STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1492

State of Minnesota,
Respondent,

vs.

Billy Ray Pigeon,
Appellant.

Filed July 22, 2013
Affirmed
Kirk, Judge

Cass County District Court
File No. 11-CR-12-59

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

Christopher J. Strandlie, Cass County Attorney, Barbara J. Harrington, Assistant County Attorney, Walker, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

KIRK, Judge

On appeal from his conviction of stalking, appellant argues that the district court erred by denying his motion to withdraw his guilty plea. We affirm.

FACTS

On January 10, 2012, respondent State of Minnesota charged appellant Billy Ray Pigeon with stalking—third or subsequent violation in 10 years, stalking—pattern of stalking conduct, terroristic threats, domestic abuse, and violation of a no contact order. The complaint alleged that, on January 7, appellant spoke to his ex-girlfriend, M.R.H., on the phone in violation of a Domestic Abuse No Contact Order (DANCO) and an order for protection (OFP). The complaint alleged that, during their conversation, appellant asked M.R.H. if he could claim their children on his taxes, and she replied that he could not. In response, appellant threatened to dismember M.R.H. and "scatter pieces of her body next to where their parents are buried." The complaint alleged that M.R.H. "believes [appellant] wants to kill her and that he is capable of doing so." M.R.H. "was visibly distraught and crying" when she reported the incident to a police officer and she told the officer that she was afraid of appellant.

The complaint further alleged that appellant has convictions for five offenses where M.R.H. individually or M.R.H. and her children were the victims. These convictions include: (1) an August 2011 conviction for violation of an OFP that was granted on behalf of M.R.H. and her children with two or more violations within 10 years; (2) a July 2011 conviction of domestic assault for assaulting M.R.H.'s daughter,

D.H.; (3) a January 2009 conviction of domestic abuse—violation of an OFP that was granted on behalf of M.R.H.; (4) an April 2003 conviction of fifth-degree domestic assault for assaulting M.R.H.; and (5) a July 2001 conviction of fifth-degree domestic assault for assaulting M.R.H. The complaint alleged that on August 11, 2010, M.R.H. obtained an OFP against appellant on behalf of herself and her children. The OFP remained in effect until October 10, 2011. In addition, appellant was served with a DANCO on July 28, 2011, and ordered not to have any contact with M.R.H. or her daughter, D.H. The DANCO is in effect until July 18, 2016.

On February 23, 2012, the parties reported to the district court that they had reached a plea agreement. Appellant pleaded guilty to the charge of stalking—third or subsequent violation within 10 years. Appellant's counsel questioned appellant regarding the factual basis for his plea, and appellant admitted that he spoke with M.R.H. on the phone on January 7, and that he knew he was not supposed to talk to her. Appellant also admitted that M.R.H. became upset during the conversation. Appellant's counsel then asked appellant, "Did you manifest a threat to [M.R.H.] at that time?" Appellant replied, "No, I didn't." At that point in the colloquy, the district court questioned the sufficiency of appellant's testimony. Appellant's counsel further questioned appellant:

> [APPELLANT'S COUNSEL]: [D]o you believe that it's possible that [M.R.H.] was threatened by anything that you had said on the phone that day?
> [APPELLANT]: It's possible if she was drinking.
> [APPELLANT'S COUNSEL]: Do you believe that she is scared of you at all?
> [APPELLANT]: No, I don't believe she is, but she probably said she was.

Based on appellant's testimony, the district court did not accept appellant's plea and continued the hearing. The district court stated, "I'm sorry. It's probably my neglect as much as anyone's here. I'm not real familiar with this statute to which you're entering a plea, and that language is a little bit confusing to me. I'd hate to have us accept a plea for something that we couldn't and then have us start all over again."

On February 27, the district court held another hearing, and appellant pleaded guilty to the same charge. Appellant admitted the following facts:

> [APPELLANT'S COUNSEL]: [W]ere you located in Cass County on January 7th, 2012?
> [APPELLANT]: Yes, I was.
> [APPELLANT'S COUNSEL]: And at that time you were aware that there was a domestic abuse no contact order against you, correct?
> [APPELLANT]: Yes.
> [APPELLANT'S COUNSEL]: And that was for you not to have contact with the victim in this matter, [M.R.H.]; is that correct?
> [APPELLANT]: Yes, it is.
> [APPELLANT'S COUNSEL]: And on January 7th, 2012, you had contact with [M.R.H.], correct?
> [APPELLANT]: Yes, I did.
> [APPELLANT'S COUNSEL]: And at that time you knew that you could not have contact with [M.R.H.], correct?
> [APPELLANT]: Yes.
> [APPELLANT'S COUNSEL]: And so you knew that that was an unlawful act, having contact with [M.R.H.], correct?
> [APPELLANT]: Yes.
> [APPELLANT'S COUNSEL]: And that occurred in Cass County?
> [APPELLANT]: Yes, it did.
> [APPELLANT'S COUNSEL]: And you understand that under the law, under the domestic abuse no contact order, that [M.R.H.] had a right not to have you contact her, correct?
> [APPELLANT]: Yes.
> [APPELLANT'S COUNSEL]: And you understand that you violated her rights by having contact with her, correct?
> [APPELLANT]: Yes.

Appellant also testified that he had three prior convictions for violating an OFP and one conviction for domestic assault. At appellant's counsel's request, the district court received a copy of the complaint into evidence.

Appellant subsequently moved to withdraw his guilty plea, arguing that his counsel misinformed him about the identity of the judge who would be sentencing him. In an attached affidavit, appellant's counsel stated that he advised appellant to accept the plea agreement based on his knowledge of the sentencing practices of the judge who would be accepting the plea. He stated that this was significant because the plea agreement included an agreement that appellant could argue for a downward dispositional departure at the time of sentencing. Appellant's counsel asserted that he later found out that a different judge would be sentencing appellant and, if he had known that information earlier, he would have advised appellant differently. Following a hearing, the district court denied appellant's motion. The district court determined that it would not be fair and just to allow appellant to withdraw his plea, and that appellant retains the benefit of the plea agreement because the other counts of the complaint were dismissed in exchange for his plea. The district court also noted that appellant does not have a right to be sentenced by a judge of his choosing. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred by denying his motion to withdraw his guilty plea because his plea was not supported by a sufficient factual basis. Appellant did not raise this specific argument before the district court; instead, he moved the district court to withdraw his guilty plea because the judge who sentenced him was not the same

judge who accepted his plea. In this appeal, appellant has abandoned the argument for plea withdrawal that he raised before the district court.

This court generally does not consider issues which were not raised before the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). "At the court's discretion, it may deviate from this rule when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Id.* But a defendant may challenge the acceptance of a guilty plea on a direct appeal, even if the issue was not raised before the district court, when the grounds for the challenge are contained within the record. *See State v. Newcombe*, 412 N.W.2d 427, 430 (Minn. App. 1987) ("The supreme court has held a direct appeal an inappropriate means of challenging acceptance of a guilty plea only where the grounds for the challenge go outside the record on appeal."), *review denied* (Minn. Nov. 13, 1987). Because appellant's argument on appeal is based on the transcript of his plea hearing and not on evidence outside of the record, we consider appellant's argument here.

A district 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. A manifest injustice occurs if a guilty plea is not valid. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). A valid guilty plea is one that is "accurate, voluntary, and intelligent." *Id.* The validity of a guilty plea is a question of law that this court reviews de novo. *Id.* The defendant has the burden of demonstrating that his plea was invalid. *Id.*

Appellant only challenges the accuracy of his plea. "A proper factual basis must be established for a guilty plea to be accurate." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). A factual basis is typically established by the defendant explaining what happened in his or her own words. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). The district court is responsible for ensuring that an adequate factual basis has been established and, therefore, the district court should personally interrogate the defendant unless the district court is satisfied that an adequate factual basis was established. *Ecker*, 524 N.W.2d at 716. "The factual-basis requirement is satisfied if the record contains a showing that there is credible evidence available which would support a jury verdict that defendant is guilty of at least as great a crime as that to which he pled guilty." *State v. Genereux*, 272 N.W.2d 33, 34 (Minn. 1978). But the factual basis is inadequate if "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).

Appellant pleaded guilty to stalking—third or subsequent violation in 10 years, in violation of Minn. Stat. § 609.749, subd. 4(b) (2010). The statute provides that "[a] person is guilty of a felony who violates any provision of subdivision 2 within ten years of the first of two or more previous qualified domestic violence-related offense convictions." Minn. Stat. § 609.749, subd. 4(b). Under subdivision 2, a person is guilty of a gross misdemeanor if he "stalks" another person by "directly or indirectly, or through third parties, manifest[ing] a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act." *Id.*, subd. 2(1) (2010). The

statute defines "stalking" to mean "to engage in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and victim." *Id.*, subd. 1 (2010). "[T]he state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated." *Id.*, subd. 1a (2010).

Appellant contends that he did not admit to any facts on the record that established that he knew or had reason to know that his conduct would cause M.R.H. to feel frightened, threatened, oppressed, persecuted, or intimidated. At the February 27 plea hearing, appellant testified that he had contact with M.R.H. on January 7 despite being aware that a DANCO prevented him from having contact with her, knew having contact with M.R.H. was an unlawful act, and violated M.R.H.'s right to not have contact with him under the DANCO. Appellant further testified that he had previous convictions for violating an OFP. Appellant did not testify about whether he knew or had reason to know that his conduct would cause M.R.H. to feel frightened, threatened, oppressed, persecuted, or intimidated. But a defendant's explanation of the facts on the record may be supplemented with additional evidence, including the complaint, to establish a sufficient factual basis. *See Lussier v. State*, 821 N.W.2d 581, 589 (Minn. 2012) ("[T]he plea petition and colloquy may be supplemented by other evidence to establish the factual basis for a plea."); *Trott*, 338 N.W.2d at 252 ("The record also contains a copy of the complaint and defendant, by his plea of guilty, in effect judicially admitted the allegations contained in the complaint.").

Here, the district court received the complaint into evidence at appellant's request. The complaint describes appellant's "long history of assaultive behavior and harassment towards [M.R.H.]," including two convictions for violating an OFP that M.R.H. obtained on behalf of herself and her children, two convictions for committing domestic assault against M.R.H., and one conviction for committing domestic assault against M.R.H.'s daughter. The complaint stated that, on the date of the offense, M.R.H. was "visibly distraught and crying" and she told the police officer that she is afraid of appellant and believes that he wants to kill her. The complaint establishes that appellant has a history of domestic violence directed at M.R.H. and that M.R.H. was upset and scared after the January 7 incident. Based on the facts alleged in the complaint, the district court could determine that appellant knew or had reason to know that his conduct would cause M.R.H. to feel frightened, threatened, oppressed, persecuted, or intimidated. *See State v. Franks*, 765 N.W.2d 68, 75 (Minn. 2009) ("[I]t is proper to view a defendant's words and acts in the context of the defendant's relationship with the victim, including evidence of past crimes against the victim.").

Appellant contends that the statements in the complaint are outweighed by his express denial at the first plea hearing that he threatened M.R.H. But appellant overlooks the fact that appellant's plea at that hearing was not accepted. The district court did not accept appellant's guilty plea until the second plea hearing, when appellant entered a guilty plea, admitted facts on the record, and the district court received the complaint into evidence. The record includes credible evidence that would support a jury verdict that appellant is guilty of at least as great of a crime as the crime to which he pleaded guilty.

Considering the record as a whole, it provides an adequate factual basis for appellant's guilty plea to stalking—third or subsequent violation in 10 years.

Finally, appellant asserts that his plea was invalid because the factual basis did not establish that he manifested a purpose or intent to injure the rights of M.R.H. Appellant bases this argument on his contention that the word "right" as used in Minn. Stat. § 609.749, subd. 2(1), is unconstitutionally vague. He also asserts that there is no authority to establish that M.R.H. had a "right" to not be contacted by appellant. As previously discussed, this court generally does not consider issues which were not raised to and decided by the district court. *See Roby*, 547 N.W.2d at 357. Constitutional issues also "may not generally be raised for the first time on appeal." *State v. Frazier*, 649 N.W.2d 828, 839 (Minn. 2002) (declining to consider a constitutional challenge to a statute on appeal because it was not raised to or addressed by the district court or this court). Because it is undisputed that this argument was not raised to and decided by the district court, we decline to consider the issue here.

Accordingly, appellant has not sustained his burden of proving that withdrawal of his guilty plea is necessary to correct a manifest injustice and, therefore, the district court's acceptance of appellant's plea to stalking—third or subsequent violation in 10 years, was not erroneous.

Affirmed.