendant asserts an absence of memory on the essential elements of the offense . . . ."). It is undisputed that Backen testified at the plea hearing that he did not remember digitally penetrating child 2's vagina. This testimony is sufficient for us to conclude that Backen entered a valid *Norgaard* plea due to his inability to remember the factual details surrounding the sexual abuse of child 2, regardless the cause.

Backen also claims that the factual basis for his *Norgaard* plea is inadequate because it was based upon his testimony in response to leading questions. Establishing the factual

basis for a *Norgaard* plea differs from establishing the factual basis of a normal plea. Generally, a factual basis is laid by "questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime." *Ecker*, 524 N.W.2d at 716. When a defendant enters a *Norgaard* plea, however, "the record must establish 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." *Id.* "[A]n adequate factual basis" for a *Norgaard* plea requires "two related components: a strong factual basis and the defendant's acknowledgment that the evidence would be sufficient for a jury to find the defendant guilty beyond a reasonable doubt." *Williams*, 760 N.W.2d 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)). 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).

Backen's plea is supported by an adequate factual basis. Although Backen could not remember digitally penetrating the vagina of child 2, he believed there was a substantial likelihood that he would be convicted based on his review of the available evidence that could be used against him, including police reports and a summary from the child advocacy center that contained statements made by child 2 describing the events of which he was accused. Backen also asked the district court to take judicial notice of the facts alleged in

the complaint to supplement his plea colloquy.[2] The complaint alleged that Backen first touched child 2 when she was 11 or 12 years old, that Backen inserted a finger in her vagina, and that he had repeated this act during every "incident." These facts, in the context of a *Norgaard* plea, provide an adequate factual basis to establish that Backen engaged in the sexual penetration of a child in violation of Minn. Stat. § 609.342, subd. 1(g) (2016).

Backen argues the use of leading questions by his attorney to elicit this testimony was improper and invalidates the plea. But Backen cites to no authority *requiring* us to allow plea withdrawal after the factual basis of a *Norgaard* plea was established using primarily leading questions, despite the practice being disfavored. *See Nelson*, 880 N.W.2d at 860 (explaining that the Minnesota Supreme Court has "repeatedly discouraged the use of leading questions to establish a factual basis" but that the use of leading questions does not automatically invalidate a guilty plea). We also note that the district court independently questioned Backen about his motivations for pleading guilty, the strength of the state's evidence, and that he did not maintain his innocence despite not remembering the events to which he was pleading guilty. We encourage this type of questioning from the district court that allows a defendant to state, in his own words, the reasons why they have decided to plead guilty. *Ecker*, 524 N.W.2d at 717.

[2] While this method of establishing a factual basis may not be "typical," it is sometimes necessary in the context of a *Norgaard* plea. *See Rosendahl v. State*, 955 N.W.2d 294, 301 (Minn. App. 2021) (citing *Ecker*, 524 N.W.2d at 716).

On this record, we conclude that Backen's *Norgaard* plea was supported by an adequate factual basis and his counsel's use of leading questions to establish this factual basis does not otherwise warrant reversal to allow Backen to withdraw his pleas.

Affirmed.