STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1338

State of Minnesota,
Respondent,

vs.

Emilie Rae Hewitt,
Appellant.

Filed August 7, 2023
Affirmed
Jesson, Judge

Hennepin County District Court
File No. 27-CR-20-4596

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

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Reilly, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Appellant Emilie Rae Hewitt pleaded guilty to felony driving while impaired after she crashed her car into a highway guardrail on a Wednesday morning. She now seeks to withdraw her guilty plea, claiming it is invalid because she cannot recall the events that

form the basis of her plea and her counsel used leading questions during her plea hearing. Because Hewitt submitted a valid plea and the use of leading questions is only disfavored—not prohibited—we affirm her conviction.

FACTS

On February 19, 2020, around 11:20 a.m., state patrol troopers responded to the scene of a one-vehicle crash in Brooklyn Center and spoke with the driver, later identified as Hewitt. After troopers noticed an "overwhelming odor of alcohol" coming from Hewitt, her slurred speech, and her bloodshot eyes, Hewitt submitted to a preliminary breath test. The test registered an alcohol concentration of 0.239. Respondent State of Minnesota charged Hewitt with felony driving while impaired because Hewitt had three qualified prior impaired-driving incidents within ten years of the accident.[1]

In April 2022, Hewitt pleaded guilty to the sole charge. At the plea hearing, she provided (as relevant here) the following factual basis:

> HEWITT'S COUNSEL: . . . were you approached as your car sat up against the median on Highway 100 near Brooklyn Boulevard? I know you don't remember it specifically, but having gone over the discovery with me, you're satisfied that that person that the police interacted with, the state police, that day was you?
>
> HEWITT: Yes.
>
> HEWITT'S COUNSEL: Okay. And as we've seen, you told them that you had been cut off – that somebody had cut you off in traffic and that's what caused you to wreck the vehicle into the – into the guardrail that serves as the median on that stretch of highway; right?

[1] This offense violates Minnesota Statutes section 169A.20, subdivision 1(1) (2018).

> HEWITT: Yes.
>
> HEWITT'S COUNSEL: All right. You also told them that your last drink was at 4:00 in the morning, and that you had – I guess, rum was – well, rum and coke, let's just put it that way; right?
>
> HEWITT: Yes. I –
>
> HEWITT'S COUNSEL: All right.
>
> HEWITT: – don't –
>
> HEWITT'S COUNSEL: And I know you don't remember this and we've had go [sic] through it, but you agree, having seen the discovery, that that – that that is you and that those were the words that were said; right?
>
> HEWITT: Yes.
>
> . . . .
>
> HEWITT'S COUNSEL: All right. There's really two things that have to be present for there to be a DWI offense. One, you have to be in physical control of a motor vehicle, and, two, you have to be under the influence of alcohol. *Would you agree that both those things were true* on February 19th of 2020 in that – in that little car accident out there on Highway 100?
>
> HEWITT: Yes.

(Emphasis added.) Hewitt then admitted to the three qualified prior impaired-driving incidents within ten years of the accident. The district court accepted Hewitt's guilty plea and sentenced her to 57 months' imprisonment.

Hewitt appeals.

DECISION

Hewitt alleges that her guilty plea was invalid because she did not provide an accurate factual basis to support her plea given that she could not remember her conduct. Hewitt further contends that the factual basis was not proper because her counsel used leading questions. We address each argument in turn.

Hewitt's plea satisfies the requirements of a Norgaard *plea*.

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). And a valid guilty plea is one that is accurate, voluntary, and intelligent. *Raleigh*, 778 N.W.2d at 94. The burden is on the appellant to prove that a plea was not accurate, voluntary, or intelligent. *Barrow*, 862 N.W.2d at 689. "Assessing the validity of a plea presents a question of law that we review de novo." *Raleigh*, 778 N.W.2d at 94.

Hewitt only challenges the accuracy of her plea. An accurate guilty plea requires a factual basis "showing that the defendant's conduct meets all elements of the offense" to which they are pleading guilty. *State v. Jones*, 921 N.W.2d 774, 779 (Minn. App. 2018), *rev. denied* (Minn. Feb. 27, 2019). Hewitt contends that her guilty plea was inaccurate because she "could not provide a single detail about her conduct relating to the alleged offense from memory." In response, the state argues that Hewitt entered a valid *Norgaard* plea. *See State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 872 (Minn. 1961) (allowing

a defendant to plead guilty even though they claim loss of memory regarding the circumstances of the offense).

When a defendant claims a loss of memory, through amnesia or intoxication, regarding the circumstances of the offense, they may plead guilty via a *Norgaard* plea if the record establishes "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 (Minn. 1994). The validity of a *Norgaard* plea, a legal issue, is reviewed de novo. *See Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009), *rev. denied* (Minn. Apr. 21, 2009).

Here, Hewitt gave a proper factual basis for a *Norgaard* plea because she testified that she reasonably believed that the state had sufficient evidence to obtain a conviction. *Ecker*, 524 N.W.2d at 716. In response to her counsel's questions, Hewitt conceded that it was true that she was in physical control of a motor vehicle while under the influence of alcohol. Truth is a higher bar than the beyond-a-reasonable-doubt standard that the state would have had to meet to convict Hewitt of the charge she pleaded guilty to. *See Williams*, 760 N.W.2d at 13. Because Hewitt gave a proper factual basis for a *Norgaard* plea, her guilty plea is accurate, and therefore valid.[2]

[2] At oral argument, the state submitted that there is a second way for a *Norgaard* plea to be valid: that the evidence against the defendant is sufficient to persuade the defendant and his or her counsel that the defendant is guilty. *Ecker*, 524 N.W.2d at 716. But because we find that Hewitt reasonably believed that she was likely to be convicted of the crime charged, we need not reach this argument.

Still, Hewitt contends that she did not enter a *Norgaard* plea because (1) "no party, at any time, indicated that Hewitt was entering a *Norgaard* plea," (2) the plea petition did not mention a *Norgaard* plea, and (3) Hewitt did not admit that the evidence the state would present would be sufficient to convict her of felony driving while intoxicated. But there are no magic words that render a plea a *Norgaard* plea. And Hewitt has cited no caselaw that shows that the steps she describes as missing are required for a valid *Norgaard* plea.

To further support her argument regarding the accuracy of her plea, Hewitt cites to a nonprecedential case from this court, *State v. Williams*, No. A18-0289, 2019 WL 1430316, at *2-3 (Minn. App. Apr. 1, 2019). In *Williams*, we held that because Williams testified that he did not remember his conduct, and because he did not acknowledge on the record that the state's evidence was sufficient to convict him, his plea was not a *Norgaard* plea and was inaccurate. *Id.* But *Williams* is distinguishable because Hewitt acknowledged in her testimony that the state's evidence against her was true and satisfied all the elements of the crime. Because Hewitt testified that she reasonably believed that the state had sufficient evidence to obtain a conviction, she gave a valid *Norgaard* plea.

Hewitt's plea is accurate despite the use of leading questions.

Hewitt also contends that her plea was inaccurate because the factual basis was established through leading questions. But while the use of leading questions to establish a plea's factual basis is disfavored, their use is not forbidden. *E.g.*, *Raleigh*, 778 N.W.2d at 94-96 (concluding that the guilty plea was accurate and explaining that although counsel used leading questions, "the factual basis for [the] plea [was] sufficient,

despite its disfavored format"); *see also Nelson v. State*, 880 N.W.2d 852, 860 (Minn. 2016) (observing that the Minnesota Supreme Court has "never held that the use of leading questions automatically invalidates a guilty plea"). And Hewitt cites no authority *requiring* us to allow plea withdrawal after the factual basis of a plea was established using primarily leading questions, despite the practice being disfavored. As a result, the use of leading questions is not enough to render Hewitt's plea invalid.

In sum, Hewitt has the burden on appeal to demonstrate that her plea was invalid, *Barrow*, 862 N.W.2d at 689, and she has not done so. Because Hewitt did not remember the incident but reasonably believed that the state had sufficient evidence to convict her, she submitted an accurate and valid *Norgaard* plea. And because leading questions are disfavored but not prohibited, their use to establish the factual basis of Hewitt's plea does not automatically invalidate her plea.

Affirmed.