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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1310**

State of Minnesota,
Respondent,

vs.

Kevin Bernard Thompson,
Appellant.

**Filed July 9, 2018
Affirmed
Kirk, Judge**

Pine County District Court
File Nos. 58-CR-16-922, 58-CR-16-937

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

Reese Frederickson, Pine County Attorney, Michelle R. Skubitz, Assistant County Attorney, Pine City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Kirk, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

KIRK, Judge

In this direct appeal, appellant argues (1) that his *Alford* plea to violating a domestic-abuse no-contact order (DANCO) was inaccurate and must be vacated because he did not

acknowledge that there was a substantial likelihood that he would be convicted at a trial and (2) that his guilty plea to terroristic threats must be vacated because the plea colloquy did not establish that he threatened to commit a crime of violence or that he did so intending to terrorize the victim or with reckless disregard of terrorizing the victim. We affirm.

FACTS

On September 5, 2016, law enforcement received an anonymous call to perform a welfare check on a female named A.J. at her residence in Pine County. The caller reported that appellant Kevin Bernard Thompson had assaulted A.J., his wife, and was in violation of an active DANCO in place for A.J. against appellant. Deputy Chad Wiener went to the residence to investigate. He saw a gold Pontiac known to belong to appellant parked in the driveway, observed appellant enter the residence, and saw appellant leave the residence in the Pontiac a short time later.

Deputy Wiener initiated a traffic stop of appellant's vehicle based on suspicion of a DANCO violation. Deputy Wiener then learned from dispatch that the DANCO allowed appellant to be in the Pine County residence when A.J. was not present. Meanwhile, Deputy Timothy Vaagenes went to the residence, where A.J. answered the door and told Deputy Vaagenes that she lived there. Deputy Wiener placed appellant under arrest for a DANCO violation.

Appellant was released from custody on September 7. Later that day, appellant had a physical altercation with an individual named J.S. at another residence in Pine County. Law enforcement spoke to J.S. at a medical facility where he was being treated for injuries allegedly sustained during the altercation. J.S. alleged that appellant came to his residence

in Pine County; accused him of reporting the DANCO violation to police; punched him with a closed fist, causing a gash that required stitches; and then initially refused to leave the property when J.S. requested. J.S. further alleged that appellant followed him into the residence and said, “I will kill you.” When J.S. asked appellant to leave again, he complied.

Appellant was charged in one file with a felony DANCO violation for the September 5 incident and in a second file with first-degree burglary, terroristic threats, and fifth-degree assault for the September 7 incident. Appellant entered guilty pleas in both files, but the district court later allowed appellant to withdraw his pleas before sentence was entered. In May 2017, the parties reached another agreement on both files. In the first file, appellant entered an *Alford* plea to an amended gross misdemeanor DANCO violation under Minn. Stat. § 629.75, subd. 2(c) (2016). In the second file, appellant pleaded guilty to felony terroristic threats under Minn. Stat. § 609.713, subd. 1 (2016), and the remaining two charges were dismissed.

On appeal, appellant asks this court to allow him to withdraw his pleas.

D E C I S I O N

I. Appellant’s *Alford* plea to the DANCO violation was accurate and valid.

Whether a plea is valid presents a question of law that this court reviews de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). “At 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. “Manifest injustice occurs if a guilty plea is not accurate, voluntary, and intelligent, and thus the plea may be withdrawn.” *Perkins v. State*, 559 N.W.2d 678, 688

(Minn. 1997). To be accurate, a plea must be established on a proper factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

Appellant argues that his *Alford* plea to the DANCO violation was not accurate and that he is entitled to withdraw his plea because he did not clearly acknowledge that the state's evidence would be sufficient to obtain a conviction if the matter went to a trial. Appellant does not dispute that his *Alford* plea was intelligent and voluntary.

An *Alford* plea may be accepted when the state offers “a strong factual basis for the plea and the defendant clearly expresse[s] his desire to enter the plea based on his belief that the [s]tate’s evidence would be sufficient to convict him” at a trial. *State v. Theis*, 742 N.W.2d 643, 647 (Minn. 2007) (quotation omitted). “[C]areful scrutiny of the factual basis for the plea is necessary . . . because of the inherent conflict in pleading guilty while maintaining innocence.” *Id.* at 648-49. “[T]he court must be able to determine that the defendant, despite maintaining his innocence, agrees that evidence the [s]tate is likely to offer at trial is sufficient to convict.” *Id.* at 649. The preferred practice is to discuss the factual basis with the defendant on the record and for the defendant to acknowledge “that the evidence the [s]tate would likely offer against him is sufficient for a jury, applying a reasonable doubt standard, to find the defendant guilty of the offense.” *Id.*

Here, before the court accepted appellant’s *Alford* plea, appellant and his attorney discussed the *Alford*-plea process, appellant’s rights, and the proposed plea agreement. Appellant agreed that he went over the plea agreement “line-by-line,” understood what he was giving up, and acknowledged that he wanted to enter the *Alford* plea. Appellant’s

attorney asked appellant, “[Do] you believe there is a substantial likelihood that a jury would find you guilty should you choose to try the case,” to which appellant replied, “Yes.”

The state then reviewed the evidence that it would have presented at a trial through the testimony of Deputy Weiner and Deputy Vaagenes to establish a factual basis for the plea. At the end of the state’s summary of the evidence, the prosecutor asked appellant if, “given all that testimony[,] . . . there is a substantial likelihood the jury would find that you were guilty of violating th[e DANCO] by having contact with [A.J.] on that date?” Appellant responded, “Oh, are you talking to me?” and then stated, “Well, I understand that that’s what the police wrote in his report.”

Because appellant was initially unclear, the district court interjected and again explained to appellant what was necessary to accept his *Alford* plea. The court stated that appellant did not have to agree that the information was accurate, and then asked, “If the jury heard it and the jury believed it, is there a substantial likelihood that you would be found guilty? And instead of taking that risk, you want to take this deal?” Appellant responded with a single “[y]es.”

Appellant argues that this plea colloquy was insufficient to support an accurate *Alford* plea because it is unclear whether he responded “yes” to the court’s first question, to the court’s second question, or to both questions. Appellant concedes that if he responded “yes” to the first question, then he agreed that there would have been a sufficient factual basis to support his *Alford* plea at a trial. But appellant argues that if he answered “yes” to the second question only, he merely acknowledged that he wanted to avoid a risk of conviction, and that is not enough to support an *Alford* plea.

The state argues that the plea hearing should be taken as a whole and the full interchange viewed in context. We agree. Our review of the entire plea colloquy shows that appellant discussed his decision to enter an *Alford* plea on the record with his attorney and the court and that he acknowledged to his attorney and to the court that the evidence summarized by the state would be sufficient, if believed, for a jury to find him guilty at a trial. The court was satisfied that appellant's single reply of "yes" indicated this acknowledgement and concurred with appellant "that if [the] evidence were believed by the jury there is a substantial likelihood that the jury would find [him] guilty of the offense of violation of a [DANCO]."

Our review of the record indicates that appellant acknowledged during the plea colloquy that there would likely be a sufficient factual basis to find him guilty if the matter proceeded to a trial. Accordingly, appellant's *Alford* plea to a DANCO violation was accurate and valid, and he is not entitled to withdraw his plea.

II. Appellant's guilty plea to felony terroristic threats was accurate and valid.

Appellant argues that there was insufficient evidence in his plea colloquy to support his plea to felony terroristic threats. Appellant's challenge is to the accuracy of his plea, which we review de novo. *Raleigh*, 778 N.W.2d at 94. Again, to be valid a guilty plea must be "accurate, voluntary and intelligent," and to be accurate, a proper factual basis must be established. *Ecker*, 524 N.W.2d at 716. "The district court typically satisfies the factual basis requirement by asking the defendant to express in his own words what happened." *Raleigh*, 778 N.W.2d at 94. "[A] defendant may not withdraw his plea simply

because the court failed to elicit proper responses if the record contains sufficient evidence to support the conviction. *Id.*

To convict appellant of felony terroristic threats, the state had to prove (1) that appellant made threats toward J.S. (2) to commit a crime of violence (3) with the purpose of terrorizing J.S., or with reckless disregard of the risk of terrorizing J.S. *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). “The test of whether words or phrases are harmless or threatening is the context in which they are used.” *Id.* Courts consider if, given the context in which the statement was made, the statement would “have a reasonable tendency to create apprehension that its originator will act according to its tenor.” *Id.* (quotation omitted).

At the May 2017 plea hearing, appellant acknowledged that he saw J.S. in Pine County on September 7, 2016, after he was released from jail and that he got into a fight with J.S. When asked if he made threats of violence against J.S., appellant replied, “Yes” and said that he, “Threatened to beat [J.S.] up.” The prosecutor remarked that that was “not a crime of violence” and explained to the court that appellant allegedly threatened to kill J.S. Appellant then remarked, “I threatened to kill him, whatever the paper say I did.” The court could not hear the full statement, so appellant repeated again, “I threatened to kill him, whatever the papers said that I said that I did, I did.” At that point, the state suggested that an *Alford* plea may be more appropriate.

Instead, the district court inquired of appellant further and asked him if he did not recall what happened because he was so angry at the time. Appellant said, “No, that’s not it.” The court then asked appellant if he understood that if J.S. testified “he would tell the

jury . . . that [appellant] threatened to kill him. You're not necessarily - - you're not disputing that, it sounds like, today; is that correct?" Appellant responded, "Yeah," and the court replied, "Okay, that's good enough for me." Defense counsel indicated that it had nothing further, and the court found that there was a sufficient factual basis to support the plea's accuracy.

Appellant argues that this plea colloquy did not establish a proper factual basis for a straight guilty plea to terroristic threats, as opposed to an *Alford* plea, because appellant did not agree or admit that he threatened to commit an enumerated crime of violence against J.S., or that he did so with an intent to terrorize J.S. or with reckless disregard of the risk that J.S. would be terrorized. Appellant adds that even if he threatened to kill J.S., J.S. had no reason to believe that threat, or to feel terror from that threat, because the second time J.S. told appellant to leave the residence, he did.¹

To support his argument, appellant cites to *State v. Bjergum*, in which the supreme court explained that "'I am going to kill you' is objectively a threat to commit homicide, but the context may establish something else. . . . [It] might convey an actual intent to kill, [but] it also may indicate anger, or frustration without an intent to kill, or even humor." 771 N.W.2d 53, 56 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009). Appellant contends that, if given the opportunity, he could have further explained the context in which the statement was made.

¹ During his plea, appellant testified that the altercation with J.S. took place in Pine County, but he did not agree that it was at J.S.'s residence. Appellant's argument on appeal appears to concede this fact, and there is evidence in the record to support that the altercation took place at J.S.'s residence in Pine County.

Our review of the record shows that appellant provided his own explanation for the physical altercation with J.S. on September 7, 2016 in Pine County during his plea, but he also stated twice that he “threatened to kill him,” as it was alleged “in the paper.” After the state expressed its concern about appellant’s responses, the court questioned appellant further to confirm that appellant was indeed admitting that he threatened to kill J.S. After questioning appellant, the court was satisfied with appellant’s explanation and accepted his plea. On this record, there was a sufficient factual basis to find that appellant threatened to commit an act of violence against J.S. so as to support his plea to terroristic threats.

There was also a sufficient factual basis to find that appellant’s threat to kill J.S. had a tendency to create apprehension in J.S. that appellant would act according to his threat or that the threat was made with a reckless disregard for the risk of terrorizing J.S. so as to support appellant’s plea. There is evidence in the record that appellant made the threat after J.S. asked appellant to leave the property, and that instead of doing so, appellant followed J.S. into the residence and threatened to kill him. There is also evidence in the record that appellant made the statement after a physical altercation with J.S. that left J.S. in need of medical attention. Appellant’s argument that he left the residence the second time J.S. asked does not dispel this context, nor does it establish that appellant’s threat to J.S. was transitory, made in jest, or merely born out of anger or frustration.

On this record, the factual basis elicited during appellant’s plea colloquy established the required elements of felony terroristic threats so as to establish the accuracy and validity of appellant’s guilty plea. Appellant is not entitled to withdraw his plea.

Affirmed.