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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1535**

State of Minnesota,
Respondent,

vs.

Matthew Hong,
Appellant.

**Filed July 2, 2018
Reversed and remanded
Bjorkman, Judge**

St. Louis County District Court
File No. 69DU-CR-16-2552

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

Mark S. Rubin, St. Louis County Attorney, Jonathan D. Holets, Assistant County Attorney,
Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Larkin, Judge; and Bjorkman,
Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his aggravated-robbery conviction, arguing that he is entitled to withdraw his guilty plea because it is not supported by a proper factual basis. We agree and reverse.

FACTS

Appellant Matthew Hong was charged with the July 6, 2016 first-degree aggravated robbery of A.T.S.¹ Hong pleaded guilty, admitting that he “smacked [A.T.S.] around,” gave him a bloody nose, and grabbed and ripped A.T.S.’s pants. Hong stated that he does not remember taking anything from A.T.S. because he was under the influence of methamphetamine at the time. But he acknowledged that police reports indicate, and A.T.S. would testify, that Hong took one or two wallets, glasses, and a cell phone from A.T.S.

Before sentencing, Hong moved to withdraw his guilty plea. He asserted that he was innocent because he was convinced, after watching surveillance footage he had not seen before pleading guilty, that he did not take anything from A.T.S. The district court denied the motion. Hong appeals.

DECISION

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). But a court must permit a defendant to

¹ Hong was also charged with fifth-degree possession of methamphetamine. He pleaded guilty to that offense and does not challenge his conviction in this appeal.

withdraw a guilty plea, even after sentencing, if it is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs if a plea is not valid; to be valid, a plea must be accurate, voluntary, and intelligent. *Raleigh*, 778 N.W.2d at 94. We review the validity of a guilty plea de novo. *State v. Johnson*, 867 N.W.2d 210, 214-15 (Minn. App. 2015), *review denied* (Minn. Sept. 29, 2015).

Hong challenges the accuracy of his guilty plea. The accuracy requirement is intended to protect the defendant from pleading guilty to a charge more serious than he could be convicted of if he went to trial. *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009) (citing *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994)), *review denied* (Minn. Apr. 21, 2009). This goal is accomplished by establishing a “proper factual basis” for the plea, usually by asking the defendant to explain the circumstances of the crime in his own words. *Id.* But where the defendant is unable to do so because of “absence of memory on the essential elements of the offense,” a factual basis may be established through a *Norgaard* plea in which the defendant acknowledges that the state has sufficient evidence to obtain a conviction. *Id.* (citing *State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 112-14, 110 N.W.2d 867, 871-72 (1961)). A *Norgaard* plea is accurate if it is supported by a strong factual basis and the defendant “specifically acknowledge[s] on the record at the plea hearing” that the evidence the state would likely present against him is “sufficient for a jury, applying a reasonable doubt standard, to find [him] guilty.” *Johnson*, 867 N.W.2d at 215 (quotation omitted). This acknowledgement is a critical component of an accurate *Norgaard* plea. *Williams*, 760 N.W.2d at 12-13.

Our first step in evaluating the accuracy of Hong's guilty plea is to identify the essential elements of first-degree aggravated robbery. Simple robbery is the wrongful taking of another's personal property from his person or presence, through force or threat of force. Minn. Stat. § 609.24 (2014). A person who, "while committing a robbery, . . . inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree." Minn. Stat. § 609.245, subd. 1 (2014).

Hong argues that his *Norgaard* plea is inaccurate with respect to the "taking" element of the offense because he was not asked to and did not acknowledge that the state's evidence is sufficient for a jury applying a reasonable-doubt standard to find that he took anything from A.T.S. This argument has merit. After Hong testified that he did not remember taking personal property from A.T.S., defense counsel inquired:

DEFENSE COUNSEL: And you are not disputing what the reports read about that, I believe it stated you took his wallet or phone for a short time and then crushed them or threw them, but you don't recall that; is that correct?

HONG: I don't.

DEFENSE COUNSEL: But you don't dispute that; is that correct?

HONG: I guess not.

DEFENSE COUNSEL: Can't be a "guess not"?

HONG: Yeah, no.

The prosecutor then elicited Hong's acknowledgement that if there were a trial, A.T.S. would testify that Hong took the objects from him. And when the district court asked Hong to confirm that he "hurt [A.T.S.] and stole stuff from him," Hong reiterated that he does

not remember “taking the stuff” but agreed that it “seems pretty clear that [he] took the stuff.”

Hong does not acknowledge in any of these exchanges that the state likely had sufficient evidence to prove what he could not remember—that he took A.T.S.’s personal property—let alone that the state could likely prove this element beyond a reasonable doubt. In fact, as Hong notes, the concept of proof beyond a reasonable doubt was never addressed at the guilty-plea hearing.

The state does not dispute this deficiency, but insists that Hong directly admitted all of the necessary elements of the robbery by “conce[ding]” or “acknowledg[ing]” that he took and briefly possessed A.T.S.’s wallet or phone. According to the state, these admissions obviated the need for a *Norgaard* acknowledgement. We disagree. Hong testified that he does not dispute what the police reports say he took from A.T.S., and he acknowledges that the reports and A.T.S.’s statements make the fact of the taking “seem[] pretty clear.” These statements are not the same as direct admissions that Hong committed the taking. Rather, they represent part of the factual foundation that, together with an acknowledgement that the state’s evidence is sufficient to prove guilt beyond a reasonable doubt, establishes an accurate *Norgaard* plea. See *Williams*, 760 N.W.2d at 12-14 (identifying and separately analyzing these “two related components” of a *Norgaard* plea). Because the record contains no such acknowledgement, Hong’s guilty plea does not satisfy the accuracy requirement. We therefore reverse his conviction and remand to the district court to permit Hong to withdraw his plea.

Reversed and remanded.