STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0387

State of Minnesota,
Respondent,

vs.

Ricardo Mello,
Appellant.

Filed January 13, 2014
Affirmed
Stauber, Judge

Polk County District Court
File No. 60CR112043

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, F. Richard Gallo, Jr., Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

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

STAUBER, Judge

On appeal from his convictions of second-degree felony murder, criminal vehicular operation, fourth-degree assault, and gross misdemeanor obstructing legal process or arrest,

appellant argues that he is entitled to withdraw his guilty pleas because his pleas did not satisfy the requirements of a valid *Norgaard* plea. We affirm.

FACTS

Appellant Ricardo Mello was charged with second-degree felony murder, aggravated first-degree robbery, simple robbery, felony theft of a motor vehicle, criminal vehicular homicide, criminal vehicular operation—great bodily harm, felony fourth-degree assault, and gross misdemeanor obstruction of legal process or arrest. The complaint alleged that on September 3, 2011, law enforcement responded to a complaint that appellant had damaged a woman's automobile. Two police officers subsequently confronted appellant at a nearby bar, prompting appellant to punch one of the officers in the face two or three times. Appellant also resisted the other officer's efforts to arrest him, despite being tased and maced. Appellant then left the bar, stole a police squad car that was parked outside of the bar, and eventually crashed the squad car into an oncoming vehicle. The passenger of the oncoming vehicle was seriously injured in the accident, and the driver was killed. Appellant then fled the scene of the accident by commandeering another driver to take him to the hospital, where appellant was arrested.

Appellant agreed to plead guilty to second-degree felony murder, criminal vehicular operation—great bodily harm, fourth-degree assault, and gross misdemeanor obstructing legal process or arrest. Because appellant claimed that the details of the offenses were "not exactly clear," the prosecutor treated appellant's guilty pleas as *Norgaard* pleas. The district court then sentenced appellant to 240 months in prison. This appeal followed.

D E C I S I O N

Appellant argues that his pleas of guilty were not accurate and that he should be allowed to withdraw them because they were unsupported by an adequate factual basis. Appellant, however, did not raise this issue to the district court. When a defendant challenges the accuracy of a plea in a direct appeal from a judgment of conviction, this court reviews the record de novo to determine whether the plea meets the requirement.[1] *See State v. Hoaglund*, 307 Minn. 322, 326-27, 240 N.W.2d 4, 6 (1976) (evaluating validity of plea on challenge to sufficiency of factual basis); *see also State v. Anyanwu*, 681 N.W.2d 411, 413 n.1 (Minn. App. 2004) (stating that "a direct appeal is appropriate when the record contains factual support for the defendant's claim and when no disputes of material fact must be resolved to evaluate the claim on the merits").

A defendant does not have an absolute right to withdraw a guilty plea. *Raleigh*, 778 N.W.2d at 93. But a district court may allow a defendant to withdraw a guilty plea at any time "to correct a manifest injustice," or "before sentence if it is fair and just to do so." Minn. R. Crim. P. 15.05, subds. 1, 2. Manifest injustice exists if the plea is invalid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). The defendant bears the burden of showing that his plea was invalid. *Raleigh*, 778 N.W.2d at 94.

[1] The state argues that because appellant "never moved to withdraw his guilty pleas via a presentence or postconviction motion," his "claims should be reviewed only for plain error." But the state fails to cite any Minnesota caselaw applying the plain error standard to cases involving a request to withdraw a guilty plea. And the supreme court plainly stated in *State v. Raleigh* that "[a]ssessing the validity of a plea presents a question of law that that [is] review[ed] de novo." 778 N.W.2d 90, 94 (Minn. 2010). Thus, the state's claim that the plain error standard is applicable here is without merit.

"To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *Id.* "An accurate plea protects the defendant from pleading guilty to a charge more serious than he or she could be convicted of were the defendant to go to trial." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). "Accuracy requires that the plea be supported by a proper factual basis, that 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) (quotation omitted).

Here, appellant entered a *Norgaard* plea. *State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 113-14, 110 N.W.2d 867, 872 (1961). Unlike an *Alford* plea, by which a defendant maintains his innocence but wishes to plead guilty to avoid the possibility of a harsher penalty after trial, in a *Norgaard* plea the defendant does not claim that he is innocent, but rather contends that he does not remember the circumstances that gave rise to the crime. "A defendant may also plead guilty even though he or she claims a loss of memory, through amnesia or intoxication, regarding the circumstances of the offense." *Ecker*, 524 N.W.2d at 716. "In such cases, the record must establish that the evidence against the defendant is sufficient to persuade the defendant and his or her counsel that the defendant is guilty or likely to be convicted of the crime charged." *Id.* An adequate factual basis consists of two components: (1) a strong factual basis and (2) defendant's agreement that the evidence is sufficient for a jury to find him guilty beyond a reasonable doubt. *Theis*, 742 N.W.2d at 648-49.

Appellant argues that his "inability to provide support for his guilty pleas and the district court's failure to act in accordance with *Norgaard* and *Ecker* leave [his] pleas inaccurate." Specifically, appellant contends that that the district court failed to act in accordance with *Norgaard* by: failing to "determine that appellant's admissions were sufficient to support a guilty plea"; not "accept[ing] appellant's guilty pleas"; not "mak[ing] any findings regarding appellant's plea"; making "no determination as to whether appellant fulfilled the requirements of *Norgaard*"; and not independently determining that the state's evidence was "sufficient and likely to convince a jury that [appellant] was guilty beyond a reasonable doubt."

Appellant's argument is without merit. When accepting a *Norgaard* plea, the district court "must be certain [that] the defendant understands his . . . rights . . . [and] must affirmatively ensure an adequate factual basis has been established in the record." *Ecker*, 524 N.W.2d at 717. A district court should encourage the defendant to state in his own words why he is pleading guilty notwithstanding his claimed loss of memory. *Id.* In addition, it is important for counsel or the district court "to indicate explicitly on the record that the defendant is entering" a *Norgaard* plea. *Id.* Finally, the district court "should personally interrogate the defendant regarding why [he] is willing to plead guilty, *unless* the court is reasonably satisfied defense counsel and the prosecution have established an adequate factual basis." *Id.* (emphasis added); *see also State v. Nelson*, 311 Minn. 109, 110, 250 N.W.2d 816, 817 (1976) (stating that a district court is not required to personally interrogate the defendant prior to accepting a guilty plea if counsel have established an adequate factual basis).

Here, the record reflects that appellant understood his rights and that he was waiving these rights by pleading guilty. The following exchange then occurred between appellant and his defense counsel:

> COUNSEL: [Appellant], you're not simply pleading guilty today because you don't want to run the risk of going to trial, is that right?
> APPELLANT: Yes.
> COUNSEL: I mean, you're - - you're pleading guilty because you want to take responsibility for this and you've understood - - since you became aware of what had occurred, you wanted to take responsibility, is that correct?
> APPELLANT: Yes, sir.
> COUNSEL: So, it's not just a matter of some type of an agreement and running the risk, you've always wanted to resolve this file, is that right?
> APPELLANT: Yes, sir.

This exchange clarifies that appellant decided to plead guilty because he did not "want to run the risk of going to trial," as well as because he wanted to "take responsibility" for his actions. The exchange also satisfies the *Norgaard* requirement that appellant state why he is pleading guilty notwithstanding the claimed loss of memory. *See Ecker*, 524 N.W.2d at 717.

The record also reflects that the prosecutor suggested to the court that appellant's plea be treated as a *Norgaard* plea because appellant was unable to clearly remember the circumstances surrounding the offenses. The district court replied: "Go ahead." The prosecutor then explained to appellant the process involving a *Norgaard* plea, and appellant stated that he understood the process. Thus, the record "explicitly" demonstrates that the district court, appellant, and the lawyers understood that appellant was entering a *Norgaard* plea. *See id.*

Finally, the record reflects that the district court did not "personally interrogate [appellant] regarding why [he] is willing to plead guilty." *Ecker*, 524 N.W.2d at 717. But such an interrogation is unnecessary if the court "is reasonably satisfied that defense counsel and the prosecution have established an adequate factual basis." *Id.* The record here reflects that the prosecutor set forth in detail the charges against appellant and the evidence that the state intended to present. Appellant acknowledged that the evidence was accurate and that based on the state's evidence, a jury would likely find him guilty of second-degree felony murder, criminal vehicular operation—great bodily harm, fourth-degree assault, and gross misdemeanor obstructing legal process or arrest. The prosecutor then asked the district court: "Your Honor, is that sufficient for your purposes?" The court replied: "It is sufficient. I've also reviewed the probable cause portion of the complaint and it comports with what the questions were." This exchange indicates that the district court was satisfied that an adequate factual basis had been stated. *See Ecker*, 524 N.W.2d at 717. Therefore, the record reflects that the district court complied with the *Norgaard* requirements when it accepted appellant's guilty plea.[2]

[2] We note that under *State v. Smoot*, not just any felony can qualify as the underlying felony in a felony murder charge; rather "[t]o serve as a predicate offense for second-degree unintentional felony murder, an offense must involve a special danger to human life." 737 N.W.2d 849, 851 (Minn. App. 2007), *review denied* (Minn. Nov. 21, 2007). And fleeing police cannot form the basis for that felony. *See State v. Craven*, 628 N.W.2d 632, 637 (Minn. App. 2001) (stating that because fleeing a peace officer in a motor vehicle causing death is a more specific charge than felony murder predicated on the felony of fleeing a peace office in a motor vehicle, the fleeing a peace officer in a motor vehicle charge may not be used as the predicate felony for a charge of felony murder), *review denied* (Minn. Aug. 15, 2001). In this case, the record is not clear what underlying felony appellant committed which serves as the predicate felony for the felony murder charge. But that issue was not raised before us and we decline to comment

Appellant is not entitled to withdraw his guilty plea.

Affirmed.

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further on that issue. We further note that under *Craven* "when two criminal statutes, one general and one specific, conflict because they have the same elements but differing penalties, the more specific statute governs over the more general statute, unless the legislature manifestly intends for the general statute to control." *Id.* at 635. Here, although not raised by appellant, the offense of fleeing a peace officer in a motor vehicle that causes death is more specific than the felony murder charge. *Compare* Minn. Stat. § 609.487, subd. 4 (2010), *with* Minn. Stat. § 609.19, subd. 2(1) (2010). But because felony murder and fleeing a peace officer causing death are both severity level ten offenses on the sentencing guidelines grid in effect at the time of the offenses, appellant has suffered no prejudice by the conviction of felony murder. *See* Minn. Sent. Guidelines 4, 5 (Supp. 2011) (sentencing guidelines grid and offense severity reference table).