

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0533**

State of Minnesota,
Respondent,

vs.

Brice Killian Foster,
Appellant.

**Filed February 7, 2022
Reversed and remanded
Segal, Chief Judge**

St. Louis County District Court
File No. 69DU-CR-19-1952

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

Kimberly Maki, St. Louis County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Segal, Chief Judge; Johnson, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this direct appeal, appellant argues that his four felony convictions for violating a domestic-abuse no-contact order (DANCO) should be reduced to gross misdemeanors because the factual basis entered in support of his guilty pleas does not support felony-

level offenses. Alternatively, appellant argues that he is entitled to specific performance of the plea agreement. We reverse and remand.

FACTS

In July 2017, appellant Brice Killian Foster was convicted of engaging in a pattern of stalking conduct against the mother of one of his children. As a condition of the stayed sentence, the district court issued a probationary DANCO that prohibited Foster from having contact “directly, indirectly or through others, in person, by telephone, in writing, electronically or by any other means with the protected person.” The probationary DANCO also prohibited Foster from “harassing, stalking, or threatening the protected person,” and is effective until 2022. In June 2019, respondent State of Minnesota charged Foster with four felony counts of violating the DANCO. The complaint alleged that Foster has a 2016 conviction for violating an order for protection (OFP) and a 2017 conviction for interference with a 911 call.

Foster signed a plea petition indicating that he agreed to “plead guilty to all 4 felony DANCO violations in this case to run concurrent (with a criminal history score of 4),” he understood that his probation would be revoked in the pattern-of-stalking-conduct case, his attorney would move for a dispositional departure that the state would oppose, and the “court will decide any future sentence.” At the plea hearing, Foster’s counsel told the court that Foster “does potentially have a criminal history of 4, so this will be a case where he’ll be facing some sort of Guideline sentence for a commit.” Foster’s counsel repeated the terms of the plea agreement regarding the request for a dispositional departure and stated that the sentences would be concurrent “no matter what the Court decides to do with them.”

In response to his counsel's questioning, Foster admitted that he knew a DANCO prohibited him from contacting the complainant and that he violated it by texting her in April 2019 and saying things to her when she was picking up their child, sending her a Snapchat message on May 29, 2019, and texting her before and after she reported him to police on June 1, 2019. With respect to the prior-conviction element, Foster denied that he had been convicted of interference with a 911 call in 2017 and clarified that it was interference with privacy. But Foster agreed that the DANCO violations are felonies because he has "those two priors," which he identified as stalking and interference with privacy. The district court ordered a presentence investigation (PSI).

The PSI and sentencing guidelines worksheets revealed that Foster, in fact, had a criminal-history score of five, not four. At the sentencing hearing, Foster's counsel stated that he reviewed the worksheets and did not object to the calculation of Foster's criminal-history score. Counsel argued in support of the motion for a dispositional departure, and the state opposed it. The district court imposed the following presumptive sentences: 27 months' imprisonment for count one with a criminal-history score of five; a concurrent sentence of 30 months' imprisonment for count two; and concurrent sentences of 33 months' imprisonment each for counts three and four. The district court denied the motion for a dispositional departure and executed the sentences.

Foster appeals.

DECISION

Foster claims that the district court erred by convicting him of felony-level DANCO violations because the interference-with-privacy conviction, which he admitted to as part

of the factual basis for his guilty pleas, is not on the list of qualified domestic violence-related offenses in Minn. Stat. § 609.02, subd. 16 (2018). Accordingly, Foster argues that his guilty pleas did not establish the prerequisite prior convictions to qualify for the enhancement of the DANCO violation to a felony. Minn. Stat. § 629.75, subd. 2(d)(1) (2018).

“To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent.” *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). The validity of a guilty plea is a legal question that this court reviews de novo, and the defendant bears the burden of proving that his plea is invalid. *Id.* “To be accurate, a plea must be established on a proper factual basis.” *Id.* The importance of the accuracy requirement is to ensure that a defendant is not convicted of an offense that is more serious than the conduct warrants. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). A prior conviction is an element of an aggravated offense that the state must prove at trial and that the defendant has the right to have a jury decide. *State v. Berkelman*, 355 N.W.2d 394, 396 (Minn. 1984). Foster argues that his guilty plea was inaccurate because the factual basis for his plea failed to establish the prior-conviction element for a felony DANCO violation.

It is a felony offense when a person violates a DANCO “within ten years of the first of two or more previous qualified domestic violence-related offense convictions or adjudications of delinquency.” Minn. Stat. § 629.75, subd. 2(d)(1). A previous “qualified domestic violence-related offense” is defined in section 609.02, subdivision 16. *Id.*, subd. 2(a) (2018). The list of qualified offenses includes violation of an OFP, domestic assault,

criminal sexual conduct, interference with an emergency call, and stalking; interference with privacy is not included as a qualified offense. Minn. Stat. § 609.02, subd. 16.

Foster is correct that the factual basis for his guilty pleas does not support felony DANCO violations because only one of the prior convictions that he admitted to having is a qualified domestic violence-related conviction. Foster's guilty pleas, therefore, lack an adequate factual basis to establish felony DANCO violations. The PSI shows that Foster has three 2017 convictions of qualified domestic violence-related offenses under Minn. Stat. § 609.02, subd. 16, that would satisfy the prior-conviction element of a felony DANCO violation: pattern of stalking conduct, misdemeanor violation of an OFP, and gross misdemeanor violation of an OFP. But other-record evidence cannot be used to establish the deficient prior-conviction element; we are limited to only those prior convictions that Foster admitted at the plea hearing. *See Rosendahl v. State*, 955 N.W.2d 294, 300 (Minn. App. 2021) (stating that in determining the accuracy of a guilty plea a reviewing court may not consider other-record evidence unless the truthfulness and accuracy of the evidence has been admitted by the defendant). Foster's guilty pleas, therefore, lack an adequate factual basis to establish felony DANCO violations.

An inaccurate guilty plea is an invalid plea, and a "manifest injustice would occur if the plea were not withdrawn." *State v. Theis*, 742 N.W.2d 643, 650 (Minn. 2007); *see also* Minn. R. Crim. P. 15.05, subd. 1 (stating that "the court must allow a defendant to withdraw a guilty plea" if "withdrawal is necessary to correct a manifest injustice"). Foster, however, does not seek guilty-plea withdrawal. Instead, he argues that his felony convictions must be reversed and remanded for the district court to enter judgments of

conviction for gross-misdemeanor DANCO violations and imposition of gross-misdemeanor sentences. To support this argument, Foster relies on Minn. R. Crim. P. 28.02, subd. 12(c), which provides that if an appellate court reverses a judgment it may reduce “the conviction to a lesser included offense or to an offense of lesser degree, as the case may require,” and “[i]f the court directs a reduction of the conviction, it must remand for resentencing.”

Foster relies on a nonprecedential opinion as support for his requested remedy. In *State v. Ogris*, we reversed and remanded for entry of judgment of conviction and resentencing on the lesser-included offense of misdemeanor domestic assault when the factual basis for the plea to gross-misdemeanor domestic assault was inadequate and did not include the defendant’s admission that the prior conviction was a qualified domestic-violence related conviction. No. A17-1008, 2018 WL 2090323, at *3-4 (Minn. App. May 7, 2018), *rev. denied* (Minn. Aug. 7, 2018). But this decision is not binding. Minn. R. Civ. App. P. 136.01, subd. 1(c). Moreover, the plain language of the rule relied on by Foster makes such a disposition by this court permissive and not obligatory.

We are not persuaded that rule 28.02, subdivision 12(c), is an appropriate remedy under the circumstances of this case for two reasons: (1) evidence may exist that could establish that Foster has prior convictions for qualified domestic violence-related offenses that would satisfy the prior-conviction element of a felony DANCO violation, and (2) the state has not agreed to this remedy. See Minn. R. Crim. P. 15.07 (stating defendant may plead guilty to lesser-included offense with prosecutor’s consent and court’s approval, or without prosecutor’s consent when the court is satisfied the state cannot introduce

sufficient evidence to justify submission of offense charged to the jury). We therefore reverse and remand for the district court to (1) permit Foster to withdraw his guilty pleas or, (2) if the state and the district court agree, enter judgment of conviction for gross-misdemeanor DANCO violations and resentence accordingly.

Because appellant's guilty plea is invalid, we need not decide whether the district court's sentence breached the plea agreement.

Reversed and remanded.