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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2004**

State of Minnesota,
Respondent,

vs.

Jennifer Lee Nibbe,
Appellant.

**Filed March 3, 2014
Affirmed
Johnson, Judge**

Blue Earth County District Court
File No. 07-CR-11-1207

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

Susan B. Devos, Blue Earth County Attorney's Office, Mankato, Minnesota (for
respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Frank R. Gallo, Jr., Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Johnson, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Jennifer Lee Nibbe was indicted on charges of first-degree murder and second-degree murder following the death of her husband. She pleaded guilty to second-degree murder pursuant to a plea agreement that allowed her to avoid the risk of a sentence of life in prison without the possibility of release, the mandatory sentence for first-degree murder. On appeal, she argues that she should be allowed to withdraw her guilty plea to second-degree murder because it is not supported by a proper factual basis. We conclude that the record of the plea proceeding establishes that the guilty plea is valid. Therefore, we affirm.

FACTS

During the early morning hours of August 31, 2010, law-enforcement officers in Blue Earth County received a 911 call from Nibbe, who reported that an unknown person had shot her husband during a home invasion. When officers arrived at Nibbe's home, she stated that she had been in the bathroom when she heard a gunshot. She stated that she went to the bedroom she shared with her husband and encountered an intruder wearing dark clothing and a nylon over his face. She stated that the intruder placed a rope around her neck, threatened her with a knife, and dragged her to the living room of the home before fleeing.

Investigators soon suspected that Nibbe was responsible for her husband's death. There was no sign of forced entry into the home. Police officers searched the premises, a farm on a gravel road, but did not find any footprints or tire tracks either inside or outside

the home, even though it had been raining that day. Nothing else seemed out of place at the property. Investigators also discovered that, for several months before her husband's death, Nibbe had been exchanging sexually explicit text messages with another man. Investigators also learned that Nibbe's husband had recently taken out a life insurance policy and that Nibbe was addicted to prescription pain medication, which had become a financial burden.

In September 2010, a special agent of the Minnesota Bureau of Criminal Apprehension and a detective with the Blue Earth County Sheriff's Department arrested Nibbe on suspicion of murder. Nibbe initially declined to speak to the agent and the detective. But she contacted them one day later and said that she wanted to talk. She did so and gave a statement to officers to the effect that she shot her husband in the back of the head while he was sleeping in their bed and then tried to make it appear as though an intruder had killed him during a home invasion.

In March 2011, a Blue Earth County grand jury indicted Nibbe on one count of first-degree murder, in violation of Minn. Stat. § 609.185(a)(1) (2010), and one count of second-degree murder, in violation of Minn. Stat. § 609.19, subd. 1(1) (2010). In June 2012, Nibbe and the state entered into a plea agreement by which Nibbe would plead guilty to second-degree murder and the state would dismiss the charge of first-degree murder and recommend to the district court a sentence of 306 months of imprisonment. The plea agreement allowed Nibbe to avoid the risk of a life sentence without the possibility of release, the mandatory sentence for a conviction of first-degree murder. *See* Minn. Stat. § 609.106, subd. 2(1) (2010). During the plea hearing, Nibbe indicated

that her memory of the shooting was fragmented. She nonetheless recalled making an incriminating statement to police, and she did not dispute that she gave the statement or that it is true. At the conclusion of the plea hearing, the district court conditionally accepted Nibbe's plea and scheduled a sentencing hearing.

Nibbe appeared for sentencing in July 2012. The district court unconditionally accepted Nibbe's plea and adjudicated Nibbe guilty of second-degree murder. The district court imposed a sentence of 306 months of imprisonment, as recommended by the state pursuant to the plea agreement. On the same day as the sentencing hearing, the district court filed an order and memorandum in which it recited the highlights of the plea hearing. Nibbe appeals.

D E C I S I O N

Nibbe argues that the district court erred by accepting her guilty plea because it is invalid. We begin by noting that Nibbe did not present this argument to the district court. Nonetheless, the caselaw permits her to make the argument for the first time on appeal from her conviction. 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). 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 the validity of Nibbe's guilty plea even though she did not ask the district

court to do so. We apply a *de novo* standard of review to the validity of a plea. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

A guilty plea is invalid if it is not “accurate, voluntary and intelligent.” *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). As the supreme court has explained,

The main purpose of the accuracy requirement is to protect a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial. Other possible benefits of the accuracy requirement include assisting the court in determining whether the plea is intelligently entered and facilitating the rehabilitation of the defendant. The purpose of the voluntariness requirement is to insure that the defendant is not pleading guilty because of improper pressures. The purpose of the requirement that the plea be intelligent is to insure that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea.

State v. Trott, 338 N.W.2d 248, 251 (Minn. 1983). If a guilty plea fails to meet any of these three requirements, the plea is invalid. *State v. Theis*, 742 N.W.2d 643, 650 (Minn. 2007).

Nibbe’s brief initially states in a heading that her guilty plea is invalid because it does not satisfy the voluntariness requirement. But, as the state notes, the body of the brief clearly argues only that her guilty plea does not satisfy the accuracy requirement. Nibbe’s brief repeatedly contends that her guilty plea is not supported by a proper factual basis. 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)). If a guilty plea is not supported by a proper factual basis, the plea is invalid on the ground that it is inaccurate. *Ecker*, 524 N.W.2d at 716.

In this case, the parties agree that Nibbe entered a *Norgaard* plea to second-degree murder. A *Norgaard* plea is a guilty plea in which a defendant “plead[s] guilty even though he or she claims a loss of memory . . . regarding the circumstances of the offense.” *Id.*; see also *State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 110 N.W.2d 867 (1961). The factual basis of a *Norgaard* plea is particularly important because the plea “is not supported by the defendant’s admission of guilt.” *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009) (quoting *Theis*, 742 N.W.2d at 649), review denied (Minn. Apr. 21, 2009). In *Williams*, this court synthesized the supreme court cases of *Ecker*, a case concerning *Norgaard* pleas, and *Theis*, a case concerning *Alford/Goulette* pleas,¹ to clarify the two essential elements of an accurate *Norgaard* plea: “[1] a strong factual basis and [2] the defendant’s acknowledgement that the evidence would be sufficient for a jury to find the defendant guilty beyond a reasonable doubt.” *Id.* at 12-13.

Nibbe’s argument has three parts. First, she contends that she did not make an adequate acknowledgment that the evidence would be sufficient for a jury to find her guilty beyond a reasonable doubt. She points to the following excerpt from the transcript of the plea hearing:

¹ An *Alford/Goulette* plea is a guilty plea in which a defendant maintains his or her innocence but reasonably believes, based on the record, that the state has sufficient evidence to obtain a conviction. *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977) (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970)).

COURT: Now I have to be somewhat concerned because you are telling me you can't remember this incident. But looking at all of the evidence that your lawyers have discussed with you on this case, you're – do you feel satisfied that it's likely or, in fact, very likely that a jury would, in fact, convict you of this offense if the jury was one to hear all of the evidence?

NIBBE: That's what I've been told.

COURT: Well, you're making your own decision. I know lawyers give you advice, but based upon your – your analysis and your own mind, is that something that you are thinking about when you are entering into this plea agreement?

NIBBE: Yes.

Nibbe contends that she did not articulate her own acknowledgment that a jury would likely convict her but, rather, merely recited the acknowledgments of others and stated that she was “thinking about” the issue. It is true that Nibbe initially deferred to others’ understanding of the evidence. But the district court followed up with a question that was appropriately focused on her own understanding, and her answer to that question is a sufficient acknowledgment of her own belief that a jury likely would convict her. Nibbe separately acknowledged that the state would be required to prove her guilt beyond a reasonable doubt. *See Williams*, 760 N.W.2d at 14 (reasoning that defendant’s knowledge of burden of proof demonstrates awareness of likelihood of conviction). Thus, Nibbe acknowledged that the evidence is sufficient for a jury to find her guilty beyond a reasonable doubt.

Second, Nibbe contends that the district court erred by not making any findings as to whether she acknowledged that the evidence is sufficient for a jury to find her guilty.

But Nibbe does not cite any authority for the proposition that a district court has an obligation to make findings on that issue, and we do not believe that any such authority exists. A district court's obligation is to "ensure that an adequate factual basis has been established in the record." *Ecker*, 524 N.W.2d at 716. This court can evaluate the adequacy of the factual record by reviewing a transcript of the plea hearing. *See Brown*, 449 N.W.2d at 182-83; *Williams*, 760 N.W.2d at 13-14. In this case, we have conducted that evaluation and have concluded that Nibbe acknowledged that the evidence is sufficient for a jury to find her guilty.

Third, Nibbe contends that the district court did not obtain her acknowledgment that the evidence is sufficient for a jury to find her guilty of second-degree murder, "the offense to which [she] plead[ed] guilty." *Theis*, 742 N.W.2d at 649. Nibbe is correct that the transcript of the plea hearing indicates that her acknowledgement may have related to the likelihood of being convicted of first-degree murder, not second-degree murder. But even that acknowledgment would be sufficient to satisfy the requirements of a *Norgaard* plea to second-degree murder. A defendant must acknowledge that the evidence "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); *see also Trott*, 338 N.W.2d at 251-52. In this case, the record shows that Nibbe acknowledged that the evidence is sufficient for a jury to find her guilty of either second-degree murder, the crime of which she was convicted, or first-degree murder, a crime that is greater than the crime of which she was convicted.

Thus, we conclude that Nibbe's guilty plea is not invalid due to the absence of an adequate factual basis. Notwithstanding that conclusion, we do not foreclose the possibility of further proceedings in the district court related to the validity of Nibbe's guilty plea, if she wishes to pursue the matter further. In *Brown*, the supreme court concluded that a guilty plea was not invalid due to an inaccurate factual record but nonetheless authorized the district court in that case to conduct postconviction proceedings on the question whether the plea was invalid on other grounds, *i.e.*, that it was not voluntary or not intelligent. 449 N.W.2d at 182-83; *see also State v. Schaefer*, 374 N.W.2d 199, 202 (Minn. App. 1985) (affirming validity of guilty plea but allowing further postconviction proceedings). Given the unusual circumstances of this case, some of which are contained in confidential portions of the record, we believe that Nibbe should have an opportunity similar to that of the appellant in *Brown*, if she wishes to urge a different reason why her plea is invalid. The district court plainly is in a better position from which to assess the issue of voluntariness, for example, and also is in a better position from which to determine whether "withdrawal is necessary to correct a manifest injustice," *see* Minn. R. Crim. P. 15.05, subd. 1. However, "it is not always in a defendant's best interest to seek to withdraw [her] guilty plea even if [she] believes that grounds exist for withdrawal." *Brown*, 449 N.W.2d at 183 n.1. If Nibbe were allowed to withdraw her plea to second-degree murder, she would face trial on the charge of first-degree murder. *See id.* At such a trial, the state surely would introduce evidence that Nibbe admitted to shooting her husband in the back of the head while he lay asleep in bed, and the state also would introduce evidence that she had motives for doing so. If she

were convicted of first-degree murder, she would face a mandatory sentence of life in prison without any possibility of release. *See* Minn. Stat. § 609.106, subd. 2(1).

Affirmed.