STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0663

State of Minnesota,
Respondent,

vs.

Efrem Andre Jackson,
Appellant.

Filed March 17, 2014
Affirmed in part, reversed in part, and remanded
Stauber, Judge

Stearns County District Court
File No. 73CR11781; 73CR0912470

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

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

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

STAUBER, Judge

Appellant argues that he should be allowed to withdraw his guilty pleas to third-degree assault with substantial bodily harm and to felony theft by swindle because the

factual bases for the pleas do not reflect that he inflicted substantial bodily harm or that he illegally obtained property valued at more than $1,000. We affirm appellant's conviction of theft by swindle, but reverse and remand appellant's conviction of assault.

FACTS

Assault File No. 12470

On November 21, 2009 the police were dispatched to a residence on a report of an assault. The victim reported that, during an argument, appellant Efram Andre Jackson struck him on the head with a metal broom, causing a laceration to his scalp. According to the complaint, the laceration required several stitches. The police found a metal broom with blood on it outside the residence.

Theft File No. 7811

On November 12, 2010, a detective from the U.S. Department of Veterans' Affairs (VA) began investigating suspected fraudulent payments of benefits to appellant. The investigation revealed that between April 2010 and January 2011 appellant was receiving mileage reimbursement for travel between Little Canada and St. Cloud for medical appointments at the VA Hospital in St. Cloud. But the appellant was not living in Little Canada and had not attended several of the appointments. According to investigators, the total amount of money appellant allegedly received in fraudulent mileage reimbursements was $2,125.86.

Guilty Pleas

On November 16, 2011, a guilty-plea hearing was held on both of these files. Appellant agreed to enter an *Alford* plea to third-degree assault with substantial bodily

harm. An additional count of second-degree assault was dismissed. He also agreed to plead guilty to theft by swindle of an amount in excess of $1,000—a felony. *See* Minn. Stat. § 609.52, subd. (3)(a) (Supp. 2009). The district court accepted appellant's guilty pleas and requested a pre-sentence investigation report.

On February 14, 2012, appellant filed a motion in district court seeking to withdraw his guilty pleas prior to sentencing because they were not knowingly entered. A hearing was scheduled on his motion for February 16, 2012, but appellant failed to appear, and a warrant was issued. Another hearing was scheduled for March 22, 2012, and appellant again failed to appear. Finally, on October 11, 2012, appellant appeared to address his motion. Appellant stated that he wanted to withdraw his guilty pleas because he wanted to go to trial on the assault charge in order to prove that he had acted in self-defense, and because he never saw any paperwork establishing the amount of money that he swindled from the VA. The district court denied the motion, stating that appellant indicated during the guilty plea hearing that he fully understood the rights he was giving up, that appellant acknowledged that there was a substantial likelihood of being convicted on the assault charge, that appellant admitted that the amount he swindled from the VA was in excess of $1,000, and that the state would be prejudiced because nearly a year had elapsed since appellant pleaded guilty.

On January 11, 2013, appellant was sentenced to 26 months in prison for third-degree assault and also received a concurrent sentence of 25 months in prison for theft by swindle. This appeal followed.

D E C I S I O N

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007). But a defendant may be allowed to withdraw his plea "at any time before sentence if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2. After sentencing, a defendant may withdraw his guilty plea upon "proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." *Id.*, subd. 1. Manifest injustice exists when a guilty plea is invalid, which occurs when a guilty plea is not accurate, voluntary, and intelligent. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). If a review of the record shows that the manifest injustice standard is met, we need not review the plea under the fair-and-just standard. *Id.* We review a district court's decision to deny a motion to withdraw a guilty plea for abuse of discretion. *State v. Raleigh*, 778 N.W.2d 90, 97 (Minn. 2010). But whether a plea is valid is a question of law that this court reviews de novo. *Id.* at 94.

I.

Appellant argued to the district court that he should be entitled to withdraw his plea to third-degree assault because his plea was not knowing or intelligent. But appellant now argues on direct appeal that his plea was not *accurate* because he never admitted that he caused substantial bodily harm, which is an element of the offense of third-degree assault. *See* Minn. Stat. § 609.223, subd. 1 (2008). The state asserts that appellant's argument is new on appeal and therefore not properly before this court, and that appellant is required to raise this argument in a postconviction petition to the district court. We disagree. "[A] defendant has a right to challenge his guilty plea on direct

appeal even though he has not moved to withdraw the guilty plea in the district court." *State v. Anyanwu*, 681 N.W.2d 411, 413 (Minn. App. 2004); *see also Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989) ("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 in one or more of these respects."). Moreover, it is an issue of judicial economy. Because appellate courts review the validity of a guilty plea de novo, remanding the issue back to the district court would result in a duplication of judicial resources should the case be appealed yet again to this court following judgment on a postconviction petition. *See Raleigh*, 778 N.W.2d at 94. Therefore, we conclude that appellant's argument is properly before this court.

"The accuracy requirement protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial." *Raleigh*, 778 N.W.2d at 94. "A proper factual basis must be established for a guilty plea to be accurate." *Theis*, 742 N.W.2d at 647 (quotation omitted). A court may accept a defendant's plea even though he maintains his innocence where the state demonstrates "a strong factual basis for the plea and the defendant clearly expresse[s] his desire to enter the plea based on his belief that the state's evidence would be sufficient to convict him." *Id.* (quotation omitted). A court should not "cavalierly accept an *Alford* plea" and the "factual basis inquiry is essential to a determination of this issue." *Id.* at 648 (quotations omitted). "[T]he better practice is for the factual basis to be based on evidence discussed with the defendant on the record at the plea hearing." *Id.* at 649. The factual basis may be established through testimony or the presentation of documents. *Id.*

The defendant should also "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.*

The state has conceded that the plea colloquy was largely deficient, stating that "the *Alford* plea on the assault file in this case was not the model of specificity and if looking simply at the plea transcript itself, this court might be well inclined to review the accuracy of the plea." The factual basis elicited at the plea hearing through appellant's testimony was that, on November 21, 2009, appellant was at a residence in Stearns County. Two women and a man, S.P., were present.

> PROSECUTOR: Okay. And, in any event, a physical confrontation happened between you and [S. P.].
> APPELLANT: Uhm-hmm.
> PROSECUTOR: And I know that you have maintained all along that you disagree with –
> APPELLANT: Uhm-hmm.
> PROSECUTOR: -- essentially his version that you attacked him with a weapon.
> APPELLANT: Right.
> PROSECUTOR: But you agree that there was that physical confrontation?
> APPELLANT: Uhm-hmm.
> PROSECUTOR: And that's kind of what led us here today.
> APPELLANT: Uhm-hmm.
> PROSECUTOR: I don't have any other questions concerning the incident.

Appellant acknowledged that "there is a substantial likelihood that the jury would convict [him] if they heard all the evidence." And he stated that he was willing to plead guilty although he maintained his innocence in order to "take advantage of the 26-month offer."

While it is important for a defendant to acknowledge why he is willing to plead guilty on an *Alford* basis, it is more important that the court is "reasonably satisfied [that] defense counsel and the prosecution have established an adequate factual basis." *State v. Ecker*, 524 N.W.2d 712, 717 (Minn. 1994). Appellant pleaded guilty to third-degree assault with substantial bodily harm in violation of Minn. Stat. § 609.223, subd. 1. "'Substantial bodily harm' means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. § 609.02, subd. 7a (2008). The factual basis provided in the plea colloquy establishes that a "physical confrontation" occurred, but does not address the extent of the injuries involved. At no time during the guilty-plea hearing did counsel or the court address the injuries received by the victim.

In *State v. Goulette*, the supreme court emphasized that "it is absolutely crucial that when an Alford-type plea is offered the [district] court should not cavalierly accept the plea but should assume its responsibility to determine whether the plea is voluntarily, knowingly, and understandingly made, and whether there is a sufficient factual basis to support it." 258 N.W.2d 758, 761 (Minn. 1977). Moreover,

> the factual-basis requirement would appear to be essential to a determination of this issue. . . . [T]he factual-basis requirement provides a means by which the [district] court can test whether the plea is being intelligently entered, since an *Alford*-type plea could hardly be accepted as an intelligent, rational plea if there were insufficient factual basis offered to support it.

Id. In *Goulette*, the factual basis was provided by the public defender "who recited in summary form some of the key evidence which the prosecution would have offered." *Id.* Nevertheless, the supreme court stated that the "better practice would be the introduction, by the prosecutor, of statements of witnesses or other items from his file which would aid the court in its determination." *Id.* Likewise, *Theis* prescribes that the prosecutor should discuss the evidence against the defendant with the defendant on the record. 742 N.W.2d at 649.

In this case, there was no discussion on the record regarding the extent of the assault victim's injuries, or the evidence that would have proved that appellant struck the defendant in such a way so as to have caused substantial bodily harm. No evidence was introduced or summarized to support the state's assertion that appellant struck the victim with a metal broom, causing an injury that required stitches. There is nothing in the plea agreement regarding the injuries the victim sustained. Appellant also did not admit in the PSI that he caused a substantial injury to the victim. Because appellant refused to admit guilt and because there is no evidence in the record supporting the element of substantial bodily harm aside from assertions made in the complaint, we conclude that this factual basis is not sufficient under *Theis* or *Goulette*. The state's concession on this point further supports the conclusion that the plea was not accurate. Accordingly, we reverse appellant's conviction of third-degree assault and remand to the district court for further proceedings.

II.

Appellant also argued to the district court that he should be entitled to withdraw his guilty plea to theft by swindle because he was never shown any paperwork to account for the amounts of money he allegedly stole from the VA, and he maintained that occasionally his requests for mileage reimbursements accurately reflected his actual mileage. The district court denied his request, concluding that during the plea colloquy appellant acknowledged that the amount he took was in excess of $1,000 and that federal agents had evidence to prove the amounts. Appellant makes essentially the same argument to this court, asserting that his guilty plea was inaccurate because the factual basis did not establish which mileage requests were fraudulent and what amount of money appellant swindled from the VA.

As previously explained, a guilty plea that is inaccurate is invalid. *See Raleigh*, 778 N.W.2d at 94. Appellant is entitled to withdraw his guilty plea if he can show his plea was invalid. *Id.* This court assesses the validity of a guilty plea de novo. *Id.*

The accuracy requirement on an ordinary guilty plea (as opposed to an *Alford* plea) requires that 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." *State v. Iverson*, 664 N.W.2d 346, 349 (Minn. 2003) (quotation omitted). "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. "This court may also look to the whole record, beyond what the defendant said,

when evaluating the quality of a guilty plea's factual basis." *Barnslater v. State*, 805 N.W.2d 910, 914 (Minn. App. 2011).

The following exchange occurred during appellant's plea hearing:

> PROSECUTOR: You would agree that during a time frame from approximately April 2nd, 2010 through January 31st, 2011 you had collected money benefits from the VA, is that correct?
> . . . .
> APPELLANT: Yes.
> PROSECUTOR: And you received some cash benefits from the VA?
> APPELLANT: Uhm-hmm. Yes.
> PROSECUTOR: And that was for travel, mileage reimbursement, travel pay?
> APPELLANT: Uhm-hmm.
> PROSECUTOR: And you would agree that you submitted paperwork that –
> APPELLANT: -- wasn't actually true.
> PROSECUTOR: Wasn't true.
> APPELLANT: Pretty much.
> PROSECUTOR: Showing you coming from St. Paul but you were probably coming from St. Cloud.
> APPELLANT: Uhm-hmm.
> PROSECUTOR: And in fact some of those you didn't even go to the appointments and collected the money for?
> APPELLANT: I wouldn't say that.
> PROSECUTOR: Okay.
> APPELLANT: I'm not going to say that because I went to my appointments.
> PROSECUTOR: Okay. Would you agree that the value of the money that you got was more than a thousand dollars?
> APPELLANT: Over that period of time it's possible.
> PROSECUTOR: Okay. So you don't disagree with that if that's what the VA police came up with?
> APPELLANT: No.
> DEFENSE COUNSEL: If the VA submitted a document to that effect, [appellant], you don't think they'd be making it up?
> APPELLANT: No, they wouldn't, no.
> COURT: All right. I'll accept that.

In order to plead guilty to felony theft by swindle, appellant had to admit that he took money "by artifice, trick, device, or any other means," in excess of $1000. Minn. Stat. § 609.52, subds. 2(4), 3(3)(a) (2008 & Supp. 2009). Appellant did admit that he falsified mileage reimbursement reports by stating that he was driving from Little Canada when he was actually driving from St. Cloud. And he admitted that he received more than a thousand dollars from the VA for mileage, but that some of his mileage requests were not fraudulent.

When considering the validity of a guilty plea, we may look beyond appellant's testimony to other facts in the record. *See Barnslater*, 805 N.W.2d at 914. The complaint stated that appellant submitted 38 claims for mileage reimbursement between April 2010 and January 2011. For each reimbursement request, appellant claimed that he traveled 150 miles from Little Canada to St. Cloud for medical appointments at the VA. Investigators interviewed the resident of the address appellant gave in Little Canada, and that person stated that appellant never lived at the address. The investigator also discovered that appellant did not attend many of his appointments. According to the complaint, the total amount of the fraud was $2,125.86. Upon sentencing, appellant was ordered to pay that amount in restitution to the VA. Appellant also admitted to a corrections agent that he had accepted these reimbursement payments even though he had not been traveling from Little Canada. On these facts, even if appellant did attend some of his medical appointments and did travel from Little Canada on occasion, the record as a whole shows that appellant falsified most of his mileage reimbursement requests, and that he swindled at least $1,000, and probably more. *See Lussier v. State*, 821 N.W.2d

581, 588-89 (Minn. 2012) (stating that a court may look to the record as a whole, including statements made in a presentence investigation report, to determine the accuracy of a plea). Therefore, we conclude that the factual basis was sufficient to support appellant's guilty plea to theft by swindle, and affirm appellant's conviction and sentence.

Affirmed in part, reversed in part, and remanded.