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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0195**

State of Minnesota,
Respondent,

vs.

Todd Peter Holmes,
Appellant.

**Filed January 6, 2014
Reversed and remanded
Schellhas, Judge**

Rice County District Court
File No. 66-CR-08-936

Lori Swanson, Attorney General, St. Paul, Minnesota; and

G. Paul Beaumaster, Rice County Attorney, Terence Swihart, Assistant County Attorney, Faribault, Minnesota (for respondent)

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

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the validity of his guilty plea, arguing that the factual basis for his plea to theft by false representation was insufficient. We reverse and remand.

FACTS

In early September 2007, appellant Todd Holmes provided an estimate to P.D. and A.D. for the cost of labor and materials to make repairs to their barn. In his written work proposal, Holmes requested an immediate payment of \$11,998 to cover the cost of materials. P.D. and A.D. gave Holmes a check for \$11,882. Holmes did not commence work on the barn or use the money to purchase materials for the job.

In March 2009, Holmes pleaded guilty to felony nonpayment for improvement under Minn. Stat. § 514.02, subd. 1(b) (2006), and gross-misdemeanor theft under Minn. Stat. § 609.52, subds. 2(1) and 3(4) (2006). The district court stayed sentencing for ten months to allow Holmes time to pay restitution. After Holmes failed to pay restitution, the district court convicted him of nonpayment for improvement and sentenced him. On appeal to this court, Holmes challenged the validity of his guilty plea and conviction, arguing that his plea to nonpayment for improvement was not supported by a sufficient factual basis. We agreed and reversed the felony conviction in an order opinion in August 2011. We also revived the gross-misdemeanor theft charge under Minn. R. Crim. P. 15.01, subd. 1(6)(o).

In November 2011, respondent State of Minnesota charged Holmes with felony theft by false representation under Minn. Stat. § 609.52, subds. 2(3)(ii) and 3(2) (2006), and, in June 2012, Holmes pleaded guilty to gross-misdemeanor theft by false representation. Holmes confirmed at the plea hearing that he had reviewed the plea petition with his attorney and signed it. The district court accepted Holmes's plea to gross-misdemeanor theft by false representation, sentenced him, and ordered him to pay

restitution in the amount of \$11,998. Holmes now challenges his guilty plea, arguing that it was not supported by a sufficient factual basis.

D E C I S I O N

Waiver

Relying on *Sykes v. State*, 578 N.W.2d 807 (Minn. App. 1998), *review denied* (Minn. July 16, 1998), and *State v. Hemmings*, 371 N.W.2d 44 (Minn. App. 1985), the state argues that Holmes waived his right to withdraw his guilty plea based on an insufficient factual basis when he pleaded guilty to theft by false representation after consulting with counsel. We disagree. The procedural posture of *Hemmings* and *Sykes* is distinct from Holmes's case. In *Sykes* and *Hemmings*, this court reviewed a district court's denial of a motion to withdraw a guilty plea. *Sykes*, 578 N.W.2d at 810; *Hemmings*, 371 N.W.2d at 46. We review a district court's denial of a motion to withdraw a guilty plea only for abuse of discretion. *State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991).

Holmes's appeal is controlled by *State v. Iverson*, 664 N.W.2d 346 (Minn. 2003). In *Iverson*, the supreme court stated that ““a guilty plea by a counseled defendant operates as a waiver of all nonjurisdictional defects.”” *Iverson*, 664 N.W.2d at 350 (quoting *State v. Lothenbach*, 296 N.W.2d 854, 857 (Minn. 1980), *superseded by statute on other grounds*, Minn. R. Crim. P. 26.01, subd. 4). But “[a] claim that the factual basis for the plea was insufficient . . . is a challenge to the validity of the plea itself. Thus, by pleading guilty, a defendant does not waive the argument that the factual basis of his guilt

was not established.” *Id.* Holmes did not waive a challenge to the sufficiency of the factual basis for his plea by pleading guilty.

Validity of Guilty Plea

Holmes argues that his guilty plea was invalid because he did not admit to making a promise with the intent not to perform or to engaging in any sort of intentional deception with a false representation. In addition to the misplaced waiver argument, the state argues that Holmes’s guilty plea was valid because he failed to carry his burden of proving that a manifest injustice will occur if he is not allowed to withdraw his plea.

The validity of a guilty plea is a question of law, which this court reviews de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). A defendant may withdraw a guilty plea after the defendant has been sentenced only to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice sufficient to permit a plea withdrawal exists when the guilty plea is not valid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). A plea is constitutionally valid when it is accurate, intelligent, and voluntary. *Raleigh*, 778 N.W.2d at 94. The primary purpose of the accuracy requirement is to ensure a defendant does not plead guilty to a more serious offense than the defendant could be convicted of were he to go to trial. *Theis*, 742 N.W.2d at 649; *see also State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). For a plea to be accurate, it must establish a proper factual basis. *Ecker*, 524 N.W.2d at 716. A proper factual basis must develop sufficient facts to establish that the defendant’s conduct met all the elements of the charge admitted. Minn. R. Crim. P. 15.01, subd. 1(8), 15.02, subd. 2; *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008).

Theft by false representation occurs when someone

obtains for the actor or another the possession, custody, or title to property of or performance of services by a third person by *intentionally* deceiving the third person with a false representation which is *known to be false*, made with *intent to defraud*, and which does defraud the person to whom it is made. “False representation” includes . . . a promise made with intent not to perform. *Failure to perform is not evidence of intent not to perform unless corroborated by other substantial evidence.*

Minn. Stat. § 609.52, subd. 2(3)(ii) (emphasis added). Holmes provided the following facts at his plea hearing:

DEFENSE COUNSEL: Now, Mr. Holmes, I’m going to direct your attention back to the events that occurred on or about September 3 of 2007 and ask you, do you now have those in mind?

THE DEFENDANT: Yes.

DEFENSE COUNSEL: On that date, had you been asked to give a quote as far as the repair of a barn that was owned by [P.D. and A.D.]?

THE DEFENDANT: Yes.

DEFENSE COUNSEL: Is the . . . farm located here in Rice County, State of Minnesota?

THE DEFENDANT: Yes.

DEFENSE COUNSEL: And is that where you had gone in order to prepare up this proposal for their work?

THE DEFENDANT: Yes.

DEFENSE COUNSEL: Now, it is true, is it not, that when you prepared up this report, you had asked for payment for materials in the amount of \$11,998. Isn’t that true?

THE DEFENDANT: Yes.

DEFENSE COUNSEL: And [P.D. and A.D.], in fact, gave you a check in the amount of \$11,882.

THE DEFENDANT: Yes.

DEFENSE COUNSEL: And that check was supposed to be for purchasing materials. Isn’t that correct?

THE DEFENDANT: Yes.

DEFENSE COUNSEL: And you didn’t use the money for paying for materials?

THE DEFENDANT: That is correct.

DEFENSE COUNSEL: You understood that making that representation that it was for materials and not using it for that is theft by false representation.

THE DEFENDANT: Yes.

Holmes is correct that he did not admit to making a promise with the intent not to perform or to engaging in any sort of intentional deception with a false representation.

The state cites caselaw for the proposition that, “because intent is a state of mind, it is generally proved by inferences drawn from a person’s words or actions in light of all the surrounding circumstances.” *State v. Thompson*, 544 N.W.2d 8, 11 (Minn. 1996); *see also State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997); *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989). Each of the cited cases involved an appeal following a trial and conviction of murder. And the state’s argument includes the following:

In this matter, [Holmes] completed a Petition to Enter a Plea of Guilty pursuant to Rule 15. Within that Petition [Holmes] acknowledged that he was charged with violating Minnesota Statute § 609.52, subd. 2(3)(ii), Theft by False Representation. [Holmes] confirmed that he talked with his attorney about his case, the offense charged, and possible defenses. He also acknowledged that he could have challenged the complaint against him, including [Holmes’s] absence of the *requisite intent* when committing the offense. [Holmes] *waived his right to challenge evidence*, including evidence that *he did not intend* to defraud his victims.

(Emphasis added.) We disagree with the state’s summary of the record. Neither the transcript of the plea hearing nor Holmes’s plea petition contains the words “intent” or “intend.” We will not repeat our discussion regarding the state’s waiver argument.

The state argues that “from the totality of the circumstances this court can infer that when [Holmes] agreed that he took the money, did not perform on the promise, and

committed the offense of Theft by False Representation, he . . . acted with requisite intent.” The state emphasizes that ““intent’ is referenced no less than three times within the statute,” and that “[w]ith such extensive references to intent, by pleading guilty to the offense, one can infer that [Holmes] acknowledged that he committed the acts intentionally, even if not specifically stated.” We reject the state’s circular reasoning. We will not infer intent simply because the statute contains the word.

Holmes’s admitted representation to P.D. and A.D. that he would use their payment to purchase materials and his mere failure to do so do not constitute theft by false representation, unless he *intended* to deceive P.D. and A.D. when he asked them for the money because he *knew at the time* that he would not use the money for materials. We completely reject the state’s contention that, based on the totality of circumstances, the facts contained in Holmes’s plea petition and plea colloquy provide a sufficient basis from which to infer Holmes’s intent. The facts do not support an inference of intent, especially in consideration of the language in Minn. Stat. § 609.52, subd. 2(3)(ii), that “[f]ailure to perform is not evidence of intent not to perform unless corroborated by other substantial evidence.”

We conclude that the record contains insufficient facts to support Holmes’s guilty plea to gross-misdemeanor theft by false representation. The facts in the record suggest only that Holmes failed to perform on his promise to P.D. and A.D.

Reversed and remanded.