**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-2010**

Ryan Thomas Dorry, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 18, 2009**
**Reversed and remanded**
**Shumaker, Judge**

Beltrami County District Court
File No. 04-CR-07-1441

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Timothy R. Faver, Beltrami County Attorney, David P. Frank, Assistant County Attorney, 600 Minnesota Avenue N.W., Suite 400, Bemidji, MN 56601 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

**SHUMAKER**, Judge

On appeal from the district court's denial of his motion to withdraw his plea of guilty to the crime of coercion, appellant argues that his plea was neither accurate nor voluntary. We agree and reverse and remand.

## FACTS

On April 17, 2007, the state charged appellant Ryan Thomas Dorry with criminal sexual conduct in the second degree. The complaint described in detail the circumstances giving rise to the charge. According to the complaint, Dorry and the alleged victim were at a friend's home one evening, when Dorry followed the alleged victim into a bathroom and refused to leave when she asked him to. The complaint stated that Dorry "pushed [her] over the side of the tub and, against her will, took her pants off," telling the victim to "lighten up and have fun." Then, he allegedly forced oral sex on her, biting her while doing so. The complaint also recited that Dorry digitally penetrated the alleged victim's vagina and attempted to penetrate her vagina with his penis. After the alleged victim managed to "escape the bathroom . . . she walked into the adjacent bedroom . . . Dorry held [the victim's] throat with his hand and pulled her hair as he continued to digitally penetrate [her] vagina and attempt to penetrate her with his penis."

Just over one year later, Dorry and the state reached a plea agreement. At the plea hearing, the prosecutor explained that the state had promised to amend the complaint from the criminal sexual conduct charge to a single count of coercion in exchange for Dorry's plea of guilty. The prosecutor filed the amended complaint at the plea hearing.

The facts recited in the amended complaint were identical to those in the original complaint. The prosecutor also noted that Dorry had "requested the Court to review a proposed finding of fact," but that "[t]he state takes no position on that matter." That proposed finding was contained in an order that defense counsel asked the district court to sign. The order stated:

> For purposes of Minn. Stat. § 243.166, and Minn. Stat. § 609.035, the conduct giving rise to the conviction for coercion occurring on the Amended/Substituted Complaint, dated May 30, 2008, is separate from the conduct giving rise to the allegations of criminal sexual conduct in the second degree found in the original Complaint filed herein . . . . The conviction for coercion . . . does not arise out of the same set of circumstances as the charge of criminal sexual conduct in the second degree . . . .

Dorry's counsel informed the district court that if the court refused to sign the order by the time of sentencing, it was understood that the court would "allow [Dorry] to move to withdraw" his plea. The district court did not indicate at the plea hearing whether it would or would not sign the order, but Dorry pleaded guilty to the coercion charge.

The district court signed the order on June 12, 2008, and sentenced Dorry on June 19, 2008. Because Dorry had been incarcerated since his arrest, he had no time left to serve on his executed prison sentence for coercion. However, he was committed to the Minnesota Department of Corrections (DOC) for processing.

On July 2, 2008, the DOC's End of Confinement Review Committee (ECRC) assigned Dorry a risk severity level of three because his conviction for coercion arose out of the same set of circumstances as the charged criminal sexual conduct offense. Dorry was required to register as a predatory offender and was referred to Beltrami County for

civil-commitment proceedings because of the risk assignment. Dorry sought administrative review of the DOC's decision based upon the district court's order stating that the coercion conviction did "not arise out of the same set of circumstances as the . . . [charge] of Criminal Sexual Conduct." An administrative law judge declined to overturn the ECRC's decision, noting that the district court's order "begs credibility and appears to be a radical and constrained departure from the established case law."

On July 22, 2008, Dorry returned to the district court and moved to withdraw his plea. He argued that his willingness to enter a guilty plea was conditioned upon the district court's signing the proposed order, and the purpose of the order was to prevent him from having to register as a predatory offender. Because he was now required to register, he argued that he had been deprived of the benefit of his plea agreement. The district court denied Dorry's motion to withdraw his plea, finding the plea was accurately, voluntarily and intelligently made because a registration requirement is a "collateral," rather than "direct," consequence of pleading guilty.

Dorry appealed.

**D E C I S I O N**

On appeal, Dorry argues that he must be allowed to withdraw his plea of guilty because it was not supported by an adequate factual basis and was based on the unfulfilled promise that he would not have to register as a predatory offender. He also argues that, even if the factual basis was sufficient to sustain a conviction for coercion, he could not be convicted of felony-level coercion. In other words, he claims that his plea was neither accurate nor voluntary. A defendant does not have an absolute right to

withdraw a plea of guilty, *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998), but may withdraw the plea if it is necessary to correct a manifest injustice, Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when a defendant can show that a plea was not "accurate, voluntary, and intelligent (i.e., knowingly and understandingly made)." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). We review a district court's refusal to permit plea withdrawal for an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

*Factual Basis for Conviction*

Respondent state points out that Dorry failed to address the alleged inadequacy of the factual basis for his plea at the hearing on his motion to withdraw. But, as the state immediately thereafter concedes, a defendant may challenge the accuracy of his plea on appeal. *See Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989) (stating, "[a]lthough this appeal is from the denial of postconviction relief, it is in practical effect a direct appeal on the record made at the time the pleas were entered," and addressing appellant's challenge to the factual basis of his plea). Thus, we address the merits of Dorry's argument.

Dorry argues that his plea was not supported by an adequate factual basis, and, therefore, is invalid. To be valid, a defendant's plea of guilty must be accurate, voluntary, and intelligent. *State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983). "Accuracy requires that the plea be supported by a proper factual basis . . . there 'must be 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) (quoting *Kelsey v. State*, 298 Minn. 531, 532, 214 N.W.2d 236, 237 (1974)). The factual basis is preferably "established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). If the defendant's testimony at the plea hearing is insufficient to establish a factual basis, courts may look to other parts of the record, including a sworn complaint, to determine whether there is a basis for concluding that the defendant committed each element of the charged offense. *See, e.g., Trott*, 338 N.W.2d at 252 (relying on defendant's admissions to allegations in criminal complaint to establish factual basis for plea).

Dorry was charged with and pleaded guilty to coercion under Minn. Stat. § 609.27 subd. 1(1) (2006). That subdivision criminalizes oral or written threats to confine or inflict bodily harm upon an individual that result in an action or forbearance on the part of the victim. In pertinent part, it provides:

> Whoever orally or in writing makes any of the following threats and thereby causes another against the other's will to do any act or forbear doing a lawful act is guilty of coercion and may be sentenced as provided in subdivision 2: (1) a threat to unlawfully inflict bodily harm upon, or hold in confinement, the person threatened or another when robbery or attempt to rob is not committed thereby . . . .

Minn. Stat. § 609.27 subd. 1(1). The Minnesota Practice Criminal Jury Instruction Guide parses out the four elements of the crime of coercion:

> First, the defendant communicated a threat to [the victim]
> [1] to unlawfully inflict bodily harm on [the victim] . . . .
> [2] to unlawfully hold [the victim] in confinement.

. . . .

> Second, the defendant acted with the intent of causing [the victim] (to _____) [or] (to refrain from _____).
> Third, as a result of the threat, [the victim] (did _____ against [her] will) (refrained from _____, which is was [her] legal right to do).
> Fourth, the defendant's act took place on (or about) _____ in _____ County.

10 *Minnesota Practice*, CRIMJIG 13.104 (2006). Because Dorry did not admit to conduct satisfying each of these elements, his plea lacked an adequate factual basis.

Defense counsel questioned Dorry on the factual basis for his plea.

> Q. At some point in time, did [the alleged victim] go into the bathroom at the Puposky residence?
> A. Yes
> Q. And did you go into that bathroom at a time when she was in there?
> A. Yes.
> Q. At some time while you were in the bathroom with [the alleged victim], did you make some oral threats to her about requiring or forbidding her from leaving? Basically, keeping her in the bathroom?
> A. Yes.
> Q. And do you agree that she impart [sic] because of those statements that you made, stayed in that bathroom longer than she might have wanted to stay?
> A. Yes.
> Q. In other words, she should have been free to leave that bathroom any time she wanted to, right?
> A. Yes.
> Q. Do you agree that she likely suffered some emotional distress over the course of that evening due to those kinds of statements that you made?
> A. Yes.
> Q. Are you agreeing for the purposes of this plea that although signing [sic] a momentary [sic] value to that type of distress, you would agree that she suffered more than $300 of damage and less than $2,500 of damages that the statue [sic] talks about?

A. Yes.
Q. And we don't know exactly what kind of mental health services that she's received. We've made requests for records on that. But you understand that she had—you didn't know this at the time on the 14th but you know now that she's had some mental health issues previous to April 14th, 2007?
A. Yes.
Q. And do you agree that your conduct toward her with regard to those threats, this coercion that you are admitting to, didn't help matters?
A. Yes.

The prosecutor asked Dorry whether he "knew that both your presence and your threats caused [the alleged victim] to be in fear and remain in the bathroom against her will?" Dorry replied, "Yes."

This colloquy is insufficient. It does not elicit the requisite particular "threat" that Dorry made to compel the alleged victim to refrain from doing what she was legally entitled to do—here, apparently, her right to leave the bathroom. The coercion statute makes five enumerated threats illegal. Minn. Stat. § 609.27, subd. 1 (2006). Thus, not just a threat but a specific threat as enumerated in the statute is required before the crime of coercion is established. Dorry was charged with making the specific threat to inflict bodily injury or to confine. The factual basis elicited entirely by leading questions during the plea hearing fails to disclose the specific threat that Dorry allegedly made. To make a proper assessment of the adequacy of the factual basis, the district court needed to know what Dorry allegedly said to the victim, that is, what specific oral threat he made.

*Damages*

Even if Dorry's specific threat had been made a part of the record, the factual basis for his plea would still be inadequate to support his conviction. The coercion statute prescribes a three-tiered sentencing structure for coercion convictions. *Id.*, subd. 2 (2006). A defendant will be convicted of misdemeanor coercion "if neither the pecuniary gain received by the violator nor the loss suffered by the person threatened . . . exceeds $300, or the benefits received or harm sustained are not susceptible of pecuniary measurement." *Id.*, subd. 2(1). A defendant may be convicted of felony-level coercion and sentenced to a maximum of five years imprisonment "if such pecuniary gain or loss is more than $300 but less than $2,500," *id.*, subd. 2(2), and to a maximum of ten years if the pecuniary damage is $2,500 or more, *id.*, subd. 2(3).

Dorry was convicted under the felony-level coercion subdivision, which provides for a felony conviction "if such pecuniary gain or loss is more than $300 but less than $2,500." *Id.*, subd. 2(2). Thus, after establishing that the first four elements of the offense have occurred as described in subdivision 1 of the coercion statute, the next question is whether the loss or gain resulting from the crime is capable of pecuniary measurement, and if so, what amount of damage the victim has suffered. *See* CRIMJIG 13.104.

Felony-level coercion requires that the victim suffered a measurable pecuniary loss between $300 and $2,500. At the plea hearing, Dorry agreed that the victim "likely suffered some emotional distress over the course of that evening due to those kinds of statements that [he] made," and that "she suffered more than $300 of damages and less

than $2,500 of damages." However, there is nothing in the record to support this fact other than Dorry's bare speculative admission. "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." *Trott*, 338 N.W.2d at 251-52. Dorry's general admission that the victim suffered "more than $300" and "less than $2,500 of damages" appears to have no basis in fact and constitutes nothing more than a recital of the statute's language. The damages element is a necessary component of a coercion conviction, and therefore Dorry's plea is also inadequate and inaccurate on this basis.

*Registration Requirement*

Finally, the record compels us to conclude that Dorry was promised that he would not have to register as a predatory offender if he pleaded guilty to the crime of coercion. Despite the prosecutor's protestations that the state made no "promise" that Dorry would not be subject to registration, we can find no rational explanation for the state's agreement, on identical facts, to amend the charge from criminal sexual conduct, the crime described in the complaint, to coercion, an offense for which registration is not required and the factual basis for which was absent from the charging document. Nor are we able to find any rational explanation for the district court's order other than that the focus of the agreement was Dorry's avoidance of the registration requirement. The blatant factual inaccuracy of the order, which stated that the coercion charge arose out of "separate" circumstances from those underlying the criminal sexual conduct charge, and the state's refusal to take a "position" on the order only serve to bolster our conclusion

that all involved in the fashioning of this plea arrangement understood that the charges were amended and the order was signed so that Dorry would not have to register as a sex offender.

Thus, the registration requirement, or the anticipated lack thereof, was not a "collateral" consequence to Dorry's plea, as the district court concluded. Rather, it was at the very heart of Dorry's negotiated agreement. When a condition of defendant's negotiated plea agreement goes unfulfilled, the plea is rendered involuntary and withdrawal is necessary. *See State v. Garcia*, 582 N.W.2d 879, 882 (Minn. 1998) (holding that unfulfilled promise by prosecutor renders plea involuntary); *see also Carey v. State*, 765 N.W.2d 396, 401 (Minn. App. 2009) ("[A] guilty plea becomes involuntary as a matter of law only if a promise made to the defendant prior to the plea later becomes unfulfilled.").

For all of these reasons, we hold that Dorry's plea was both inaccurate and involuntary, and that the district court abused its discretion when it refused to allow Dorry to withdraw his plea.

**Reversed and remanded.**