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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-494**

Madi Omot Nyigow, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 3, 2011
Affirmed
Toussaint, Judge**

Mower County District Court
File No. 50-CR-07-3282

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

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

Kristen Nelsen, Mower County Attorney, Jeremy L. Clinefelter, Assistant County Attorney, Austin, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and
Toussaint, Judge.

UNPUBLISHED OPINION

TOUSSAINT, Judge

Appellant Madi Omot Nyigow challenges the postconviction court's denial of his motion to withdraw his guilty plea, arguing that the facts elicited during the plea hearing

are insufficient to establish that a simple robbery occurred. Because the district court did not abuse its discretion by denying appellant's postconviction motion, we affirm.

DECISION

An appellate court reviews a district court's decision to deny postconviction relief for an abuse of discretion. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004). The scope of our review is limited to determining whether there is sufficient evidence to sustain the findings of the postconviction court. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). When considering a district court's denial of postconviction relief, we review issues of law de novo and findings of fact for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). "A postconviction petitioner bears the burden of alleging and proving by a fair preponderance of the evidence facts that would warrant a decision to reopen the case." *Longoria v. State*, 749 N.W.2d 104, 106 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008).

There is no absolute right to withdraw a guilty plea after it is entered. *Shorter v. State*, 511 N.W.2d 743, 746 (Minn. 1994). Instead, Minn. R. Crim. P. 15.05 sets forth two bases for withdrawal. Under subdivision 1, if a defendant demonstrates that "withdrawal is necessary to correct a manifest injustice," the district court shall permit withdrawal before or after sentencing. Minn. R. Crim. P. 15.05, subd. 1. The second basis—articulated in Minn. R. Crim. P. 15.05, subd. 2—is not applicable in this case.

Manifest injustice exists if a plea does not comply with constitutional due-process requirements that the plea be accurate, voluntary, and intelligent. *Rhodes*, 675 N.W.2d at 326. "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.” *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). The defendant must present a factual basis sufficient to establish that the elements of the offense to which he is pleading have been met. Minn. R. Crim. P. 15.02, subd. 2; *Ecker*, 524 N.W.2d at 716. “[A]n adequate factual basis is usually established 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. “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.” *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003).

I.

The Minnesota Rules of Criminal Procedure provide that the court must allow a defendant to withdraw a guilty plea “upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. The state argues that the district court did not abuse its discretion by denying appellant’s motion to withdraw his guilty plea because the motion was untimely.

Under the postconviction statute, “[n]o petition for postconviction relief may be filed more than two years after the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court’s disposition of petitioner’s direct appeal.” Minn. Stat. § 590.01, subd. 4(a) (2010). Appellant’s petition was filed within this two-year limit. The state’s argument that the petition was untimely is unavailing, despite the fact that appellant’s sentence expired prior to his filing of the

petition. We therefore address the merits of appellant's petition.

II.

Appellant argues that he must be allowed to withdraw his guilty plea because the facts elicited during the plea colloquy “did not establish that he used force to overcome the victim's resistance or to compel [the victim's] acquiescence in the taking or carrying away of the property.”

The usual way in which the factual-basis requirement is satisfied is for the court to ask a defendant to express in his own words what happened. *State v. Hoaglund*, 307 Minn. 322, 240 N.W.2d 4 (1976). The defendant's statement will usually suggest questions to the court and, with the assistance of counsel, the court can interrogate the defendant in further detail. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). “Other ways of establishing a factual basis include testimony of witnesses and statements summarizing the evidence.” *Id.* “The court should not accept the plea unless the record supports the conclusion that the defendant actually committed an offense at least as serious as the crime to which he is pleading guilty.” *Id.* at 251-52. A defendant may not withdraw his plea “simply because the [district] court failed to elicit proper responses if the record contains sufficient evidence to support the conviction.” *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). The use of leading questions, while disfavored, is an insufficient ground to invalidate a guilty plea. *Ecker*, 524 N.W.2d at 717.

At the plea hearing, appellant was questioned by defense counsel and the court in establishing the factual basis for the plea. Appellant admitted to entering the liquor store with another person and taking at least one bottle of vodka without paying for it. He

agreed that he shoved or grabbed the wrist of the store manager when he tried “to get [the manager] away from the female that was there with [him]” and that his actions in doing so constituted “use of some force.” The district court questioned defense counsel as to whether “the fact that [appellant] shoved the [manager], used the force, and then took the vodka makes it [a] Simple Robbery.” Defense counsel responded in the affirmative, and appellant confirmed that he understood the consequences of his actions and that he had time to go over each of the elements of the crime with his attorney.

The basis for appellant’s postconviction motion is that these facts do not establish that his use of force overcame the store manager’s resistance or compelled his acquiescence in the taking or carrying away of the vodka. *See* Minn. Stat. § 609.24 (2006) (stating that a person is guilty of simple robbery when he or she takes personal property from another person and “uses or threatens the imminent use of force against any person to overcome the person’s resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property”); *cf. State v. Moore*, 295 N.W.2d 101, 102 (Minn. 1980) (reversing simple-robbery conviction when facts indicated that victim freely gave defendant money believing that he was engaging in a drug transaction). But such an argument is without merit. Appellant admitted that he used physical force to “get [the store manager] away” from his companion. The evidence elicited by appellant indicates that he and his female companion were working “in concert” when they robbed the liquor store.

Because appellant’s use of force related to the store manager’s restraint of appellant’s companion, with whom appellant was acting in concert, the force was used to

overcome the store manager's resistance to the carrying away of the property. As such, the district court did not abuse its discretion by denying appellant's motion for postconviction relief.

Affirmed.