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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0136**

Todd Deon Rolack, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 14, 2023
Affirmed
Bratvold, Judge**

Dakota County District Court
File No. 19HA-CR-12-3304

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

Kathryn M. Keena, Dakota County Attorney, Heather D. Pienhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In an appeal from the district court's denial of his second petition for postconviction relief, appellant challenges the validity of his guilty plea to fourth-degree criminal sexual conduct. Appellant argues his guilty plea was inaccurate given intervening caselaw. We

agree that the factual basis of appellant’s guilty plea does not establish that appellant knew or had reason to know the victim was mentally incapacitated. But because appellant’s plea-hearing testimony sufficiently establishes that appellant knew or had reason to know the victim was physically helpless, an alternative means of committing the offense of conviction, we affirm.

FACTS

In September 2012, respondent State of Minnesota charged appellant Todd Deon Rolack with fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(d) (2010). The complaint alleged that in February 2012, when Rolack was 20 years old, he had sexual contact with an intoxicated 16-year-old girl, J.H., during a party at his Burnsville residence. In February 2013, Rolack pleaded guilty to fourth-degree criminal sexual conduct. The district court accepted Rolack’s plea, convicted him, and imposed the sentence recommended by the parties and the presentence-investigation (PSI) report: 48 months’ imprisonment stayed for ten years.

In December 2020, Rolack filed a pro se petition for postconviction relief, contending that his guilty plea was invalid because of his “untreated severe mental illness.” After an attorney began representing Rolack, a supplemental postconviction petition argued that Rolack’s “untreated mental health interfered with his ability to understand the consequences of his decisions or the court proceedings.” The state opposed relief. In April 2021, the district court denied Rolack’s petition, and in February 2022, this court affirmed. *Rolack v. State*, No. A21-0752, 2022 WL 433440, at *4 (Minn. App. Feb. 14, 2022).

In June 2022, Rolack filed a second petition for postconviction relief, arguing that his guilty plea was “constitutionally inaccurate and must be withdrawn” based on an intervening decision by the supreme court. Rolack relied on *State v. Khalil*, 956 N.W.2d 627 (Minn. 2021), which interpreted “mentally incapacitated” as used in the criminal-sexual-conduct statutes. Rolack first argued that the supreme court in *Khalil* held that a voluntarily intoxicated person is not “mentally incapacitated.” Second, Rolack contended that his guilty plea was “inaccurate because J.H., the complainant, was voluntarily intoxicated at the time of the alleged incident,” and thus, “Rolack did not commit fourth-degree criminal sexual conduct against a mentally incapacitated person.” The state opposed relief, contending that Rolack’s petition was untimely and that his “plea was accurate, voluntary, and intelligent.”

In December 2022, the district court denied Rolack’s second petition for postconviction relief. The district court first determined that Rolack’s petition was timely because “he filed his petition based on the new rule in *Khalil* within two years of the date the opinion was issued.” Next, the district court agreed with Rolack that “applying *Khalil*’s holding to [Rolack’s] case, the facts do not establish that J.H. was mentally incapacitated because there is no evidence that she consumed the alcohol involuntarily.”

Still, the district court determined that Rolack’s “plea was accurate” based on its conclusion that Rolack “admitted sufficient facts [during the plea hearing] to support one of the alternative methods of committing” fourth-degree criminal sexual conduct. The district court determined that Rolack’s plea-hearing testimony established that he knew

J.H. “was physically helpless because she was not able to consent to the sexual conduct or was unable to communicate her nonconsent due to intoxication.”

Rolack appeals.

DECISION

When a defendant seeks to withdraw a guilty plea after sentencing, “the motion to withdraw the plea must be raised in a petition for postconviction relief.” *James v. State*, 699 N.W.2d 723, 727 (Minn. 2005). Appellate courts review a denial of postconviction relief for an abuse of discretion. *Crow v. State*, 923 N.W.2d 2, 9 (Minn. 2019). “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 omitted).

“A defendant has no absolute right to withdraw a guilty plea after entering it.” *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). But “[a] defendant may withdraw a guilty plea if it is ‘necessary to correct a manifest injustice.’” *State v. Boecker*, 893 N.W.2d 348, 350 (Minn. 2017) (quoting Minn. R. Crim. P. 15.05, subd. 1). “A manifest injustice exists if a guilty plea is not valid,” and “[t]o be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent.” *Raleigh*, 778 N.W.2d at 94. Appellate courts review the validity of a guilty plea de novo. *State v. McReynolds*, 973 N.W.2d 314, 318 (Minn. 2022). The defendant bears the burden of showing the plea is invalid. *Id.*

At the plea hearing, Rolack pleaded guilty to criminal sexual conduct in the fourth degree. The statute under which Rolack was charged and convicted provides that “[a]

person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree if . . . the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless.” Minn. Stat. § 609.345, subd. 1(d).

On appeal, Rolack makes two arguments. First, he asserts that his guilty plea was inaccurate because in *Khalil*, which was decided after Rolack was sentenced, the supreme court reversed a criminal-sexual-conduct conviction based on an erroneous jury instruction. The supreme court concluded that “mentally incapacitated,” as defined in Minn. Stat. § 609.341, subd. 7 (2020),¹ does not include a victim’s voluntary intoxication. Rolack contends that the record at his plea hearing shows that he knew J.H. was voluntarily intoxicated. Second, Rolack argues that the district court erred by denying his second postconviction petition and reasoning that Rolack’s testimony established he knew the victim was physically helpless. We address these arguments in turn.

I. Rolack’s guilty plea lacked a factual basis to establish that Rolack knew or had reason to know that J.H. was mentally incapacitated.

“For a guilty plea to be accurate, a proper factual basis must be established.” *State v. Mikulak*, 903 N.W.2d 600, 603 (Minn. 2017). “The accuracy requirement protects the defendant from pleading guilty to a charge more serious than he could have been convicted of at trial.” *Id.* “It is well established that before a plea of guilty can be accepted, the trial

¹ The supreme court in *Khalil* interpreted “mentally incapacitated” using the same statutory definition that was in effect at the time of Rolack’s offense.

judge must make certain that facts exist from which the defendant's guilt of the crime charged can be reasonably inferred." *Nelson v. State*, 880 N.W.2d 852, 861 (Minn. 2016).

"Mentally incapacitated" is defined as "a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, *administered to that person without the person's agreement*, [who] lacks the judgment to give a reasoned consent to sexual contact or sexual penetration." Minn. Stat. § 609.341, subd. 7 (2010) (emphasis added). In *Khalil*, the supreme court concluded that "a person under the influence of alcohol is not mentally incapacitated unless the alcohol was administered to the person under its influence without that person's agreement." 956 N.W.2d at 642. At the plea hearing, Rolack agreed that on the day of the incident, he did not provide alcohol to J.H. Instead, Rolack testified that J.H. "brought [her] own alcohol" and "consumed quite a bit of alcohol."

The district court agreed with Rolack that the plea-hearing testimony failed to prove he knew or had reason to know that J.H. was mentally incapacitated because no evidence showed that "she consumed the alcohol involuntarily." In its brief to this court, the state likewise agrees that Rolack's "plea did not establish that the victim was mentally incapacitated." We also agree the record shows that Rolack knew J.H. was voluntarily intoxicated. Thus, the district court did not err in determining that the facts of Rolack's guilty plea "do not establish that J.H. was mentally incapacitated."

II. The district court did not err when it denied Rolack's second postconviction petition after determining that Rolack's plea-hearing testimony established that he knew or had reason to know J.H. was physically helpless.

In denying Rolack's second postconviction petition, the district court stated that the factual basis for Rolack's guilty plea supported "a finding that [J.H.] in this case was

physically helpless.” Relying on *State v. Ruel*, No. A15-0152, 2016 WL 363407, at *3 (Minn. App. Feb. 1, 2016), *rev. denied* (Minn. Apr. 19, 2016), the district court determined that there are three “alternative methods” of committing fourth-degree criminal sexual conduct: mental incapacitation, physical helplessness, or mental impairment. *See* Minn. Stat. § 609.345, subd. 1(d). Based on this reasoning, the district court concluded that Rolack’s plea was accurate because the factual basis supported “one of the alternative methods,” specifically that J.H. was physically helpless.

Rolack argues that his guilty plea is invalid because (1) his testimony did not establish a factual basis for his knowledge of J.H.’s physical helplessness; (2) mental incapacitation and physical helplessness are separate elements of separate crimes; and (3) his plea was unintelligent because the proceedings made the elements of the charged offense a “moving target.” We address these arguments in turn.

First, Rolack contends that he pleaded guilty to fourth-degree criminal sexual conduct involving a mentally incapacitated victim, and the factual basis “extensively discussed [J.H.]’s intoxication.” He argues that “the parties were trying to establish a factual basis” for his knowledge of J.H.’s mental incapacitation and that “the parties and the court thought [J.H.] was mentally [incapacitated] because she was intoxicated.” The state argues that Rolack “did not specifically plead under any one clause” of Minn. Stat. § 609.345, subd. 1(d), and Rolack “pled guilty and admitted to facts that supported the conviction based on physical helplessness.”

We agree with the state. The record does not support Rolack’s claim that he pleaded exclusively to fourth-degree criminal sexual conduct involving a mentally incapacitated

victim. The complaint charged Rolack with fourth-degree criminal sexual conduct and asserted Rolack “knew or had reason to know that the complainant [was] mentally impaired, mentally incapacitated, or physically helpless.” Rolack’s plea petition listed the charged crime as “criminal sexual conduct fourth degree,” and at the plea hearing, he pleaded “[g]uilty” to “criminal sexual conduct in the fourth degree.”

In its postconviction decision, the district court found that Rolack’s plea-hearing testimony established that he “engaged in oral sex with J.H. knowing that she was physically helpless because she was not able to consent to the sexual conduct or was unable to communicate her nonconsent due to her intoxication.” Physically helpless means “a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.” Minn. Stat. § 609.341, subd. 9 (2010).

Caselaw helps our analysis of Rolack’s testimony. In *State v. Berrios*, appellant Berrios challenged the sufficiency of the evidence supporting his conviction for third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d) (2008). 788 N.W.2d 135, 137, 141 (Minn. App. 2010), *rev. denied* (Minn. Nov. 16, 2010). This court determined that there was “ample evidence” for the jury to conclude Berrios “knew or had reason to know” the victim “had been rendered physically helpless by her alcohol consumption” when the victim was “falling down drunk, vomited several times, lost consciousness more than once, and could not walk without assistance.” *Id.* at 143; *cf. State v. Blevins*, 757 N.W.2d 698, 701 (Minn. App. 2008) (concluding that the evidence was

insufficient to sustain a conviction for criminal sexual conduct involving a physically helpless victim because the victim “expressed [to the defendant] that she did not consent to the sexual encounter”).

The factual basis for Rolack’s guilty plea shows that Rolack knew or had reason to know J.H., like the victim in *Berrios*, was physically helpless. At the plea hearing, Rolack agreed that (1) “J.H. had consumed quite a bit of alcohol”; (2) “at one point [J.H.] was kind of blanked out, she was kind of asleep” because “she was under the influence of alcohol”; (3) a friend of J.H.’s “laid her down on the bed because of her intoxicated state”; (4) J.H. was lying on the bed “fully clothed,” and Rolack “pulled down J.H.’s pants and undergarments”; (5) “J.H. did not give [Rolack] permission to . . . engage in any sexual contact with her”; (6) Rolack “knew” that J.H. “was incapacitated and really mentally not able to acquiesce or consent to any type of sexual contact” when he “perform[ed] oral sex on her”; and (7) J.H.’s “physical state . . . caused her to be helpless while [Rolack was] present in [the] room with her.” Based on these facts, the district court did not err by concluding that Rolack knew J.H. was physically helpless.

Second, Rolack relies on *Khalil* to argue that physical helplessness and mental incapacitation are “individual elements of separate crimes” and not alternative means of committing a single element of fourth-degree criminal sexual conduct. Rolack quotes the supreme court’s statement in *Khalil* that “it is impossible to know whether the jury relied on the mental incapacitation or physical helplessness *elements* of Minn. Stat. § 609.344, subd. 1(d), in arriving at its verdict.” 956 N.W.2d at 643 (emphasis added). Rolack asserts

that because mental incapacitation and physical helplessness are “elements of different crimes, one cannot after the fact be substituted for the other.”

We are not persuaded based on the context of the supreme court’s reasoning. In *Khalil*, the defendant appealed from his conviction for third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d) (2016), and “challenged the validity of the jury instructions,” arguing that the district court erroneously instructed the jury on the defendant’s knowledge of the victim’s mental incapacitation because the instructions included voluntary intoxication. *Id.* at 631. The supreme court agreed the instruction on mental incapacitation was erroneous. *Id.* at 643. The supreme court determined the error warranted a new trial, reasoning that it was impossible to tell whether the jury’s guilty verdict was based on the defendant’s knowledge of “the mental incapacitation or physical helplessness elements” because the instruction included both alternatives. *Id.*

Rolack challenges the validity of the factual basis for his guilty plea, while the appellant in *Khalil* challenged jury instructions. Thus, while *Khalil* guides our analysis of what is sufficient evidence of mental incapacitation, it does not guide our analysis of whether Rolack’s factual basis is accurate as to physical helplessness.

Even if we accept Rolack’s argument that mental incapacitation and physical helplessness are separate elements and that he only pleaded guilty to sexual contact with a mentally incapacitated victim, we would still determine his plea was accurate. A guilty plea is accurate if the defendant establishes a proper factual basis such that they do not plead guilty to a more serious charge than they could be convicted of at trial. *Mikulak*, 903 N.W.2d at 603. As detailed above, Rolack’s testimony at the plea hearing established

that Rolack knew or had reason to know J.H. was physically helpless when he engaged in oral sex with her. Fourth-degree criminal sexual conduct with a physically helpless victim is not a more serious crime than fourth-degree criminal sexual conduct involving a mentally incapacitated victim. Thus, Rolack’s plea is accurate.

Third, Rolack argues, in the alternative, that the plea agreement “called for him to plead guilty to fourth-degree criminal sexual conduct—mentally [incapacitated],” and so “changing” the plea and conviction to an offense based on physical helplessness made the plea “a moving target and rendered it unintelligent.” An intelligent guilty plea is “a knowing and intelligent choice [among] the alternative courses of action available.” *Dikken v. State*, 896 N.W.2d 873, 877 (Minn. 2017). “The intelligence requirement ensures that a defendant understands the charges against him, the rights he is waiving, and the consequences of his plea.” *Nelson*, 880 N.W.2d at 858 (quotation omitted).

Rolack cites *State v. Bertsch*, in which the supreme court determined a guilty plea was invalid and unintelligent because the state amended the date of one of the charged offenses after the district court accepted the defendant’s guilty plea. 707 N.W.2d 660, 664-65 (Minn. 2006). The supreme court described the charges for the plea as “a moving target.” *Id.* at 665. Here, the complaint notified Rolack that the charge was fourth-degree criminal sexual conduct involving a “mentally impaired, mentally incapacitated, or physically helpless” victim, he pleaded guilty to “criminal sexual conduct in the fourth degree,” and the charge did not change. Thus, Rolack’s argument that his guilty plea was unintelligent because the charges were a moving target is unavailing.

In sum, Rolack pleaded guilty to fourth-degree criminal sexual conduct and testified to facts sufficient to show he knew or had reason to know the victim was physically helpless. The district court therefore did not err in denying Rolack's second postconviction petition.

Affirmed.