

*This opinion is nonprecedential except as provided by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
A21-0845**

State of Minnesota,
Respondent,

vs.

Juan Bustamante,
Appellant.

**Filed May 2, 2022
Reversed and remanded
Frisch, Judge**

Polk County District Court
File No. 60-CR-19-1615

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney,
Crookston, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Frisch, Judge; and Kirk,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Following his conviction for aggravated first-degree controlled-substance sale, appellant argues that he is entitled to withdraw his guilty plea because it was inaccurate and therefore manifestly unjust. We reverse and remand.

FACTS

In August 2019, respondent State of Minnesota charged appellant Juan Bustamante with one count of aggravated sale of controlled substance in the first degree in violation of Minn. Stat. § 152.021, subds. 1(1), 2b, 3(d) (2018),¹ and one count of conspiracy to commit the same, in violation of Minn. Stat. § 152.096, subd. 1 (2018).²

The state alleged that, in October 2018, Bustamante facilitated the sale of 110 grams of methamphetamine through an intermediary, his son. The state further alleged that this controlled-substance sale involved the following three aggravating factors: Bustamante's son trafficked the narcotics across state lines; his son traveled through a park zone with the narcotics; and his son possessed a significant amount of money, evidencing that the sale

¹ This charge includes aggravating factors as an element of the controlled-substance crime as defined by Minn. Stat. § 152.021, subd. 2b, as distinguished from an aggravated, upward-departure sentence. See *State v. Dettman*, 719 N.W.2d 644, 649 (Minn. 2006) (explaining that an aggravation-based upward-departure sentence is only permissible “if the facts authorizing the departure were either found by a jury . . . or admitted to by [the defendant]”).

² The state clarified at the plea hearing that it was charging Bustamante under an accomplice-liability theory. See Minn. Stat. § 609.05, subd. 1 (2018).

was for “quantities substantially larger than the minimum threshold amount for the offense.” Minn. Stat. § 152.01, subd. 24(4), (9), (10) (2018).

In October 2020, the state offered Bustamante the opportunity to plead guilty to the aggravated first-degree controlled-substance charge in exchange for dismissal of the conspiracy charge. Bustamante accepted the offer. In November 2020, the district court held a hearing wherein Bustamante pleaded guilty. In his plea colloquy, Bustamante testified that he facilitated the sale of methamphetamine between his son and a buyer in Polk County and that the sale was for “a significant amount” of methamphetamine. Bustamante did not contest that the sale was for 110 grams of methamphetamine.

Bustamante then testified that he was unaware of the factual circumstances giving rise to each aggravating factor. The district court asked Bustamante whether he knew and understood that his son trafficked the narcotics across state lines:

Q: That methamphetamine came from the state of North Dakota into the state of Minnesota, correct?

A: I’m not sure where it came from really, I just know [my son] had it. I don’t know where he got it from or where he brought it from.

Q: Okay. Do you, did you know the route that [your son] drove to get to East Grand Forks?

A: No ma’am.

Q: Okay. Where was he coming from, what city?

A: I’m not sure if it was Willmar or Austin.

Q: Okay. Alright. Do you know if he was on Interstate 29 coming up from Fargo . . . ?

A: No.

Q: You don’t know?

A: No ma’am.

The district court next asked Bustamante if he knew and understood that his son traveled with the methamphetamine through a park zone. See Minn. Stat. § 152.01, subd. 12a (2018) (defining a park zone as the area within 300 feet of a public park). Bustamante testified that he was unaware of whether his son passed through a park zone:

Q: Are you aware . . . , that [your son], in travelling to the exchange location . . . was within 300 feet of Sherlock Park and within 300 feet also of Itts Williams Park . . . ?

A: No ma'am.

Q: Okay. Would you have any reason to dispute that?

A: Um, no.

The district court then asked Bustamante whether his son possessed money evidencing that the distribution was in “quantities substantially larger than the minimum threshold amount for the offense.” Minn. Stat. § 152.01, subd. 24(10). Bustamante again testified that he was unaware of this fact:

Q: And were you aware that [your son] had um, I believe pretty significant amount of cash with him as part of the process?

A: No.

Following the district court’s questioning, the state “request[ed] that the Court accept the probable cause portion of the complaint as part of the permanent record as part of Mr. Bustamante’s guilty pleas.”³ Bustamante’s counsel stated that he had no objection

³ The probable-cause portion of the complaint contained allegations that law-enforcement officers witnessed Bustamante’s son drive from Grand Forks, North Dakota into East Grand Forks, Minnesota and distribute methamphetamine to the confidential informant, and that an officer knew that the son traveled through a park zone en route to the narcotics-sale location.

to the district court receiving the probable-cause portion of the complaint. The state then engaged in a lengthy colloquy with Bustamante regarding the alleged aggravating factors:

Q: [F]irst of all, h[ave] you read through the complaint . . . ?

A: I, I, no not really. I glanced at it here and there, but no.

Q: You haven't read through it?

A: Well I've glanced at it. I, you know, a bunch of it, I mean, he just blamed us for everything, but I mean, he had a lot to do with it too. So I just didn't even bother going through it.

. . . .

Q: Okay. And you also understand that according to the facts here and the reports that this methamphetamine that your son brought to the [confidential informant] here came from Grand Forks in North Dakota into East Grand Forks, do you understand that?

A: No, I didn't. I don't know where he came from, I mean, I know he was—

Q: I'm not asking if you were with, I'm asking if you understand that? You've been through the reports with . . . your attorneys, correct?

A: That's what they said that it came from down there, but . . .

Q: Yep.

A: Yeah.

Q: Yeah. And in fact . . . that's what your son even admitted to when he was interviewed by law enforcement, that he was supposed to meet someone . . . in Grand Forks and then it came over to East Grand Forks. Do you understand that?

A: No, I didn't. I didn't understand that one.

Q: Okay, are you contesting that it came from Grand Forks North Dakota into Minnesota?

A: Um, no. I read the report I seen it in the report.

Q: Okay. And you also understand that in doing that it went through [a] park zone, that the methamphetamine here was in a park zone?

A: Yeah, I read that also.

Q: Okay. And you're not contesting that either?

A: No sir.

The district court found that a factual basis existed for Bustamante's guilty plea and accepted the plea. The district court expressly stated, "I am accepting the probable cause portion of the complaint in furtherance of Mr. Bustamante's plea here today."

In March 2021, the district court held a contested sentencing hearing and thereafter sentenced Bustamante to 144 months' incarceration.

Bustamante appeals.

DECISION

Bustamante argues that his guilty plea was inaccurate because the state did not establish the factual basis for the aggravating element of the offense.⁴ He further argues that the allegations set forth in the probable-cause portion of the complaint cannot properly be considered in determining whether a factual basis exists to support his plea of guilty. The state disagrees, arguing that the probable-cause portion of the complaint establishes

⁴ Bustamante also argues in both his principal brief and in his pro se supplemental brief that his sentence was based on an incorrect criminal-history score. Because we reverse Bustamante's sentence and conviction and because "[w]e do not issue advisory opinions," *State v. Arens*, 586 N.W.2d 131, 132 (Minn. 1998) (quotation omitted), we decline to address this issue.

the factual basis for the aggravating element of the crime and that Bustamante's plea was therefore accurate.⁵

A manifest injustice occurs when a guilty plea is not constitutionally valid. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). “To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent.” *Id.* “The accuracy requirement protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial.” *Id.* For a guilty plea to be accurate, a proper factual basis must be established for each element of the offense. *State v. Jones*, 921 N.W.2d 774, 779 (Minn. App. 2018), *rev. denied* (Minn. Feb. 27, 2019); *see* Minn. R. Crim. P. 15.01, subd. 2(7) (“The defendant must state the factual basis for an aggravated sentence.”). A proper factual basis exists if there are “sufficient facts on the record to support a conclusion that defendant’s conduct falls within the charge to which he desires to plead guilty.” *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008) (quotation omitted).

“In a typical plea, where the defendant admits his or her guilt, an adequate factual basis is usually established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime.” *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). The factual basis may also be established “with

⁵ The state also argues that Bustamante did not preserve the issue for appeal because he did not request to withdraw his plea in district court. This argument is without merit. Bustamante does not forfeit his manifest-injustice argument by raising it for the first time on appeal. *See Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989) (“A defendant is free to simply appeal directly from a judgment of conviction and contend that the record made at the time of the plea was entered is inadequate” to establish that a plea was inaccurate, involuntary, or unintelligent).

testimony of witnesses and statements summarizing the evidence.” *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). “While a guilty plea may be tactically advantageous for the defendant, the plea is not simply a strategic choice; it is itself a conviction, and the high stakes for the defendant require the utmost solicitude.” *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (quotations and citations omitted). “Accordingly, counsel lacks authority to consent to a guilty plea on a client’s behalf.” *Id.*

“[T]he trial court has the primary responsibility for eliciting from defendant the testimony needed to establish a factual basis.” *State v. Nace*, 241 N.W.2d 101, 102 (Minn. 1976). A district court should not accept a guilty plea when the defendant denies an essential element of the offense. *See State v. Olson*, 133 N.W.2d 489, 492 (Minn. 1965) (holding that “the court on its own motion should have refused to accept defendant’s plea of guilty” when the defendant refused to testify that he committed the offense); *State v. Jones*, 127 N.W.2d 153, 156-57 (Minn. 1964) (invalidating a guilty plea when the defendant “denied the commission of acts which constitute the essential elements of the offense charged” by testifying, “God help me, I wasn’t even there”). “The defendant bears the burden of establishing the facts that support his claim that the guilty plea is invalid.” *State v. Mikulak*, 903 N.W.2d 600, 603 (Minn. 2017). “Whether a plea is valid is a question of law which we review de novo.” *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012).

Here, Bustamante asserts that his plea was inaccurate because he did not admit to facts that established his guilt for the aggravating element of the charge. We agree.

To establish an aggravated controlled-substance crime in the first degree, the state was required to prove two aggravating factors. Minn. Stat. § 152.021, subd. 2b(2). The

state alleged that the crime involved three aggravating factors: Bustamante's son trafficked the narcotics across state lines, his son trafficked the narcotics through a park zone, and his son possessed money evidencing that the distribution was for "quantities substantially larger than the minimum threshold amount for the offense." Minn. Stat. § 152.01, subd. 24(4), (9), (10).

Bustamante's testimony, however, did not establish a factual basis for the aggravating element of the crime requiring that the offense involve two aggravating factors. Bustamante repeatedly stated that he did not know that his son traveled across state lines with the narcotics, was unaware of whether his son traveled through a park zone, and had no knowledge of the amount of money in his son's possession following the drug sale.

The state appears to concede that Bustamante's testimony, on its own, did not establish the necessary factual basis for the aggravating factors. The state instead asserts that the probable-cause portion of the complaint, which was offered into the record by the state without objection from Bustamante's counsel, establishes the necessary factual basis for the aggravating factors. We disagree.

In order for the allegations set forth in the probable-cause portion of the complaint to become part of the record, the defendant must "expressly testify as to the truthfulness and accuracy of the[] allegations of the complaint during his colloquy." *Rosendahl v. State*, 955 N.W.2d 294, 298 (Minn. App. 2021). Bustamante did not expressly testify to the accuracy of the complaint. To the contrary, Bustamante testified that he was not aware of the contents of the complaint, had not read the entirety of the complaint, and only "glanced

at [the complaint] here and there.” Given Bustamante’s testimony, he was unable to testify as to the accuracy and truthfulness of the allegations in the complaint.

The state relies on Bustamante’s *counsel* consenting to the state’s request to include the complaint in the record. But counsel’s consent to include the state’s allegations in the record does not equate to a defendant’s confirmation of the accuracy and truthfulness of allegations in the complaint. Just as counsel cannot plead guilty on a client’s behalf, *Nixon*, 543 U.S. at 187, or testify to the factual basis of the offense on a client’s behalf, *see* Minn. R. Crim. P. 15.01, subds. 1(8), 2(7); *Ecker*, 524 N.W.2d at 716, counsel cannot substitute a defendant’s personal testimony that the state’s allegations are truthful and accurate with a summary document—the complaint—setting forth the state’s alleged theory of the case, *see Rosendahl*, 955 N.W.2d at 298. Without Bustamante’s express testimony or other competent evidence establishing the truth and accuracy of the allegations set forth in the complaint, the allegations in the complaint cannot establish the factual basis for the aggravating element of Bustamante’s offense.

The state relies on *Trott* and cases citing *Trott* for the proposition that Bustamante’s guilty plea constituted a judicial admission of the allegations in the complaint. *Trott*, 338 N.W.2d at 252; *see Lussier*, 821 N.W.2d at 589; *Sanchez v. State*, 868 N.W.2d 282, 289 (Minn. App. 2015), *aff’d on other grounds*, 890 N.W.2d 716 (Minn. 2017). *Trott*, however, instructs that “[o]ther ways of establishing a factual basis include testimony of witnesses and statements summarizing the evidence.”⁶ *Trott*, 338 N.W.2d at 251. We take this

⁶ *Lussier* similarly states that “the plea petition and colloquy may be supplemented by *other evidence* to establish the factual basis for a plea.” 821 N.W.2d at 589 (emphasis

opportunity to emphasize that “a criminal complaint is an assertion, not evidence; it merely details the allegations that establish the elements of the crime charged and that must be proven beyond a reasonable doubt at trial.” *State v. Pierce*, 792 N.W.2d 83, 89 (Minn. App. 2010). Thus, the allegations set forth in the probable-cause portion of the complaint cannot support a factual basis for Bustamante’s plea of guilty in the absence of his testimony or other evidence verifying the truth and accuracy of those allegations.

We are mindful of circumstances where a defendant may desire to plead guilty but is unable to personally admit to the facts that make them guilty of the crime because of a lack of firsthand knowledge.⁷ Here, Bustamante was able to testify to his role in arranging the drug sale but lacked information about the details of the sale itself. In that circumstance, our caselaw makes clear that the testimony of a defendant may be supplemented with “other evidence.” *Lussier*, 821 N.W.2d at 589; *Trott*, 338 N.W.2d at 252; *Sanchez*, 868

added); *see also Sanchez*, 868 N.W.2d at 289 (“[A] defendant may not withdraw his plea if the record contains sufficient *evidence* to support the conviction.” (emphasis added) (quotation omitted)).

⁷ Bustamante also notes that “Minnesota law provides procedures for a defendant in Bustamante’s position to plead guilty: a *Norgaard* plea or an *Alford* plea.” *See State v. Goulette*, 258 N.W.2d 758, 760 (Minn. 1977) (citing *North Carolina v. Alford*, 400 U.S. 25 (1970)) (providing that a defendant can plead guilty despite maintaining his innocence); *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867 (Minn. 1961) (providing that a defendant may plead guilty despite claiming a loss of memory through amnesia or intoxication). Bustamante appears to argue that his plea should be treated as an *Alford* or *Norgaard* plea with the attendant heightened guilty-plea procedures. But the circumstances here do not fit into those that would give rise to an *Alford* or *Norgaard* plea because Bustamante did not maintain his innocence or claim loss of memory or intoxication. And at no point in time did any party or the district court specify that Bustamante was entering an *Alford* or *Norgaard* plea. Thus, we treat Bustamante’s plea as a “typical” plea. *See Ecker*, 524 N.W.2d at 716.

N.W.2d at 289. But here the state did not supplement the record with other evidence. Because Bustamante's testimony did not establish the factual basis for the aggravating element and the allegations set forth in the complaint cannot supplement his plea colloquy, Bustamante's guilty plea was not accurate.

Reversed and remanded.