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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1068**

State of Minnesota,
Respondent,

vs.

Bobby Joe Houle,
Appellant

**Filed June 5, 2017
Reversed and remanded
Worke, Judge**

Cass County District Court
File No. 11-CR-15-2257

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

Christopher J. Strandlie, Cass County Attorney, Jeanine R. Brand, Assistant County Attorney, Walker, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court erred when it accepted his guilty plea to the offense of placing an emergency call and reporting a fictitious emergency, claiming that

the factual basis for his plea was not accurate. Because appellant did not “report” an emergency, fictitious or otherwise, at the time of placing an emergency call, we reverse and remand.

FACTS

On December 10, 2015, at approximately 11:34 p.m., law enforcement received several 911 calls with an open line and nobody speaking. Officers responded to the address from where the calls were made. When officers arrived at the residence, appellant Bobby Joe Houle refused to open the door and kept his hand inside his coat. Houle pointed across the street and whispered, “It’s across the street at [R.B.’s].” When asked why he called 911, Houle responded, “There are women tied up and getting raped over at [R.B.’s].” When asked how he knew this, Houle stated that “everyone knows.” Houle told officers that his girlfriend and children were at R.B.’s.

An officer went to R.B.’s. R.B. stated that Houle’s girlfriend and children were not there and do not come over. R.B. denied anyone being tied up or raped, and officers confirmed her statement. The officers again spoke to Houle who stated that he had text messages about the rapes. Officers checked Houle’s phone and found no such messages.

Because of Houle’s behavior and not knowing what was going on inside the home, an officer grabbed Houle to pull him outside. During a struggle, a box cutter fell from Houle’s coat and officers found brass knuckles in his pocket. Houle was charged with obstructing legal process, placing a fictitious emergency call, providing false information to a police officer, and possessing a dangerous weapon.

Houle agreed to plead guilty to placing a fictitious emergency call, a gross misdemeanor, and possessing a dangerous weapon. The other two counts were dismissed. After Houle agreed that he placed a 911 call, the following exchange occurred between Houle, the prosecutor, and the district court:

PROSECUTOR: Why are you pleading guilty today?
HOULE: Because I made a 911 call that was fictitious.
PROSECUTOR: Okay. Would you agree that there was in fact, that your report to law enforcement that a woman was tied up and getting raped was not true? Would you agree that it wasn't true? Make sense?
HOULE: That it wasn't true?
PROSECUTOR: Right.
HOULE: I don't understand what you're asking.
PROSECUTOR: Okay. You reported that there was a woman tied up and getting raped?
HOULE: No, I didn't really. The cops just asked me why, and I had told them I heard somebody screaming.
THE COURT: Let's do this. What do you recall about December 10, 2015?
HOULE: I heard somebody screaming, so I called the cops.
THE COURT: Okay. So you do remember calling law enforcement?
HOULE: Yeah. I didn't talk on the phone with them, but I think I redialed a few times.

The district court did not accept Houle's plea initially because the factual basis was insufficient. The matter was adjourned and resumed later that day, and the following exchange occurred between Houle and his attorney:

ATTORNEY: [B]ack to December 10 of last year. Did you make a series of 911 calls to the 911 dispatch?
HOULE: Yes.

ATTORNEY: And would you agree that those calls were made when there was not an emergency?

HOULE: Yes.

....

ATTORNEY: Okay. Would you agree that you made those calls fictitiously, or that there was no good reason to make those calls?

HOULE: Yes.

ATTORNEY: What did you say . . . to the dispatch when they answered each time you called?

HOULE: I didn't talk to 'em.

ATTORNEY: So you made the calls but you didn't say anything?

HOULE: Yeah, I didn't say anything.

The district court accepted Houle's guilty pleas and sentenced Houle to one year in jail, stayed for two years, for the gross-misdemeanor offense of placing a fictitious emergency call, and 27 days in jail for possessing a dangerous weapon. This appeal followed.

D E C I S I O N

Houle argues that the district court erred when it accepted his guilty plea because the factual basis supporting the plea was insufficient.

A defendant may appeal directly from a judgment of conviction and contend that the record made at the time of the plea is inadequate. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). A claim that the factual basis for a plea is insufficient is a challenge to the validity of the plea. *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003). Whether a guilty plea is valid is a question of law that this court reviews de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). The defendant has the burden to show that a plea is invalid. *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012).

To be valid, a guilty plea must be accurate, voluntary, and intelligent. *Brown*, 449 N.W.2d at 182. “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. To be accurate, a plea must be established on a proper factual basis.” *Raleigh*, 778 N.W.2d at 94 (citations omitted). “[T]here must be sufficient facts on the record to support a conclusion that [the] defendant’s conduct falls within the charge to which he . . . plead[ed] guilty.” *Iverson*, 664 N.W.2d at 349 (quotation omitted). “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 [the] defendant is guilty of at least as great a crime as that to which he [pleaded] guilty.” *State v. Genereux*, 272 N.W.2d 33, 34 (Minn. 1978). If the defendant makes statements that negate an essential element of the offense, the factual basis for the plea is inadequate. *Iverson*, 664 N.W.2d at 350.

Here, Houle pleaded guilty to the offense of placing an emergency call and reporting a fictitious emergency with the intent of prompting an emergency response. See Minn. Stat. § 609.78, subd. 2(2) (2014). The elements of the offense include: (1) placing an emergency call and (2) reporting a fictitious emergency with (3) intent of prompting a response from law enforcement. *Id.*; 10A *Minnesota Practice*, CRIMJIG 21.35 (2015) (“[W]hoever places an emergency call and reports a fictitious emergency with the intent of prompting an emergency response by law enforcement, fire, or emergency medical personnel . . . is guilty of a crime.”).

Houle agreed that he placed a 911 call “with the intention of getting law enforcement to respond.” Houle asserts, however, that the factual basis does not establish that he

reported a “fictitious” emergency. At oral argument, Houle alternatively argued that his guilty plea failed to establish the reporting element of the offense. Houle did not raise this issue in his principal brief. See *State v. Petersen*, 799 N.W.2d 653, 660 (Minn. App. 2011) (stating that an argument that is not raised in a principal brief on appeal is waived), *review denied* (Minn. Sept. 28, 2011); see also *State v. Morse*, 878 N.W.2d 499, 502 (Minn. 2016) (stating that court of appeals erred when it addressed constitutionality issue not argued on appeal); *State v. Tracy*, 667 N.W.2d 141, 145 (Minn. App. 2003) (stating that party may not raise issues at oral argument that were not previously raised). However, we have the latitude to address any matter as the interest of justice may require. Minn. R. Civ. App. P. 103.04; see also *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017) (indicating that an appellate court may interpret a statute to determine what it requires even if not raised by appellant because “the meaning of a criminal statute is intertwined with the issue of whether . . . the defendant violated the statute”).

Under Minn. Stat. § 609.78, subd. 2(2), a person is guilty of a gross misdemeanor if he “places an emergency call and reports a fictitious emergency with the intent of prompting an emergency response.” In interpreting a statute, “words and phrases are construed according to rules of grammar and according to their common and approved usage.” Minn. Stat. § 645.08(1) (2016). “[P]laces an emergency call and reports a fictitious emergency” requires two acts: (1) placing an emergency call and (2) reporting a fictitious emergency. The word “and” means: “[t]ogether with; in addition to, as well as.” *The American Heritage College Dictionary*, 50 (3rd ed. 2000). In this context, the word “report” means: “[t]o relate or tell about.” *Id.* at 1158. Thus, to be guilty of this offense,

a person must place an emergency call and (together with; in addition to; as well as) report (relate or tell about) a fictitious emergency.

Houle placed an emergency call, but he did not report an emergency because he hung up without speaking. According to the complaint, the phone would hang up and then 911 would receive another call. Houle stated at his plea hearing that he did not talk to the dispatcher and redialed a few times.

The state argued at oral argument that Houle's failure to report at the time the call was made does not mitigate his criminal conduct because 911 will respond to every call regardless of whether the person on the other end of the call speaks. We appreciate the state's argument and recognize that the statute does criminalize Houle's conduct but as a misdemeanor rather than the gross-misdemeanor offense to which he pleaded guilty. *See* Minn. Stat. § 609.78, subd. 1(6) (2014) (stating that an individual is guilty of a misdemeanor if he makes an emergency call knowing that no emergency exists and remains silent); *see also Raleigh*, 778 N.W.2d at 94 (stating that the accuracy requirement of a valid guilty plea "protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted").

Accordingly, because the factual basis for Houle's guilty plea does not establish the element of the offense that he "report" a fictitious emergency at the time of placing the emergency call, his guilty plea is not accurate or valid. We reverse and remand this matter

to the district court to allow Houle to withdraw his guilty plea and for proceedings consistent with this opinion.¹

Reversed and remanded.

¹ See *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000) (stating that retrial is appropriate unless a conviction is overturned on appeal on the basis of insufficient evidence, and that prosecuting the defendant under an amended complaint does not violate double jeopardy).