

*This opinion is nonprecedential except as provided by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
A22-0572**

Matthew Howard Isensee, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 21, 2022
Affirmed in part, reversed in part, and remanded
Slieter, Judge**

Koochiching County District Court
File No. 36-CR-19-128

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

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

Jeffrey Naglosky, Koochiching County Attorney, International Falls, Minnesota (for
respondent)

Considered and decided by Bryan, Presiding Judge; Bjorkman, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this appeal from an order denying postconviction relief, appellant argues that he
must be permitted to withdraw his guilty plea to threats of violence because the plea is

inaccurate. Appellant also claims that he is entitled to jail credit for time served at a residential treatment facility.

A manifest injustice exists because appellant's guilty plea was inaccurate and, therefore, we reverse on that basis. However, because the treatment facility appellant spent time at is not the functional equivalent of a correctional facility, he is not entitled to jail credit, and we affirm on that issue. Therefore, we affirm in part, reverse in part, and remand.

FACTS

In February 2019, and in response to a report that he was in a bar fight and threatened to “kill everyone,” appellant Matthew Howard Isensee was arrested. The following day, Isensee was charged with one count of threats of violence, based on the risk of causing terror or inconvenience, in violation of Minn. Stat. § 609.713, subd. 1 (2018).¹

In October 2019, Isensee pleaded guilty to the charge. During the plea colloquy, Isensee testified that on February 24, 2019, near midnight, he was at the “Outpost” bar in International Falls, drinking alcohol, when “[m]ultiple people attacked” him. The plea colloquy continued as follows between Isensee and his counsel:

Q: Okay and in the police reports, [the bartender] who would testify, says that you made some threats to kill people, um seems like it was just around her, either just inside the bar or outside the bar, is that correct?

A: Yes.

¹ “Whoever threatens, directly or indirectly, to commit any crime of violence . . . in a reckless disregard of the risk of causing such terror or inconvenience may be sentenced to imprisonment.” Minn. Stat. § 609.713, subd. 1.

....

Q: So, you're saying that you did say it, you would agree that [the bartender] was at least a part of it that you either threatened to kill someone or come back and do them in, right?

A: Yes.

Q: Okay. So, you made that statement, right?

A: Yes.

....

Q: And you made these threats against the other people, or people in the bar, and those threats were threats of violence, would you agree with that?

A: Yes, but the other party was threatening me too in the same exact matter.

Q: Okay. So, again, did you threaten to kill everyone?

A: Yes.

Then the prosecutor questioned Isensee:

Q: Mr. Isensee, how do you think, that the threats that you're now taking responsibility for making to F'ing kill everybody, how do you think that made them feel?

A: Um, I believe only one person heard it, but I believe she was probably could've been a little scared at the moment, but.

Q: Okay, which, do you know which person you think is the one that heard it?

A: The one that made the record[ed] statement.² [The bartender] or whatever.

Q: Okay, the bartender?

² This recorded statement is not part of the record on appeal.

A: Yes.

Q: And so, you agree that when [the bartender] heard you say that you were going to kill everyone that she was afraid that you were going to act on that?

A: Um, I don't think she was afraid I was going to act on it, she personally knows me from, for like 15, 16 years now.

Then Isensee and his counsel resumed with this colloquy:

Q: [Y]ou made these threats, right? The second one is that you all, didn't actually intend, but you made the statements in reckless disregard that could, could have or would tend to objectively cause fear in another, right?

A: Yes.

Q: So, the statements that you have admitted to, you weren't, you recklessly made those statements --

A: Yes.

Q: -- would that be correct?

A: Yes.

The district court "defer[red] acceptance of the plea" until sentencing.

During the January 2020 sentencing hearing, the district court accepted Isensee's guilty plea, entered a conviction, granted a downward dispositional departure, stayed execution of a 32-month prison sentence, and placed Isensee on probation for five years. The district court awarded Isensee 169 days of credit for time served.

A probation condition required Isensee to successfully complete inpatient chemical-dependency treatment at Project Turnabout. Isensee spent 46 days in treatment at Project Turnabout in late 2020.

Multiple probation violation reports were filed, and a contested probation violation hearing was held in June 2021. The district court found that Isensee violated two conditions of his probation, revoked Isensee's probation, and executed his 32-month prison sentence.

In March 2022, Isensee filed a petition for postconviction relief arguing that he should be permitted to withdraw his guilty plea as "constitutionally inaccurate." The state did not respond.³ In April 2022, without a hearing, the postconviction court denied Isensee's petition in its entirety. Isensee appeals.

DECISION

"We review the denial of a petition for postconviction relief for an abuse of discretion. A postconviction court abuses its discretion when it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotation and citation omitted). We will sustain the postconviction court's factual findings if they are supported by sufficient evidence in the record. *Cuypers v. State*, 711 N.W.2d 100, 103 (Minn. 2006). "A petitioner bears the burden to establish by a preponderance of the evidence that facts exist that warrant postconviction relief." *Tscheu v. State*, 829 N.W.2d 400, 403 (Minn. 2013).

I. Isensee's guilty plea was inaccurate.

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 allow withdrawal if it is

³ The state also did not file a responsive brief in this appeal and, pursuant to Minn. R. Civ. App. P. 142.03, we determine the case "on the merits."

necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1; *Lussier v. State*, 821 N.W.2d 581, 586 n.2 (Minn. 2012) (reaffirming that “a motion to withdraw a guilty plea made after sentencing must be raised in a petition for postconviction relief”). “A manifest injustice exists if a guilty plea is not valid.” *Raleigh*, 778 N.W.2d at 94. A constitutionally valid plea must be accurate, voluntary, and intelligent. *Id.* The defendant bears the burden of showing that his plea was invalid. *Id.*; see also *Lussier*, 821 N.W.2d at 588 (holding that the accuracy requirement is intended to “protect 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” (quotation omitted)). The validity of a guilty plea is a question of law that we review *de novo*. *Raleigh*, 778 N.W.2d at 94.

A guilty plea is accurate if it is supported by a proper factual basis. *State v. Theis*, 742 N.W.2d 643, 647 (Minn. 2007). “In a typical plea, . . . 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 of a plea is inadequate when the defendant makes statements that negate an essential element of the charged crime because such statements are inconsistent with a plea of guilty.” *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003).

Minnesota Statutes section 609.713, subdivision 1, provides that a person is guilty of threats of violence if he “threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in reckless disregard of the risk of causing

such terror.” The reckless-disregard provision is at issue here. The supreme court recently concluded that:

a person recklessly makes threats of violence, in violation of section 609.713, subdivision 1, when (1) through words or actions, []he communicates an intention to injure another or their property; (2) the threat is to commit a statutorily defined crime of violence; (3) in context, those words or conduct create a reasonable apprehension that []he will follow through with or act on the threat; and (4) []he makes the violent threat in conscious disregard of a substantial and unjustifiable risk that h[is] words or conduct will cause extreme fear.

State v. Mrozinski, 971 N.W.2d 233, 240 (Minn. 2022).

“[T]he question of whether a given statement is a threat turns on whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor.” *State v. Schweppe*, 237 N.W.2d 609, 613 (Minn. 1975) (quotation omitted). “Because threats are context specific, a person who might lack a specific intent to threaten or terrorize may nevertheless utter an objectively threatening statement recklessly, committing a terroristic-threats crime.” *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *rev. denied* (Minn. Nov. 17, 2009). Although “declaring the intent to injure by an unlawful act constitutes a terroristic threat,” it is only so “when the person who utters the statement recklessly disregards the risk of terrorizing another.” *Id.* Again, Isensee’s testimony is the sole basis for our review as to the context of Isensee’s statement in the bar. *See Ecker*, 524 N.W.2d at 716.

The postconviction court found that Isensee “admitted to threatening to kill everyone with reckless disregard as to the risk of causing terror.” It based this finding on Isensee’s affirmative responses to the questions that he “either threatened to kill someone

or come back and do them in, right?” and “So again, you threatened to kill everyone?” Lastly, the postconviction court found that he admitted “his threats were reckless and that they could have caused fear in another.”

Isensee argues that withdrawal of his guilty plea is necessary to correct a manifest injustice because his plea was inaccurate and, therefore, invalid. Specifically, Isensee contends that there is an insufficient factual basis supporting his guilty plea as to the third and fourth elements⁴ of the offense because he did not admit to acting in reckless disregard of the risk of causing terror. Isensee does not challenge that the first two elements were established by his testimony.

Element Three

Isensee’s plea colloquy does not establish that his threat created a reasonable apprehension that he would follow through with or act on his threat. *Mrozinski*, 971 N.W.2d at 240. Isensee testified that only the bartender heard him say that he would “kill everyone” and that he did not “think [the bartender] was afraid [he] was going to act on it” because “she personally knows [him] from, for like 15, 16 years now.” And because the sole basis for the conviction is Isensee’s testimony, there exists no circumstantial evidence that Isensee’s threat created a reasonable apprehension that he would follow through, such as the effect his statement had on the bartender, or anyone else. *See Schweppe*, 237 N.W.2d at 614 (stating that a “victim’s reaction to [a] threat [is] circumstantial evidence relevant to

⁴ The term “elements” is based on the supreme court’s recent direction in *Mrozinski*, 971 N.W.2d at 240. We note, however, that jury instruction guidelines at the time of this case describe three elements. *See 10 Minnesota Practice*, CRIMJIG 13.107 (2021).

the element of intent of the defendant in making the threat”). To the contrary, Isensee testified that he did not believe that the bartender “was afraid” he would act on his words. That is, Isensee’s testimony negated element three. *Iverson*, 664 N.W.2d at 350 (“The factual basis of a plea is inadequate when the defendant makes statements that negate an essential element of the charged crime because such statements are inconsistent with a plea of guilty.”).

Therefore, Isensee’s plea colloquy fails to establish that his words, in the context he provided by his testimony, created a reasonable apprehension that he would follow through with or act on his threat. *Id.*

Element Four

During his plea colloquy, Isensee did not admit that his threat was made “in conscious disregard of a substantial and unjustifiable risk that h[is] words or conduct [would] cause extreme fear.” *Id.* “Recklessness requires deliberate action in disregard of a known, substantial risk.” *Bjergum*, 771 N.W.2d at 57. Reckless disregard “means that the defendant, even though not having the specific purpose of terrorizing another, recklessly risks the danger that the statements would be taken as threats by another and that they would cause extreme fear.” *Id.* (emphasis omitted) (quotation omitted). “Terrorize means to cause extreme fear by use of violence or threats.” *Schweppe*, 237 N.W.2d at 614.

The totality of Isensee’s testimony as to this element was in response to the question of whether he “made the statements in reckless disregard that could, could have or would tend to objectively cause *fear* in another.” (Emphasis added.) Isensee answered, “Yes.” However, Isensee was not asked, nor did he admit, that he consciously disregarded “a

substantial and unjustifiable risk that h[is] words or conduct [would] cause *extreme* fear.” *Mrozinski*, 971 N.W.2d at 240 (emphasis added). Instead, he specifically testified that the bartender heard him and she “could’ve been a little scared at the moment.” Therefore, Isensee did not admit facts sufficient to establish the fourth element. *Bjergum*, 771 N.W.2d at 57 (requiring extreme fear); *Schweppe*, 237 N.W.2d at 614 (same).

Because Isensee’s testimony did not establish the third and fourth elements of threats of violence as set forth in *Mrozinski*, his guilty plea was inaccurate, and the postconviction court abused its discretion in denying his petition to withdraw his guilty plea.⁵

II. Isensee is not entitled to jail credit for his time spent at Project Turnabout.

Because the issue of jail credit may still be important despite our resolution of the first issue, we now address Isensee’s argument on this question. Isensee contends that by denying his request for jail credit for time in treatment, the postconviction court erred “by focusing on cosmetic differences between Project Turnabout and other facilities.” Additionally, he argues, the postconviction court erred in concluding that “Isensee could simply have left the facility with no repercussions.” Lastly, he argues, the postconviction court improperly “discounted the COVID-predicated restrictions” at the facility by

⁵ Isensee also argues that “threats made in reckless disregard of terrorizing another are protected speech,” and therefore, the threats of violence statute is unconstitutional. Isensee concedes, however, that “[t]he Minnesota Supreme Court recently rejected this argument” in *Mrozinski*. We agree. Isensee’s argument is a facial challenge to the constitutional validity of the statute, *see Rew v. Bergstrom*, 845 N.W.2d 764, 778-85 (Minn. 2014) and the supreme court in *Mrozinski* held that “the Statute is not facially overbroad.” 971 N.W.2d at 247.

concluding that “those restrictions ‘were instituted for the safety and protection of participants to avoid an outbreak of [COVID-19] and not for purposes of restraining or confining [Isensee] or other participants during this time period.’”

A defendant is entitled to credit against their sentence for time spent in custody prior to sentencing. Minn. R. Crim. P. 27.03, subd. 4(B). “The defendant has the burden of establishing that he is entitled to jail credit for any specific period of time.” *State v. Clarkin*, 817 N.W.2d 678, 687 (Minn. 2012). Awarding custody credit is not a matter within the district court’s discretion. *Id.* Rather, the district court makes findings regarding the circumstances of the custody for which credit is requested and applies the law to those circumstances. *Id.* We review a district court’s factual determinations for clear error and its legal conclusions *de novo*. *Id.* “Findings of fact are clearly erroneous if, on the entire evidence, we are left with the definite and firm conviction that a mistake occurred.” *State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010); *see also In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 223 (Minn. 2021) (stating that, on review for clear error, the “appellate court is not to weigh, reweigh, or inherently reweigh the evidence,” but must consider evidence “only as is necessary to determine beyond question that it reasonably tends to support the findings of the factfinder” (quotation omitted)).

In addition to receiving custody credit for time spent in jail or prison, the supreme court has held that “fairness and equity demand that [custody] credit be awarded” to defendants placed in residential treatment facilities when “the level of confinement and limitations imposed” at the facility “are the functional equivalent of those imposed at a jail, workhouse, or regional correctional facility.” *Asfaha v. State*, 665 N.W.2d 523, 528 (Minn.

2003). In determining whether this standard is met, “district courts must look closely at the facts to determine the level of confinement and limitations imposed on a defendant.” *State v. Razmyslowski*, 668 N.W.2d 681, 684 (Minn. App. 2003).

Lack of Security

Isensee claims that the postconviction court overemphasized “that there were no bars on the windows at Project Turnabout” because “the alarm system served the same function: to deter and prevent people from using the windows to leave the facility.” Additionally, Isensee claims the postconviction court overemphasized “that Project Turnabout was not surrounded by a fence.” Isensee does not explicitly argue that these findings are clearly erroneous but argues that they are “not significant” in the analysis of whether a facility meets the *Asfaha* standard. And Isensee claims the postconviction court underemphasized that “at least part of Project Turnabout is not easy to access because it is located on a ‘very hilly/rocky area,’ providing a kind of natural fence.” We are not persuaded.

In *Asfaha*, the supreme court concluded that the facility, a residential treatment program for juveniles with severe conduct disorder, was the functional equivalent of a correctional facility because the program was designed with security as “the most crucial concern.” 665 N.W.2d at 524, 527, 528. The supreme court identified additional relevant circumstances including that a “central control booth” controlled access to all doors within the facility as well as entry to and exit from the facility, the windows were barred, the exercise area behind the building was secured by fencing, staff continually monitored surveillance cameras that captured activity throughout the building (except for the

individual cells), and if residents were transported from the facility, they were placed in “mechanical restraints.” *Id.* at 527. The supreme court concluded that Asfaha was entitled to custody credit because the facility “imposes essentially the same limitations on a person’s freedom as a jail, workhouse, or regional correctional facility.” *Id.*

Thus, the lack of barred windows and fencing at Project Turnabout are relevant in making this determination. *Id.* A picture of the facility shows that the windows do not have bars and there is no fence surrounding the facility.⁶ And to the extent that the alarm system and the “rocky area” served to deter and prevent people from leaving the facility, the record as a whole supports the postconviction court’s finding that the facility was not designed with security as “the most crucial concern.” *Id.*

Leaving the Facility with No Repercussions

The postconviction court found that “[b]ased upon the evidence presented to this Court, Project Turnabout is different than the treatment facility at issue in [*Asfaha*],” and “if he left the program ‘without approval’ he would be discharged from the program and would be required to reapply if he wished to re-enter the program.”

⁶ Isensee also cites a nonprecedential case to support his argument. *See State v. Truesdale*, No. A17-1632, 2018 WL 4558168, at *2 (Minn. App. Sept. 24, 2018). *Truesdale* is factually distinguished because residents in the facility in that case “were locked in and their movements were closely monitored by staff via cameras, motion detectors, and personal observation.” *Id.* Additionally, “[t]he facility included mechanical restraints” such as “‘safety’ chains, leg locks and waist shackles. Secure cells were available as a disciplinary measure, and at the beginning of his stay, whenever Truesdale was transported outside of [the facility], he was moved in shackles and with a cinch on his waist and legs.” *Id.* Our court concluded that “[t]hese are all components of a jail-like setting.” *Id.* This record contains no such evidence.

Isensee argues that he “was required to be at the facility, both by the terms of probation” and “the facility’s rules.” Moreover, he argues, “[n]othing in the record supports the idea that he could leave as he saw fit.”

As we have already noted, the postconviction court correctly found that security is not “the most crucial concern.” *Id.* Rather, “[i]f a resident leaves without approval, then the resident will be discharged from the program” at which time the resident “must repeat the application process” in order to reenroll. The record indicates that Project Turnabout does not share any of the circumstances described in *Asfaha*, except cameras throughout the facility and windows secured with an alarm system.

COVID-19 Restrictions

The postconviction court found that “the added restrictions were instituted for the safety and protection of participants to avoid an outbreak of [COVID-19] and not for purposes of restraining or confining [Isensee] or other participants during this time period.”

The record shows that:

In non-COVID times, residents would be escorted from their unit to the dining area by a staff member who sits outside the cafeteria while residents eat. The staff member informs residents when the allotted mealtime has concluded and escorts residents to their next destination. In non-COVID times, residents would be permitted to use the gym during a specified time each day but would always be supervised by a fitness trainer and staff member during that time.

Prior to the pandemic, visitors were permitted during a two-hour block of time on weekends. Staff supervised all visit[s]. Visitors were required to check in with staff prior to visitation and to submit their personal belongings to staff to be searched.

The record also shows that “Isensee was restricted to the bedroom he shared with two other men, and to the common room he shared with several. He was prohibited from using the gymnasium or the chapel and from eating in the cafeteria,” and “Isensee could not have any in-person visits.”

Isensee does not claim that the postconviction court’s finding was erroneous. Instead, he argues that “the purpose of the [COVID-19] restrictions is irrelevant” because “[t]he question is whether the effect of the restrictions made the facility comparable to a jail, workhouse, or regional correctional facility.” But Isensee does not cite any authority for this argument. And as already discussed, even with the COVID-19 restrictions in place, Project Turnabout is not similar to the facility in *Asfaha* because it does not share the critical circumstances noted in *Asfaha*, other than the presence of cameras throughout the facility and windows secured with an alarm system. The record does not support that security is “the most crucial concern” at Project Turnabout. *Asfaha*, 665 N.W.2d at 527. There is no evidence that the COVID-19 restrictions had the purpose of security as the most crucial concern. Additionally, there is no evidence to demonstrate, as existed in *Razmyslowski*, that when residents were transported from Project Turnabout they “were regularly cuffed, attached to security waist belts, and accompanied by an armed guard.” 668 N.W.2d at 684.

Thus, the postconviction court’s findings are not clearly erroneous, *Andersen*, 784 N.W.2d at 334, and, therefore, it properly concluded that Isensee was not entitled to

custody credit against his sentence for his time spent at Project Turnabout.⁷ *Pearson*, 891 N.W.2d at 596 (reviewing the denial of postconviction claims for abuse of discretion).

Affirmed in part, reversed in part, and remanded.

⁷ Isensee filed a one-page *pro se* supplemental brief arguing that “the prosecutor, judge, public defender and probation officer all worked to gether[sic] to false imprison [him]”; he was charged with “false probation violations”; his attorney and the prosecutor did not permit him to have a jury trial; the prosecutor “racially profil[ed]” him; and an investigation should be opened against the prosecutor. The brief contains no citation to the record or any legal argument and there is no indication that Isensee previously raised these arguments. Therefore, Isensee has forfeited the arguments raised in his supplemental brief. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (concluding that *pro se* defendant’s assertions are waived if they contain no argument or legal authority to support allegations); *Hecker v. Hecker*, 543 N.W.2d 678, 681 n.2 (Minn. App. 1996) (requiring that material assertions of fact be supported by citation to the record), *aff’d*, 568 N.W.2d 705 (Minn. 1997); *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (concluding that appellate courts “generally will not decide issues which were not raised before the district court”).