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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0133**

State of Minnesota,
Respondent,

vs.

Damon Michael DiMartino,
Appellant.

**Filed December 11, 2017
Affirmed
Hooten, Judge**

Washington County District Court
File No. 82-CR-15-5009

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith, T.,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant asks this court to permit withdrawal of his guilty plea to a charge of promoting prostitution of an individual under 18 years of age, arguing that (1) he had the

right to amend his plea prior to the district court's acceptance of the plea; (2) his plea is invalid and creates a manifest injustice; and (3) the district court abused its discretion by denying his withdrawal of the plea under the fair and just standard. We affirm.

FACTS

In November 2015, the state charged appellant Damon Michael DiMartino with promoting prostitution of an individual under the age of 18, in violation of Minn. Stat. § 609.322, subd. 1(a)(2) (2014). The case proceeded to jury trial in June 2016. After the jury was selected but before the parties' opening statements, DiMartino decided to enter a straight guilty plea. He did so with the understanding that the state would be requesting a 20-year prison sentence.

During his attorney's questioning, DiMartino stated that he was freely and voluntarily entering his guilty plea. He stated that although he was on medication for physical ailments, he was "of sound mind." DiMartino later testified that he was making an informed, not impulsive, decision. As part of the factual basis for the plea, DiMartino admitted that on October 14, 2015, he drove J.H., a 17 year old, to a hotel, at which he intended for J.H. to have sex with a man in exchange for money. The district court determined that there was a sufficient factual basis to support the guilty plea but deferred formal acceptance of the plea until sentencing.

Prior to sentencing, DiMartino moved to withdraw his guilty plea. He alleged that he did not voluntarily agree to the guilty plea because he was not taking his antidepressant medication at the time he entered the plea. The district court denied DiMartino's motion, reasoning that DiMartino understood the implications of his decision and that it would be

unjust and unfair to the state to schedule a new trial. The district court sentenced DiMartino to 240 months in prison. This appeal follows.

DECISION

I.

DiMartino contends that the district court should have granted his request to withdraw his guilty plea because he had the “right” to amend his guilty plea to not guilty before the district court formally accepted it. The district court may postpone acceptance or rejection of a plea until it receives a pre-sentencing investigation report. Minn. R. Crim. P. 15.04, subd. 3(1). “The interpretation of the rules of criminal procedure is a question of law subject to de novo review.” *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005). Here, DiMartino entered a straight plea of guilty, and the district court deferred acceptance of the plea until sentencing. Although the parties disagree as to DiMartino’s use of the word “amend,” DiMartino admits that his request to amend his plea from guilty to not guilty is equivalent to withdrawing his guilty plea.

Regardless of whether DiMartino’s request is to amend his guilty plea to not guilty or to withdraw his guilty plea, the written record does not demonstrate that he argued he had the right to amend his plea to the district court. We do not generally consider issues that were not presented to and addressed by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Here, DiMartino’s written motion cannot be located in the record although it is clear that DiMartino moved to withdraw his guilty plea. DiMartino argued at the sentencing hearing that the district court did not obtain an accurate, intelligent, and voluntary plea. But, there is no indication that the parties addressed any argument that he

has a right to amend his guilty plea prior to acceptance of the plea. We conclude that this argument is forfeited.

Even assuming that DiMartino did not forfeit this argument, it is without merit. DiMartino argues that there are multiple stages in the plea process, including his entering of the plea and the district court's acceptance or rejection of the plea. His argument depends on *State v. McElhaney*, in which this court stated that “[w]e believe that a defendant may withdraw his guilty plea prior to the judge’s acceptance of the plea.” 345 N.W.2d 800, 800 (Minn. App. 1984). In *McElhaney*, the district court granted the defendant’s motion to withdraw his guilty pleas and this court held that the district court’s decision was not an abuse of discretion based on a review of the record. *Id.* at 800–01.

But, as the supreme court has more recently declared, “[a] defendant has no absolute right to withdraw a guilty plea after entering it.” *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). For instance, in *State v. Tuttle*, the defendant entered a guilty plea and the district court deferred formal acceptance of the plea until after the defendant underwent psychological evaluations as part of the presentencing investigation. 504 N.W.2d 252, 254–55 (Minn. App. 1993). The defendant moved to withdraw the plea after a witness recanted her testimony but prior to the district court accepting the plea. *Id.* at 255. The district court denied the motion and then accepted the plea. *Id.* The defendant argued on appeal that the district court should have permitted him to withdraw his plea because the district court had not yet accepted it. *Id.* at 257. But this court held that Minn. R. Crim. P. 15.04, subd. 3(1) “does not give a defendant an absolute right to withdraw a plea pending

acceptance by the [district] court,” and concluded that the district court did not abuse its discretion by denying the defendant’s motion. *Id.* at 257–58.

For these reasons, we conclude that the district court did not abuse its discretion by denying DiMartino’s request to amend his guilty plea to not guilty.

II.

DiMartino next argues that it is necessary to permit withdrawal of his guilty plea to avoid a manifest injustice, or alternatively, that withdrawal is fair and just. A defendant may seek withdrawal of a guilty plea in two different circumstances. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). First, “[a]t any time the court must allow a defendant to withdraw a guilty plea upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. Second, a district court may use its discretion to permit a defendant to withdraw a guilty plea before sentencing “if it is fair and just to do so.” *Id.*, subd. 2.

A. Manifest Injustice Standard

“A manifest injustice exists if a guilty plea is not valid.” *Raleigh*, 778 N.W.2d at 94. To be valid, a guilty plea must be “accurate, voluntary, and intelligent.” *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). Whether a plea is valid presents a question of law that we review de novo. *Raleigh*, 778 N.W.2d at 94. DiMartino bears the burden of showing that his plea was invalid. *See id.*

DiMartino asserts that his guilty plea was not voluntary at the time the district court accepted the plea. The voluntariness requirement is meant to ensure that a defendant does not plead guilty while under improper pressure or coercion. *Id.* at 96. In deciding whether

a plea is voluntary, we examine whether the parties reasonably understood the terms of the plea. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000). Whether a plea is voluntary is a factual finding which we will not disturb unless the finding is clearly erroneous. *State v. Danh*, 516 N.W.2d 539, 544 (Minn. 1994). We consider all relevant circumstances in determining whether a plea is voluntary. *Raleigh*, 778 N.W.2d at 96.

DiMartino claims that the district court's refusal to amend his guilty plea to not guilty effectively compelled him to enter the guilty plea. This argument is unpersuasive. The circumstances relevant to voluntariness occurred when DiMartino entered the plea before trial, not when the district court denied his motion for plea withdrawal at the sentencing hearing. He offers no relevant authority to support his argument that the district court's denial of a plea withdrawal motion consequently renders his earlier plea to be involuntary.

A review of the record at the time when DiMartino pleaded guilty clearly indicates that he entered the plea with full understanding of its terms and consequences. DiMartino testified that he was freely and voluntarily entering the plea. He stated that he understood his straight plea did not come with any guarantees or deals and that the state would be asking for the statutory maximum sentence. DiMartino also stated, twice, that no one had pressured or forced him into accepting the plea. In denying the motion, the district court determined that "[i]t was obvious that Mr. DiMartino had thought about it, that he was understanding it, that he very well was in control and understood what was happening throughout that day." Based on a review of all relevant circumstances in the record, we

conclude that the district court's findings regarding DiMartino's voluntariness in entering the plea are not clearly erroneous.

DiMartino also argues that the guilty plea was not accurate when the district court accepted it. In order for a plea to be accurate, the plea must establish a proper factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). A proper factual basis develops sufficient facts to demonstrate that the defendant's conduct satisfies each essential element of the charged offense. *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008).

Promotion of prostitution is defined under Minnesota law as, "[w]hoever, while acting other than as a prostitute or patron, intentionally . . . promotes the prostitution of an individual under the age of 18 years." Minn. Stat. § 609.322, subd. 1(a). "Promoting the prostitution of an individual" includes knowingly soliciting or procuring patrons for a prostitute. Minn. Stat. § 609.321, subd. 7 (2014). Here, DiMartino testified that he transported J.H., an individual under 18 years of age, to a hotel with the intention for J.H. to have sex with an individual in exchange for money.

DiMartino asserts that his request to amend his plea to not guilty negates every element of the charged offense. We disagree. He relies on *State v. Iverson*, which held that "[t]he 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." 664 N.W.2d 346, 350 (Minn. 2003). But, in this case, DiMartino did not make any sworn statements that negated elements of the offense. See *State v. Misquadace*, 629 N.W.2d 487, 491–92 (Minn. App. 2001) ("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.”), *aff’d*, 644 N.W.2d 65 (Minn. 2002). He fails to refer to any authority to support his position that a later motion to withdraw a guilty plea effectively negates the factual basis provided when the plea was entered. We conclude that a sufficient factual basis exists to satisfy the accuracy requirement.

Based on our review of the record, the district court correctly concluded that DiMartino is not entitled to withdraw his plea under the manifest injustice standard.

B. Fair and Just Standard

Alternatively, DiMartino argues that it is fair and just for the court to permit him to withdraw his guilty plea. Though the fair and just standard “is less demanding than the manifest injustice standard, it does not allow a defendant to withdraw a guilty plea for simply any reason.” *Theis*, 742 N.W.2d at 646 (quotation omitted). In determining whether withdrawal is fair and just, the district court considers two factors: (1) the defendant’s reasons to support withdrawal and (2) any resulting prejudice on the state in granting the withdrawal. *Raleigh*, 778 N.W.2d at 97. The defendant bears the burden of advancing reasons for withdrawal and the state bears the burden of showing prejudice. *Id.* We review a district court’s denial of a plea withdrawal motion under this standard for an abuse of discretion. *Id.*

DiMartino asserts that it was fair and just for the district court to allow him to withdraw his guilty plea for two primary reasons. First, he claims that he had the right to amend his plea to not guilty at any time prior to the district court’s acceptance of the plea.

As stated above, DiMartino does not have an absolute right to withdraw his guilty plea. *See id.* at 93. For reasons previously discussed, this argument is unavailing.

Second, he claims that he could not have made an intelligent decision in entering the plea because he had not taken his antidepressant medication. “The intelligent requirement ensures that a defendant understands the charges against him, the rights he is waiving, and the consequences of his plea.” *Id.* at 96. DiMartino testified that he understood his agreement to plead guilty resulted in him giving up his rights to a trial. He also recognized that by entering into a straight plea, there were no guarantees or deals as to his sentence and that the state would seek the maximum sentence permitted under statute.

DiMartino repeatedly asserts that he was “mentally unstable” and that he broke down emotionally several times while providing the factual basis for the plea. But, the colloquy between DiMartino and his attorney illustrates that he was of “sound mind” when he agreed to the plea. The district court reviewed the record of the plea colloquy and determined that there is no question that DiMartino knew exactly what he was doing and that he may have been “playing a few games while he was entering his plea.” DiMartino’s reasons to withdraw his plea are inadequate to satisfy his burden.

DiMartino also claims that the state would not have been prejudiced if the district court had decided to withdraw his plea and that the state should have been prepared for trial on the day of sentencing. But, the prejudice to the state is readily apparent. As the district court found, it would be unfair to the state to prepare for a “very complex case” in which the state may wonder who of its multiple witnesses would appear. And it would be unjust to require J.H., the victim in this case, to appear again to testify. *See Kim v. State*,

434 N.W.2d 263, 267 (Minn. 1989) (considering victim's interests in weighing prejudice). Therefore, the circumstances of this case demonstrate that the state met its burden for showing prejudice.

We conclude that the district court did not abuse its discretion by determining that it would be unfair and unjust to allow the withdrawal of DiMartino's guilty plea.

Affirmed.