STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0908

State of Minnesota,
Respondent,

vs.

Matthew Nesmith,
Appellant.

Filed May 27, 2008
Affirmed
Peterson, Judge

Dakota County District Court
File No. K5-06-2188

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Thomas E. Lockhart, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

John M. Stuart, State Public Defender, Michael W. Kunkel, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Wright, Judge.

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

PETERSON, Judge

In this appeal from a conviction of second-degree assault, appellant argues that his guilty plea was not valid because the factual basis for the plea elicited at the guilty-plea hearing lacked facts that showed that he did not act in self-defense. We affirm.

FACTS

Appellant Michael Aaron Nesmith was charged by complaint with one count of second-degree assault and one count of terroristic threats. The state moved to amend the complaint to add one count of second-degree assault and one count of terroristic threats; both of these additional counts pertained to a second victim. Appellant filed a notice that he intended to rely on the defense of self-defense (authorized use of force). Pursuant to a plea agreement reached with the state, appellant pleaded guilty to count I of the complaint (second-degree assault). The state agreed to dismiss count II and agreed to a cap of 36 months on appellant's sentence, which was the presumptive sentence.[1]

Appellant's plea petition stated, "I do not make the claim that I was acting in self-defense or merely protecting myself or others at the time of the crime." At the plea hearing, appellant testified that he and his attorney "went over [his plea petition] extensively." Appellant agreed that he was guilty and testified that he understood the charges against him, he had sufficient time to consult with his attorney and was satisfied

[1] The record suggests that the state agreed to withdraw its motion to amend the complaint, but it is not clear that this was part of the plea agreement.

with her representation, and he was not making any claim of innocence or claiming self-defense.

Appellant testified that he and the victim got into an argument, and during the course of the argument, he drew a handgun and pointed it at the victim. Appellant then pushed the victim up against a wall and put the gun up against the victim, which caused an injury that required medical attention. Appellant admitted that his actions caused the victim fear and resulted in the need for eight stitches. The record indicates that the victim sought out appellant at appellant's workplace and started the confrontation, but there was no testimony about this at the guilty-plea hearing. The district court accepted appellant's plea and dismissed count II.

Appellant moved to withdraw his guilty plea. At the sentencing hearing, appellant withdrew the motion, and he was sentenced to 36 months. This appeal followed.

D E C I S I O N

It is a manifest injustice for a conviction to stand on a guilty plea that is not accurate, voluntary, and intelligent. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). "A guilty plea may not be accepted unless there exists a factual basis for concluding that the defendant actually committed an offense at least as serious as that to which he is pleading guilty." *State v. Misquadace*, 629 N.W.2d 487, 491 (Minn. App. 2001), *aff'd*, 644 N.W.2d 65 (Minn. 2002). This requirement "protects a defendant from pleading guilty to an offense more serious than defendant's conduct warrants and helps to ensure a defendant is not pleading guilty due to improper pressures or a misunderstanding of the charge." *State v. Warren*, 419 N.W.2d 795, 798 (Minn. 1988). "Although there are

various ways to present the factual basis for a guilty plea, all of them contemplate the disclosure on the record of the specific facts that would establish the elements of the crime to which the defendant is pleading guilty." *Misquadace*, 629 N.W.2d at 491-92. On appeal, this court "will reject a guilty plea if it concludes the trial judge could not fairly have concluded that the defendant's plea was accurate." *Warren*, 419 N.W.2d at 798.

Assaulting another with a dangerous weapon is second-degree assault. Minn. Stat. § 609.222, subd. 1 (2004). "'Assault' is: (1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2004).

Reasonable force may be used against another person to resist or aid another to resist an offense against the person. Minn. Stat. § 609.06, subd. 1(3) (2004). A defendant claiming self-defense carries the burden of going forward with evidence to support his claim. *State v. Graham*, 371 N.W.2d 204, 209 (Minn. 1985). The burden is one of production and "requires the defendant to come forward and present a sufficient threshold of evidence to make the defense one of the issues of the case." *State v. Charlton*, 338 N.W.2d 26, 29 (Minn. 1983). It is not until the defendant has met this burden that the state must affirmatively demonstrate that the defendant did not act in self-defense by negating one of the elements of the defense. *State v. Spaulding*, 296 N.W.2d 870, 875 (Minn. 1980). An instruction on self-defense should be given whenever there is evidence to support a finding that the defendant had reasonable grounds to believe that the force used was reasonably necessary to prevent immediate bodily harm to the

defendant. *State v. Stephani*, 369 N.W.2d 540, 546 (Minn. App. 1985), *review denied*, (Minn. Aug. 20, 1985).

At the plea hearing, appellant testified that he drew a handgun and intentionally pointed it at the victim, causing the victim to fear possible injury. He also testified that he intentionally pushed the victim up against a wall and while doing this, his gun came into contact with the victim's head, causing the victim to "fear assault or injury." Using his gun, appellant inflicted injuries to the victim's head, and the injuries required medical attention. The facts elicited at the plea hearing are sufficient to establish the elements of second-degree assault.

Appellant argues that because he served notice that he intended to assert self-defense as a defense, the factual basis elicited at the plea hearing needed to disprove that defense. He contends that, had he gone to trial, the state would have had the burden of disproving his defense, and, therefore, the factual basis for the plea should have contained facts sufficient to negate at least one of the elements of self-defense. Appellant cites no authority that supports this argument. In *State v. Gray*, the supreme court affirmed a conviction based on the defendant's guilty plea over the defendant's objection that there was insufficient inquiry by the district court to ensure that the defendant did not have a valid self-defense claim. 300 Minn. 504, 504-05, 217 N.W.2d 737, 737-38 (1974). The supreme court concluded that the defendant entered his guilty plea

> with full awareness of the availability of the defense of self-defense were he to insist on trial. He entered his plea only after discussing the matter thoroughly with his . . . counsel, who presumably had balanced the likelihood and probable

> consequences of an adverse verdict against the probability of receiving sentencing consideration in return for a guilty plea.

Id. at 505, 217 N.W.2d at 737. *See also State v. Taylor*, 288 Minn. 37, 42-43, 178 N.W.2d 892, 895 (1970) ("We are mindful, however, that this was a negotiated plea of guilty with the assistance of competent counsel who were acutely aware of this available [self-defense] defense. It was for them to measure the likelihood and consequences of an adverse verdict if the defendant elected to stand trial.")

Appellant cites nothing in the facts elicited at the guilty-plea hearing that would support a finding that he had reasonable grounds to believe that the force he used was reasonably necessary to prevent immediate bodily harm. And appellant's notice that he intended to rely on the defense of self-defense did not provide a factual basis that made self-defense an issue in the case. Absent a factual basis that made self-defense an issue in the case, there was no reason to require a factual basis that negates an element of self-defense. *See id.* at 42, 178 N.W.2d at 895 (concluding that whether the record establishes a factual basis for plea of guilty is to be determined upon the record before the judge to whom the plea is tendered).

Appellant was represented by counsel, and both he and his counsel were aware of the possibility of raising the issue of self-defense. Appellant confirmed on the record and under oath that he was not claiming self-defense. On this record, the district court could fairly conclude that appellant's guilty plea was accurate.

Affirmed.