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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0125**

State of Minnesota,
Respondent,

vs.

Rafael Ballesteros,
Appellant.

**Filed January 22, 2013
Affirmed
Johnson, Chief Judge**

Clay County District Court
File No. 14-CR-11-1061

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

Brian J. Melton, Clay County Attorney, Pamela Harris, Assistant County Attorney,
Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Bjorkman, Judge; and Crippen,
Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Rafael Ballesteros was charged with first-degree and third-degree criminal sexual conduct. He pleaded guilty to the third-degree charge pursuant to a plea agreement that allowed him to receive a presumptive sentence that is only half as long as the presumptive sentence for first-degree criminal sexual conduct. Before sentencing, he moved to withdraw his plea. The district court denied the motion. We conclude that the district court did not err by concluding that his plea was accurate and voluntary and, therefore, affirm.

FACTS

In March 2011, law-enforcement officers received a report that a young girl had informed her mother that a relative's boyfriend, Ballesteros, sexually assaulted her. In a videotaped interview, the girl said that the incident occurred during the summer of 2009 or the summer of 2010, when she was either five or six years old. The girl stated that Ballesteros invited her into a bedroom at the relative's home while the relative was in the kitchen. The girl stated that while she and Ballesteros were on the bed, Ballesteros "turned her over," "pulled down her pants and underwear," and "licked inside her 'butt.'"

On March 25, 2011, the state charged Ballesteros with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2008). It appears that the parties engaged in plea negotiations that were based, at least in part, on a probation officer's draft of a sentencing worksheet, which indicated a criminal-history score of 4 and, thus, a presumptive sentence of 234 months of imprisonment. On

September 19, 2011, the state filed an amended complaint in which it added one count of third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(d) (2008). That same day, Ballesteros pleaded guilty to the third-degree charge. The parties agreed that the first-degree charge would be dismissed and that Ballesteros would be sentenced to 117 months of imprisonment, the presumptive sentence for the third-degree charge. At the plea hearing, Ballesteros entered an *Alford-Goulette* plea to third-degree criminal sexual conduct, and the district court accepted the plea.

Before his sentencing hearing, Ballesteros moved to withdraw his guilty plea on the ground that his plea was involuntary because “he has a reading disability and did not understand.” In an accompanying memorandum, his attorney argued that Ballesteros “has indicated that he has a reading disability (and perhaps a learning disability), that he did not understand the [plea] agreement, and that he does not speak English.” The memorandum also conveyed Ballesteros’s claim “that his lawyer and the prosecutor tricked him into entering a plea of guilty.” At the sentencing hearing, Ballesteros did not present any evidence, although he briefly addressed the court. The district court denied the motion and sentenced Ballesteros to 117 months of imprisonment, as provided by the plea agreement. Ballesteros appeals.

D E C I S I O N

Ballesteros argues that the district court erred by denying his motion to withdraw his guilty plea. A defendant does not have an absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). Rather, the Minnesota Rules of Criminal Procedure set forth two circumstances in which a defendant may be entitled to

withdraw a guilty plea. First, the district court must allow a defendant to withdraw a guilty plea at any time if “withdrawal is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. Second, the district court may allow a defendant to “withdraw a plea at any time before sentence if it is fair and just to do so.” *Id.*, subd. 2.

Ballesteros relies on both of these rules in arguing that the district court erred by denying his motion. First, he invokes the manifest-injustice standard to argue that withdrawal is required because the factual basis of the plea is inaccurate. Second, he invokes the fair-and-just standard to argue that the district court erred by not permitting withdrawal for the reasons urged in the district court.

A. Manifest-Injustice Standard

Ballesteros first argues that he must be allowed to withdraw his guilty plea because the record does not reflect a sufficient factual basis for the plea. He did not present this argument to the district court. Nonetheless, the caselaw permits him to make the argument for the first time on appeal from his conviction and sentence. The supreme court has stated that, “by pleading guilty, a defendant does not waive the argument that the factual basis of his guilt was not established.” *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003) (reviewing challenge to factual basis of plea on direct appeal though factual basis was not challenged in district court). The supreme court also has stated that a defendant “is free to simply appeal directly from a judgment of conviction and contend that the record made at the time the plea was entered is inadequate” to establish the requirements of a valid plea. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). Thus,

we may review Ballesteros's first argument even though he did not present the argument to the district court.

To satisfy the manifest-injustice standard, Ballesteros must show that his guilty plea is invalid. *See State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). For a guilty plea to be valid, it "must be accurate, voluntary and intelligent." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). As the supreme court has explained,

The accuracy requirement protects the defendant from pleading guilty to a more serious offense than he or she could be properly convicted of at trial. The voluntariness requirement insures that the guilty plea is not in response to improper pressures or inducements; and the intelligent requirement insures that the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty.

Alanis v. State, 583 N.W.2d 573, 577 (Minn. 1998) (citations omitted). If a guilty plea fails to meet any of these three requirements, the plea is invalid. *Theis*, 742 N.W.2d at 650. This court applies a *de novo* standard of review to a determination that a guilty plea is valid. *Raleigh*, 778 N.W.2d at 94.

Ballesteros's first argument goes to the accuracy of his guilty plea. As a general rule, a guilty plea is inaccurate if it is not supported by a proper factual basis. *Ecker*, 524 N.W.2d at 716. Generally, a factual basis exists if there are "sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." *Iverson*, 664 N.W.2d at 349 (quoting *Kelsey v. State*, 298 Minn. 531, 532, 214 N.W.2d 236, 237 (1974)). "The factual basis of a plea is inadequate when the defendant makes statements that negate an essential element of the charged

crime because such statements are inconsistent with a plea of guilty.” *Id.* at 350 (citing *Chapman v. State*, 282 Minn. 13, 20, 162 N.W.2d 698, 703 (1968); *State v. Jones*, 267 Minn. 421, 426-27, 127 N.W.2d 153, 156-57 (1964)).

Notwithstanding the general rule, a defendant may enter a so-called *Alford* plea, which allows him to plead guilty while maintaining his innocence. *See State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977) (citing *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S. Ct. 160, 167-68 (1970)). “An *Alford* plea is not supported by the defendant’s admission of guilt, and is actually contradicted by his claim of innocence” *Theis*, 742 N.W.2d at 649. A defendant submitting an *Alford* plea must merely “agree[] that evidence the State is likely to offer at trial is sufficient to convict.” *Id.* The defendant must “specifically acknowledge on the record at the plea hearing that the evidence the State would likely offer against him is sufficient for a jury, applying a reasonable doubt standard, to find the defendant guilty.” *Id.* If the defendant has made such an acknowledgment, the district court must determine whether there is an independent basis to conclude that there is a strong probability that a jury would find the defendant guilty. *Id.*

Ballesteros contends that the factual basis of his plea is inadequate because a conviction of third-degree criminal sexual conduct requires proof that he engaged in sexual penetration while knowing that the victim is “mentally impaired, mentally incapacitated, or physically helpless.” *See* Minn. Stat. § 609.344, subd. 1(d). At the plea hearing, the district court questioned Ballesteros as to whether a jury likely would find that the girl was physically helpless, and Ballesteros agreed that it was so. The district

court relied on that rationale when it determined that there was a factual basis to support the plea. In his brief, Ballesteros contends that the girl was not physically helpless. He asserts that the girl is not within the “physically helpless” prong of the statute merely because of her young age, immaturity, or small size. He points to the statutory definition of the term “physically helpless,” which means “that a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.” Minn. Stat. § 609.341, subd. 9 (2008); *see also State v. Blevins*, 757 N.W.2d 698, 701 (Minn. App. 2008) (reversing conviction because victim was able to verbally withhold consent). In response, the state contends that there is an adequate factual basis for the plea because “the mental capacity of a 5-6 year old child makes that child unable to withhold or withdraw consent.”

We need not determine whether a five- or six-year-old girl is “mentally impaired, mentally incapacitated, or physically helpless” merely because of her young age, immaturity, or small size, because Ballesteros’s argument fails for another reason. His argument is based on the premise that a factual basis must exist for the offense to which he pleaded guilty. But the caselaw provides that an *Alford-Goulette* plea has a sufficient factual basis if the state’s evidence is likely to lead to a conviction on the offense to which the defendant has pleaded guilty *or another, more serious offense that was charged*. Even before *Goulette*, the supreme court had held that a sufficient factual basis is present if the “defendant’s admissions of the relevant facts and circumstances of his conduct establish that he committed the offense charged *or an offense at least as serious*

as the offense to which he is tendering his plea.” State v. Hoaglund, 307 Minn. 322, 325, 240 N.W.2d 4, 5 (1976) (emphasis added); see also State v. Gustafson, 298 Minn. 200, 201, 214 N.W.2d 341, 342 (1974) (rejecting argument that guilty plea to third-degree murder lacked factual basis on ground that defendant intended to kill wife, which would support charge of first-degree murder). In Goulette itself, the supreme court reiterated that a district court must determine only whether “there is evidence which would support a jury verdict that the defendant is guilty of at least as great a crime as that to which he is pleading guilty.” Goulette, 258 N.W.2d at 762 (emphasis added). In Theis, the supreme court stated that the required factual basis must establish a strong probability that a jury would find the defendant guilty of “the offense to which he is pleading guilty.” 742 N.W.2d at 649. But Theis was not a case in which the state sought to establish a factual basis for an offense other than the offense to which the defendant had pleaded guilty. See id. at 645. Thus, the supreme court in Theis did not overrule its prior opinions in Hoaglund and Goulette.

Accordingly, to resolve Ballesteros’s argument, we must determine whether a factual basis exists for *either* the third-degree charge to which he pleaded guilty *or* the first-degree charge that also was pending at the time of his plea. The state alleged that Ballesteros committed first-degree criminal sexual conduct because he engaged in sexual contact and “the complainant is under 13 years of age and the actor is more than 36 months older than the complainant.” Minn. Stat. § 609.342, subd. 1(a).

At the plea hearing, Ballesteros’s attorney questioned him about the evidence supporting the charge of first-degree criminal sexual conduct:

Q: And one of the things we talked about is for first degree criminal sexual conduct with a child this age and with a man your age, the State would not have to prove any sexual penetration?

A: Yes.

....

Q: And you've indicated that you don't want to take the chance of being convicted of first degree criminal sexual conduct; is that correct?

A: Yes.

The district court also questioned Ballesteros as to whether the state's evidence was sufficient to convict him of criminal sexual conduct generally:

Q: And would you agree that if we have the trial tomorrow and the jury sees the evidence as presented by the State and the statement of the child on the video and the statement of the child on the stand, that it is more likely than not that they're going to convict you of criminal sexual conduct?

A: Yes.

....

Q: Well, do you understand that an Alford plea means that you know and you've read all the police reports and you've looked at the evidence, and you think that based on that evidence if you go to trial, that the jury is going to find you guilty?

A: Yes, ma'am.

Q: That's what you think would happen.

A: Yes, ma'am.

Q: And I already went over with you what the child said happened, right?

A: Yes, ma'am.

....

Q: And the jury would be told about your presumption of innocence and there has to be proof beyond a reasonable doubt, and you still think that if this matter was given to the jury, that they would find you guilty beyond a reasonable doubt?

A: Yes, ma'am.

These excerpts from the transcript of the plea hearing show that Ballesteros acknowledged that the state's evidence is likely to cause a jury to find him guilty of first-degree criminal sexual conduct. Because the girl's young age is undisputed, and because the state had evidence to prove its allegations, the district court had an independent basis to conclude that there is a strong probability that a jury would find the defendant guilty, *Theis*, 742 N.W.2d at 649, of an offense "at least as great a crime as that to which he is pleading guilty," *Goulette*, 258 N.W.2d at 762. Thus, there is a sufficient factual basis for Ballesteros's *Alford-Goulette* plea to third-degree criminal sexual conduct.

B. Fair-and-Just Standard

Ballesteros also argues that the district court erred by denying his motion to withdraw his guilty plea according to the fair-and-just standard. In ruling on such a motion, a district court "must give due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea."

Minn. R. Crim. P. 15.05, subd. 2. “A defendant bears the burden of advancing reasons to support withdrawal. The State bears the burden of showing prejudice caused by withdrawal.” *Raleigh*, 778 N.W.2d at 97 (citations omitted). A district court has broad discretion to grant or deny a motion filed pursuant to rule 15.05, subdivision 2, and this court will reverse a district court’s ruling “only if it can fairly be concluded that the district court abused its discretion.” *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

Ballesteros contends in his principal brief that he should be permitted to withdraw his guilty plea because he is deficient in communication skills, apparently due to a lack of proficiency in English, and because he did not understand the plea agreement. Ballesteros filed a *pro se* supplemental brief in which he essentially reiterates his appellate counsel’s argument by stating, among other things, that he “felt very confused.” The district court considered these issues and expressly concluded that Ballesteros’s argument is without merit:

I’ve had Mr. Ballesteros in front of me for better part of 2011 and every single hearing I have spoken to him. He has spoken to me. When he got up on the stand and gave up his rights and I personally questioned him, he made no indication that he couldn’t understand me. I asked about the language issues. He’s lived in this area for the majority of his life and there was no indication to the Court that a Spanish speaking interpreter would have aided him in any way.

Additionally, he has written to me numerous, numerous letters all in English with probably better grammar and punctuation and spelling than most people I get from the jail, plus he wrote one today and read it to me all in English. So I’m not finding that there is a factual basis to withdraw his

plea because he doesn't speak and understand the English language.

The district court record supports the district court's clearly explained finding that Ballesteros is capable of communicating in English because the transcripts reveal his ability to understand and respond to the district court's questions. Ballesteros also made a statement at the sentencing hearing that evidenced his ability to communicate in English. Furthermore, Ballesteros's *pro se* supplemental brief reflects a more-than-adequate familiarity with the English language. Moreover, the district court record supports the district court's finding that Ballesteros understood the plea proceedings. The district court extensively reviewed the proceedings with Ballesteros:

Q: Do you understand that you could continue with a not guilty plea and we could have a trial which is scheduled to start tomorrow on the original first degree charge?

A: Yes.

Q: Do you understand that you are innocent until proven guilty beyond a reasonable doubt?

A: Yes.

Q: Do you understand that it's the State's burden to prove you're guilty; you don't have to prove that you're innocent?

A: Yes.

Q: Do you understand that if we had the jury trial, all 12 jurors would have to agree that you're guilty before you could be found guilty?

A: Yes.

....

Q: Now, do you understand that because you're pleading guilty here today, we're going to call off the trial tomorrow?

A: Yes.

Q: Are you pleading guilty today because you know what you did violated the law?

A: Yes.

Q: Did anyone make any threats or promises to make you plead guilty?

A: No.

Q: Are you pleading guilty because you know what you did violated the law and because you want to take advantage of the plea agreement and plead to the lesser charge?

A: Yes.

We note that Ballesteros did not submit any evidence to the district court in support of his motion; he submitted only a one-page motion and a three-page memorandum. Thus, the district court did not abuse its discretion by denying Ballesteros's motion with respect to his alleged inability to communicate or to understand the plea proceedings. *See Raleigh*, 778 N.W.2d at 97 (affirming denial of motion to withdraw plea because "nothing in the record shows that [defendant] did not understand the consequence" of plea).

Ballesteros also contends in his principal brief that his district court attorney and the prosecutor "tricked him into entering a plea of guilty" and that he was "pressured into

making his decision to plead guilty based upon the racial makeup of the victim and jury pool.” Ballesteros reiterates these arguments in his *pro se* supplemental brief.

At the plea hearing, Ballesteros expressed concern that his criminal record, which includes felony drug and terroristic-threat convictions, might influence the verdict. The district court responded to Ballesteros’s concerns by assuring him that a jury verdict “would be based on what the evidence was,” including the girl’s statement to law enforcement and her trial testimony and “all the other evidence.” Ballesteros acknowledged the district court’s statements and said that he would enter a plea of guilty. This part of the district court record supports the district court’s subsequent rejection of Ballesteros’s argument that his guilty plea is involuntary because of his concern about his prior convictions.

At the sentencing hearing, Ballesteros also attempted to withdraw his guilty plea on the ground that he “would not have a chance [because] the victim was a white female” and he is Hispanic. The district court responded to this part of Ballesteros’s motion by finding that he “knew what he was doing” at the plea hearing and “intelligently gave up his rights voluntarily” and by concluding that he failed to introduce any evidence to show otherwise. Given the lack of evidence supporting Ballesteros’s conclusory allegations, the district court record supports the district court’s rejection of Ballesteros’s argument that his guilty plea is involuntary because of his concern about the jury’s racial attitudes.

In sum, we conclude that Ballesteros’s guilty plea is not invalid on the ground that it is inaccurate and further conclude that the district court did not abuse its discretion by

denying Ballesteros's motion to withdraw his guilty plea on the ground that it would be fair and just to allow withdrawal.

Affirmed.