

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0884**

State of Minnesota,
Respondent,

vs.

David Michael Dillard,
Appellant.

**Filed March 18, 2019
Affirmed
Florey, Judge**

Brown County District Court
File No. 08-CR-17-970

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Charles W. Hanson, Brown County Attorney, Breck Rolfsrud, Assistant County Attorney,
New Ulm, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and
Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant David Michael Dillard appeals his conviction of first-degree criminal
sexual conduct, arguing that his *Norgaard* plea was not accurate because the factual basis

failed to establish that there was a substantial likelihood a jury would find beyond a reasonable doubt that he used force or coercion to accomplish sexual penetration. We affirm.

FACTS

In September 2017, appellant was arrested on allegations of sexually assaulting a family friend, 16-year-old K.G. The night before his arrest, appellant had been drinking heavily at K.G.’s home with her mother and stepfather. Appellant was invited to stay the night in their living room.

After K.G.’s mother and stepfather went to bed, appellant entered K.G.’s room where she was sleeping. Appellant laid down in K.G.’s bed and kissed her. He digitally and orally penetrated K.G., and attempted to vaginally penetrate her with his penis. K.G. screamed, ran into her parents’ bedroom, and immediately reported the incident to her mother, who called 9-1-1.

Appellant was arrested and charged with 11 counts of criminal sexual conduct. The state notified appellant of its intention to seek an aggravated sentence on the grounds that K.G. was particularly vulnerable due to age, and the offense was committed in a location in which K.G. had an expectation of privacy.

In February 2018, appellant entered a *Norgaard* plea¹ of guilty to count one: first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(e)(i) (2016). As part of the

¹ A *Norgaard* plea is one in which the defendant “claims a loss of memory, through amnesia or intoxication, regarding the circumstances of the offense,” but pleads guilty because “the record establishes that the defendant is guilty or likely to be convicted of the

agreement, the state abandoned its intention to seek an aggravated sentence. At the plea hearing, appellant affirmed having seen a copy of the criminal complaint, that the events therein occurred at a time when he was intoxicated, and that he had no recollection of the events alleged. Appellant affirmed that he had reviewed the state's evidence against him and that he believed that, if the state's evidence was presented at trial, there was a substantial likelihood that a jury would find him guilty beyond a reasonable doubt.

As part of the factual basis to support his plea, appellant affirmed that he knew K.G. and that he was at her home on the evening of the sexual assault. He affirmed his understanding that K.G. gave a statement to law-enforcement officers reporting that appellant "went into her room while she was asleep," that he "removed her pants and underwear," that he "held her down and . . . touched her vaginal area with [his] mouth," that he "penetrated her vagina with [his] fingers," that he "removed [his] pants and . . . attempted to penetrate her vagina . . . with [his] penis," and that "she felt a huge shot of pain when [he] attempted to . . . enter her vagina with [his] penis." Appellant also affirmed his understanding that the collection of DNA samples "indicated that K.G.'s DNA was on [his] penis." The district court accepted appellant's plea.

Appellant was convicted of first-degree criminal sexual conduct, and the district court dismissed the remaining ten counts against him. Appellant was sentenced to an executed prison term of 192 months. This appeal followed.

crime charged." *State v. Johnson*, 867 N.W.2d 210, 215 (Minn. App. 2015) (quotations omitted), *review denied* (Minn. Sept. 29, 2015).

DECISION

There is no absolute right to withdraw a guilty plea after it has been entered. *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997). However, “a court must allow withdrawal of a guilty plea if withdrawal is necessary to correct a ‘manifest injustice.’” *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010) (quoting Minn. R. Crim. P. 15.05, subd. 1). Manifest injustice occurs if a plea is not valid. *Id.* at 94. A constitutionally valid plea must be voluntary, intelligent, and accurate. *Id.*; see also *Perkins*, 559 N.W.2d at 688. The defendant bears the burden of showing that his plea was invalid. *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012). The validity of a guilty plea is a question of law we review de novo. *Raleigh*, 778 N.W.2d at 94.

A plea must be accurate to ensure that a defendant is not pleading guilty to a more serious crime than that for which he could be convicted if his case went to trial. *Id.* An accurate plea must be established on a proper factual basis. *Lussier*, 821 N.W.2d at 588. A proper factual basis exists “if the record contains a showing that there is credible evidence available which would support a jury verdict that defendant is guilty of at least as great a crime as that to which he pled guilty.” *Nelson v. State*, 880 N.W.2d 852, 859 (Minn. 2016) (quotation omitted).

“Ordinarily, an adequate factual basis is established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime.” *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009) (quotation omitted), review denied (Minn. Apr. 21, 2009). If the defendant enters a *Norgaard* plea, however, the factual basis must be established by other means. *Id.* In *Williams*, this court enunciated

a two-prong standard for establishing a valid *Norgaard* plea: (1) the record must provide a strong factual basis to satisfy the essential elements of the offense and (2) the defendant must “specifically acknowledge on the record at the plea hearing that the evidence the State would likely offer against him is sufficient for a jury, applying a reasonable doubt standard, to find the defendant guilty.” *Johnson*, 867 N.W.2d at 215 (quotation omitted); *Williams*, 760 N.W.2d at 12-14.

To convict appellant of first-degree criminal sexual conduct, the district court had to find that the supporting factual basis satisfied the following statutory elements: (1) appellant intentionally, and without consent, sexually penetrated K.G.; (2) appellant caused personal injury to K.G.; and (3) appellant used force or coercion to accomplish the act. Minn. Stat. § 609.342, subd. 1(e)(i); 10 *Minnesota Practice*, CRIMJIG 12.03 (2015); *see also State v. O’Brien*, 364 N.W.2d 901, 904 (Minn. App. 1985) (“The elements of [first-degree criminal sexual conduct] are (1) penetration, (2) personal injury to the victim, and (3) penetration accomplished through force or coercion.”), *aff’d as modified*, 369 N.W.2d 525 (Minn. 1985).

Appellant argues that his *Norgaard* plea was inaccurate because it failed to establish that there was a substantial likelihood that a jury would find, beyond a reasonable doubt, that he used force or coercion to accomplish sexual penetration. Specifically, appellant asserts (1) the factual basis “did not establish that [he] held K.G. down to overcome resistance for the purpose of accomplishing penetration,” (2) “there was no evidence offered that K.G. would testify that she felt threatened or feared that [he] would inflict bodily harm upon her,” (3) “there was no evidence offered that K.G. said [appellant] used

words or circumstances, confinement, or superior size or strength, to accomplish the sexual penetration,” and (4) the state did not specify at the plea hearing that K.G.’s report of feeling “a huge shot of pain when [appellant] attempted to . . . enter her vagina with [his] penis,” would be evidence offered to prove force or coercion. We are not persuaded.

The factual basis established that appellant intentionally sexually penetrated K.G. without her consent. Sexual penetration includes “any intrusion, however slight, of the penis into the female genital opening,” or “any contact between the female genital opening of one person and the mouth, tongue, or lips of another person,” or “[a]ny intrusion, however slight, of any part of one person’s body . . . into the genital . . . openings of another person’s body.” CRIMJIG 12.03; *see also* Minn. Stat. § 609.341, subd. 12 (2016).

At the plea hearing, appellant affirmed his understanding that K.G. reported he “went into her room while she was asleep,” that he “removed her pants and underwear,” that he “touched [K.G.’s] vaginal area with [his] mouth,” that he “penetrated her vagina with [his] fingers,” and that he “removed [his] pants” and “attempted to penetrate her vagina . . . with [his] penis.” Appellant also affirmed his understanding that the DNA samples collected from him and K.G. “indicated that K.G.’s DNA was on [his] penis.”

The factual basis also established that appellant caused personal injury to K.G. Physical pain constitutes personal injury. *See* Minn. Stat. §§ 609.341, subd. 8, .02, subd. 7 (2016); CRIMJIG 12.03. At the plea hearing, appellant affirmed his understanding that K.G. reported “she felt a huge shot of pain when [appellant] attempted to . . . enter her vagina with [his] penis.”

And lastly, the factual basis established that appellant used force or coercion to accomplish the offense. Minn. Stat. § 609.341, subd. 3 (2016), provides:

“Force” means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

Minn. Stat. § 609.341, subd. 14 (2016), provides:

“Coercion” means the use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant or another, or the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant’s will. Proof of coercion does not require proof of a specific act or threat.

At the plea hearing, appellant affirmed his understanding that K.G. reported he “went into her room while she was asleep” and that he “held her down” while sexually penetrating her. If this evidence had been presented to a jury, there is a substantial likelihood that it would have found, beyond a reasonable doubt, that the circumstances in which 39-year-old appellant sexually assaulted 16-year-old K.G.—by entering her bedroom, uninvited, slipping into her bed while she was sleeping, and holding her down—caused K.G. reasonably to fear that appellant would inflict bodily harm upon her, and ultimately caused K.G. to submit to the sexual penetration against her will. See Minn. Stat. § 609.341, subd. 14; see, e.g., *State v. Stufflebean*, 329 N.W.2d 314, 316 (Minn. 1983) (affirming defendant’s conviction of fourth-degree criminal sexual conduct, holding that

the element of force or coercion was established by evidence that complainant awoke, with part of her clothing removed, and with defendant “lying partially nude on top of her”); see also *State v. Carter*, 289 N.W.2d 454, 455 (Minn. 1979) (affirming defendant’s conviction of third-degree criminal sexual conduct, holding that, “although neither using actual force nor verbalized threats of force,” 35-year-old defendant, who drove 15-year-old complainant to “an isolated area,” “intentionally created an atmosphere of fear which caused complainant to finally submit to his sexual advances”). The first prong of the *Williams* standard was met.

The second prong of the *Williams* standard—that the defendant acknowledge on the record at the plea hearing that the evidence is sufficient to support his or her conviction—was also met. Before establishing the factual basis for count one, appellant affirmed that “[he] believe[d] that if the State’s evidence was presented against [him] at trial, that there[] [was] a substantial likelihood that [he] would be found guilty beyond a reasonable doubt by a jury.” After establishing the factual basis through his acknowledgment of the statements K.G. gave to law enforcement, appellant, *again*, affirmed that “the testimony that would be given, if consistent with these police reports and the forensic reports, in this case would lead a jury to find [him] guilty beyond a reasonable doubt.”

Because the factual basis satisfied the statutory elements of first-degree criminal sexual conduct, and because appellant acknowledged that the state’s evidence was sufficient to support his conviction, the district court properly accepted appellant’s *Norgaard* plea.

Affirmed.