IN THE COURT OF APPEALS OF IOWA

No. 2-108 / 11-1426
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NATHAN ANTHONY AMADEO,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Cynthia M. Moisan (plea) and Carol L. Coppola (sentencing), District Associate Judges.

Defendant appeals his conviction, based on his guilty plea, to domestic abuse assault with intent to inflict a serious injury. **SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John Sarcone, County Attorney, and Shannon K. Archer, Assistant County Attorney, for appellee.

Considered en banc.

MULLINS, J.

I. Background Facts & Proceedings

Nathan Amadeo was charged with domestic abuse assault with intent to inflict a serious injury, in violation of Iowa Code section 708.2A(2)(c) (2011), an aggravated misdemeanor. On August 4, 2011, Amadeo entered a written guilty plea. He wrote, "on 7-16-11 in Polk County, IA, I assaulted [K.C.] by choking her and causing her bruises." The district court accepted Amadeo's written plea as a plea of guilty to the charge of domestic abuse assault with intent to inflict a serious injury.

Amadeo was sentenced to a term of no more than two years in prison. The sentence was suspended and he was placed on probation for twenty-four months, with the requirement that he attend substance abuse treatment and a batterer's education program.

Amadeo now appeals his conviction, claiming he received ineffective assistance of counsel because his attorney permitted him to plead guilty when there was an insufficient factual basis in the record.

II. Scope of Review

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008).

III. Merits

A court may not accept a guilty plea without first determining whether the plea has a factual basis. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). The court "must only be satisfied that the facts support the crime, 'not necessarily that the defendant is guilty.'" *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001) (citation omitted). If counsel allows a defendant to plead guilty to a charge for which no factual basis exists, and then does not file a motion in arrest of judgment challenging the plea, counsel fails to perform an essential duty. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Prejudice is presumed under such circumstances. *State v. Ortiz*, 789 N.W.2d 761, 764-65 (Iowa 2010).

Before accepting a guilty plea, a court must be satisfied there is an adequate factual basis for the plea. Iowa R. Crim. P. 2.8(2)(b); *Schminkey*, 597 N.W.2d at 788; *State v. Greene*, 226 N.W.2d 829, 831 (Iowa 1975). The factual basis for a guilty plea must be disclosed in the record. *State v. Rodriguez*, 804 N.W.2d 844, 849 (Iowa 2011). A factual basis for a guilty plea may be found from: (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report,[1] and (4) minutes of evidence. *Ortiz*, 789 N.W.2d at 768. "This record, as a whole, must disclose facts to satisfy the elements of the crime." *Keene*, 630 N.W.2d at 581.

For the crime of domestic abuse assault with intent to inflict a serious injury, the following elements must be established:

[1] A presentence report will only support the factual basis for a guilty plea if it is in existence at the time of the plea. Iowa R. Crim. P. 2.8(2)(b); *State v. Fluhr*, 287 N.W.2d 857, 868 (Iowa 1980) *overruled on other grounds by State v. Kirchoff*, 452 N.W.2d 801, 805 (Iowa 1990). The presentence report will also support a factual basis only if it has been considered by the court. *See State v. Randall*, 258 N.W.2d 359, 362 (Iowa 1977).

> 1. The defendant did an act which was meant to cause pain or injury to, or which was intended to result in physical contact which would be insulting or offensive to, the victim.
> 2. The defendant had the apparent ability to do the act.
> 3. At that time the defendant intended to cause a serious injury to the victim.
> 4. The assault came within one or more of the circumstances set forth in Iowa Code section 236.2(2)(a)-(e).

Iowa Code §§ 708.1(1), 708.2A(1), 708.2A(2)(c); Iowa Crim. Jury Instruction 830.4.

Amadeo concedes the record demonstrates a sufficient factual basis for the first two elements, based on his record admission in his written guilty plea. Our further discussion thus focuses on and relates to the third and fourth elements.

Amadeo asserts the record does not disclose an adequate factual basis for the third element, that he intended to inflict a serious injury upon K.C. He argues the record is insufficient to demonstrate he had the specific intent to cause K.C. a serious injury. Amadeo also asserts the record discloses no factual basis to support the fourth element, that his assault of K.C. was a "domestic" assault. He argues the record relied on to support his guilty plea is devoid of facts indicating a domestic relationship.

Although the district court may consider a variety of sources in determining whether a factual basis for a guilty plea exists, "[b]efore accepting a guilty plea, the district court must establish on the record a factual basis for the plea."[2] *State v. Keene*, 629 N.W.2d 360, 366 (Iowa 2001).

[2] Although this language states that the "court must establish . . . a factual basis" for a guilty plea, other jurisdictions indicate that in fact the responsibility for making a record establishing a factual basis lies in whole or in part elsewhere. *See, e.g.*, *United States v.*

The factual basis for a guilty plea "must be disclosed by the record." *Keene*, 630 N.W.2d at 581. Whatever the source of the factual basis, "*the record must disclose the factual basis* relied on." *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1975) (emphasis added) (citing *State v. Williams*, 224 N.W.2d 17, 18-19 (Iowa 1974) ("It is essential, whatever source is used, that the factual basis *be identified and disclosed in the record*." (Emphasis added.)). "The test of any guilty plea procedure is whether it *establishes on the record* that the guilty plea . . . has a factual basis." *Brainard v. State*, 222 N.W.2d 711, 723 (Iowa 1974) (emphasis added).

In a relatively recent case our supreme court dealt with the same issue presented in this case, a contention on direct appeal that trial counsel had rendered ineffective assistance by failing to file a motion in arrest of judgment following a plea of guilty, based on an assertion the record made in the trial court did not provide a factual basis for the plea. *See State v. Philo*, 697 N.W.2d 481, 484-85 (Iowa 2005). As relevant to our case, the court stated:

> In construing Federal Rule of Criminal Procedure 11(f), the federal counterpart to our rule 2.8(2)(*b*), the Supreme Court has stated that the rule requires the judge to "develop, *on the record*, the factual basis for the plea." It has been held that "if the district judge finds it necessary to look to evidence other than the defendants' statements to establish the factual basis for the plea in any situation, *these additional facts or evidence must be specifically articulated on the record.*" Thus, if the district court in this case had

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Baugh, 787 F.2d 1131, 1133 (7th Cir. 1986) (stating the "[u]ltimate responsibility for . . . presenting the minimal proof necessary to support a conviction on a guilty plea rests exclusively with the government") *impliedly overruled on other grounds by United States v. Broce*, 488 U.S. 563, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989); *see also Bolinger v. State*, 647 N.W.2d 16, 22 (Minn. Ct. App. 2002) (stating that although the sentencing judge has primary responsibility for eliciting the information needed to establish a factual basis for a guilty plea, the prosecutor and defense counsel share the burden of creating a record supporting the plea). We tend to agree with the court's statement in *Bolinger*.

> relied on [evidence other than the defendant's statements] for a factual basis, those facts should have been made part of the record.

Philo, 697 N.W.2d at 486 (citations omitted) (second emphasis added).

The cases cited in the two immediately-preceding paragraphs, and in particular the language we have emphasized, indicate that if a source or sources other than on-the-record statements of the defendant (and perhaps on-the-record statements by the prosecutor) are to be relied on in whole or in part to establish a factual basis for a guilty plea, then such other source or sources must be identified in the record and must provide any facts, beyond the statements, that are necessary.

In a written order memorializing a court proceeding and setting a sentencing date, the court in our case stated:

> By direct conversation with the Defendant on the record, the Court finds the Defendant understands the charge(s) and its penal consequences, the Constitutional rights being waived, that there is a factual basis for the plea and that the plea is voluntary. The Defendant's guilty plea is accepted.

However, in his written guilty plea Amadeo had waived his right to have a court reporter make a verbatim record of the guilty plea proceeding. The State and the court apparently acquiesced in that waiver, and no verbatim record was made. It thus appears that any conversation between the court and the defendant was in fact not "on the record."[3] The court did not document in writing any of the content of the conversation. The unreported and undocumented conversation thus does not disclose in the record any *facts* that may be relied on to establish a factual

[3] The parties have not submitted a statement of the evidence or proceedings, as permitted by Iowa Rule of Appellate Procedure 6.806(1).

basis for Amadeo's guilty plea. *See Rodriguez*, 804 N.W.2d at 849 ("The law requires that *the factual basis* for [a guilty] plea *be disclosed in the record*." (Emphasis added.)). It does not articulate on the record *facts or evidence* relied on by the trial court. *See Philo*, 697 N.W.2d at 486 (quoting with approval the statement from *Santabello v. New York*, 404 U.S. 257, 261 (1971), that any "facts or evidence" relied on to support a guilty plea "must be specifically articulated on the record"). It does not identify the "facts or evidence" relied on by the trial court. *See Williams*, 224 N.W.2d at 18-19 (holding that the *factual basis* must be "identified . . . in the record").

According to the record made in the trial court, the sole basis for the trial court's determination that a factual base existed for Amadeo's guilty plea was the court's "conversation" with Amadeo. Nothing in the record indicates that Amadeo admitted the minutes of evidence reflected the facts. Nor does anything in the record indicate the trial court relied on, or even considered, the minutes of evidence for any facts necessary to support elements three and four. The State, and the dissent by the honorable Judge Tabor, nevertheless assume, without citing any holding in support of their assumption, that although there was no reference in the record to the minutes of evidence, and the trial court's written order indicates it relied only on its "conversation" with Amadeo for a factual basis, we may on appeal nevertheless look to the minutes for the otherwise missing factual support for the guilty plea. Amadeo, also without citation to relevant authority, asserts that the minutes may not be considered.

We readily acknowledge that minutes of evidence can provide some or all of the factual basis for a plea of guilty. *See, e.g.*, *Ortiz*, 789 N.W.2d at 768. However, the cases cited above appear to make it clear that if there is reliance on the minutes, the record made in the trial court must disclose that fact. *See Philo*, 697 N.W.2d at 486 (holding that any facts relied on for a factual basis must be made part of the record); *Johnson*, 234 N.W.2d at 879 ("[T]he record must disclose the factual basis relied on.").

Other Iowa cases, if not directly holding that the minutes may not be considered on appeal unless considered by the trial court, strongly suggest that result. *See State v. Lemburg*, 257 N.W.2d 39, 43 (Iowa 1977) (finding, in determining the record supported a factual basis, that the trial court had noted it had in part examined the indictment and minutes of evidence to establish a factual basis); *Greene*, 226 N.W.2d at 831 (noting, in determining factual basis existed, that the factual basis for the plea was *adequately identified and disclosed on the record* where the trial court had referred to and considered the minutes and the defendant had admitted they reflected the facts); *cf. State v. Randall*, 258 N.W.2d 359, 362 (Iowa 1977) (finding, in concluding the trial court had not determined a factual basis existed, that the court had made no reference to having read the minutes of evidence, and there was no other showing the court had determined if a factual basis existed for defendant's guilty plea).

Federal cases construing and applying the federal counterpart to Iowa's Rule of Criminal Procedure 2.8(2)(b) also require that any source or sources relied on to provide a factual basis for a guilty plea be identified in the record, and

that those sources provide the facts necessary to support the required factual basis. *See Santabello*, 404 U.S. at 261 ("[T]he sentencing judge must develop, *on the record*, the factual basis for the plea. . . ."); *United States v. Adams*, 961 F.2d 505, 508 (5th Cir. 1992) ("The factual basis . . . must appear on the face of the record . . . ," and "[t]he record must reveal specific factual allegations supporting each element of the offense."). In *Adams*, the court went on to state:

> We take care to point out that the district court could not rely on the information within the Presentence Report as a source of a factual basis for Adams' plea [of guilty]. . . . Here, the district court nowhere stated on the record that it was relying on the Presentence Report as the source of the factual basis of Adams' plea. The Presentence Report could not have served, therefore, as a proper factual basis of the element [challenged on appeal].

961 F.2d at 512; *see also United States v. King*, 604 F.2d 411, 414 (5th Cir. 1979) ("*As long as the factual basis is developed on the record,* it may come from several sources." (Emphasis added.)); *United States v. Bradin*, 535 F.2d 1039, 1041 (8th Cir. 1976) (holding that the presentence report adequately provided a factual basis for a guilty plea where the record "*discloses that the presentence report was submitted to and examined by the sentencing judge*" and the report "sets forth both the official and the defendant's version of the offense he committed . . . ." (Emphasis added.)).

Cases from other states are to the same effect. *See, e.g.*, *State v. Wilkinson*, 474 S.E.2d 375, 384 (N.C. 1996) (stating, in construing a North Carolina statute prohibiting judges from accepting a guilty plea without first determining the existence of a factual basis for the plea, that any information which the judge "does consider . . . must appear in the record, so that an

appellate court can determine whether the plea has been properly accepted"); *People v. Holmes*, 84 P.3d 366, 371-72 (Cal. 2004) (holding that simply reciting "[t]here's a factual basis," is not adequate; the record must demonstrate the facts and the source of the facts, whether from defendant, defense counsel, or documents).

From the foregoing Iowa, federal, and other authority, we conclude that we cannot, on the record presented, look to the minutes of evidence to provide a factual basis for the third and fourth elements of the charge to which Amadeo pled guilty.[4,5] As nothing else in the record arguably supports a factual basis for the fourth element of the offense, a domestic relationship between Amadeo and K.C., we further conclude the record on which the trial court accepted Amadeo's guilty plea lacks a factual basis for that element.

The State contends Amadeo's written statement, "on 7-16-11 in Polk County, IA, I assaulted [K.C.] by choking her and causing her bruises," provides a sufficient factual basis for the third element of the offense, an intent to inflict a

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[4] In urging that the record discloses a factual basis for the third and fourth elements, the dissent initially is replete with references to and reliance upon the minutes of evidence and police reports that are part of the minutes. This approach, however, begs the very question presented, whether in determining if the record made in the trial court supports a factual basis for a guilty plea, an appellate court may or should consider matters not considered by the trial court.

[5] The logical extension of the position implicitly taken by the State and the dissent is that in cases in which a written guilty plea is filed, the facts supporting a factual basis appear in the minutes of evidence filed with the trial information, nothing else discloses a factual basis for any one or more of the elements of the offense to which the defendant pleads guilty, and in finding that a factual basis exists the trial court expressly relies solely on a source or sources other than the minutes, we may on appeal nevertheless look to the minutes that were not considered or relied on by the trial court to determine whether the trial court correctly found a factual basis for the guilty plea. We think such a result expects too little of the trial court and the parties participating in the offer and acceptance of guilty pleas, would transfer to an appellate court a function that properly belongs to the trial court, and is inconsistent with the holdings of the cases we have cited.

serious injury upon K.C. *See Philo*, 697 N.W.2d at 486 (noting that a defendant's admission on the record may be sufficient to provide a factual basis for an element of an offense). For the following reasons, we disagree.

The term "serious injury" is defined in Iowa Code section 702.18. The State argues only that Amadeo's written statement suffices to provide a factual basis for the intent to inflict a serious injury under that part of the definition defining a serious injury as a "[b]odily injury which . . . [c]reates a substantial risk of death." *See* Iowa Code § 702.18(1)(b)(1). Domestic abuse assault *with intent to inflict a serious injury* is a specific intent crime, as it requires not only an act constituting an assault but also a further specific purpose, an intent to inflict a serious injury. A "'specific intent' designates a 'special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime.'" *State v. Neuzil*, 589 N.W.2d 708, 711 (Iowa 1999) (citation omitted). "'Specific intent' means not only being aware of doing an act and doing it voluntarily, but in addition doing it with a specific purpose in mind." Iowa Crim. Jury Instruction 200.2.

The record contains no direct evidence of Amadeo's specific intent. The required specific intent, however, "may be inferred from the circumstances of the transaction and the actions of the defendant." *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006).[6]

[6] We do note that both *Keeton* and the authority cited therein are, or cite to, cases involving the use of inferences to establish facts from evidence presented to the trier of fact, and not cases involving a guilty plea. We also note that three members of our seven-member Iowa Supreme Court, in a dissenting opinion citing federal cases, have questioned the validity of using inferences to establish the existence of an element of a

The State argues there is a sufficient factual basis to show that Amadeo intended to cause a serious injury to K.C., because he admitted he choked her and caused her bruises. We find no statute defining "choke" or "choked." We thus look to dictionary definitions to determine the meaning of the term.

The term "choke" is defined as "to check or block normal breathing of by compressing or obstructing the trachea or by poisoning or adulterating available air." *See Webster's New Collegiate Dictionary* 194 (1981). To "check" is "to slow or bring to a stop," or "to restrain or diminish the action or force of." *Id.* at 188. To "block" is "to make unsuitable for passage or progress by obstruction," or "to hinder the passage, progress, or accomplishment of by or as if by interposing an obstruction." *Id.* at 118.

Under the foregoing definitions, choking can consist of as little as a momentary and slight slowing or diminishing of breathing. The record on appeal gives no indication of either the length of time or the severity of the admitted choking. For all that can be determined from the record, it may have lasted only momentarily, and it may have only slightly slowed or diminished K.C.'s breathing. Further, the record gives no indication of the location of the admitted bruising, whether it was to K.C.'s head, neck, arm, torso, etc. In sum, the record presented is no more consistent with an inference of a specific intent to inflict a serious injury (a bodily injury which creates a substantial risk of death) than an inference of no intent to inflict a serious injury. Under such circumstances, an inference of a specific intent to inflict a serious injury would be based on

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crime in cases involving a guilty plea. *See State v. Morris*, 677 N.W.2d 787, 789-90 (Iowa 2004) (Larson, J., dissenting).

suspicion alone. Although stated in the context of a jury-tried criminal case, in which inferences are a staple of determining the existence of the elements of an offense, and in which inferences are arguably more appropriately used than in a guilty plea proceeding, the following statements appear particularly relevant here.

> Inferences drawn from the evidence must raise a fair inference of guilt, including the element of [specific] intent. Inferences that do no more "than create speculation, suspicion, or conjecture" do not create a fair inference of guilt. Under these standards, when two reasonable inferences can be drawn from a piece of evidence, we believe such evidence only gives rise to a suspicion, and, without additional evidence, is insufficient to support guilt.

State v. Truesdell, 679 N.W.2d 611, 618-19 (Iowa 2004) (citations omitted). The record presented supports only a suspicion that Amadeo had the specific intent to inflict a bodily injury creating a substantial risk of death, and thus does not provide a factual basis for the third element of the charged offense.

Although the State takes no such position, the dissent by Judge Tabor argues that by not providing a record of the guilty plea proceeding Amadeo cannot satisfy his burden to show that defense counsel breached a material duty. Her dissent cites *State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995), and quotes its holding that it is a defendant's obligation to provide the court on appeal with a record affirmatively disclosing the error relied upon. In *Mudra* the defendant entered a written plea of guilty and waived transcription of the sentencing proceeding. *Mudra*, 532 N.W.2d at 766. On appeal he contended the district court abused its discretion in failing to state reasons on the record for the sentence it imposed. *Id.* Our supreme court concluded that by voluntarily failing

to provide a record of the sentencing proceeding Mudra had waived error. *Id.* at 767.

Mudra is inapposite to our present case. Amadeo does not raise a claim of trial court error. Instead, he raises a claim of ineffective assistance of defense counsel, a claim that counsel rendered ineffective assistance by allowing him to plead guilty to a charge for which the record does not provide a factual basis. Our first and only inquiry is thus whether the record made in the district court shows a factual basis for the guilty plea. *See Schminkey*, 597 N.W.2d at 788.

Amadeo followed a procedure provided by Iowa Rule of Criminal Procedure 2.8(2)(b) to plead guilty to an indictable misdemeanor in a written guilty plea and to waive a verbatim record of the proceedings. *See* Iowa R. Crim. P. 2.8(2)-(3). We are mindful that due to the high volume of indictable misdemeanor cases and the limited resources in the courts that most of such cases are now resolved in writing. Amadeo could not, however, waive the requirements of the first sentence of rule 2.8(2)(b) which provides in relevant part: "The court . . . shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis." Defendant's rights to waive a presentence investigation and a verbatim record, the requirement that the court determine a factual basis for a guilty plea, and the requirement that such a determination be on the record are easily reconcilable: the record of the factual basis may be accomplished in writing.

Amadeo has presented the written record made in the district court, as there was no verbatim record. It discloses no factual basis for the third and

fourth elements of the charge to which he entered a guilty plea. Counsel therefore breached an essential duty in allowing Amadeo to plead guilty, and thereafter not filing a motion in arrest of judgment, *see Brooks*, 555 N.W.2d at 448, and prejudice is presumed, *see Ortiz*, 789 N.W.2d at 764-65. If Amadeo wished to enter a fully adequate guilty plea, and assuming the facts supported such a plea, one could have been presented by Amadeo and his attorney adding, either on their own volition or at the insistence of the prosecuting attorney, a few words to the written plea of guilty. For example, instead of the plea stating "on 7-16-11 in Polk County, IA, I assaulted [K.C.] by choking her and causing her bruises," it could have stated: "On 7-16-11 in Polk County, IA, *with the intent to inflict a serious injury,* I assaulted [K.C.], *the mother of my children*, by choking her and causing her bruises." Or the guilty plea form could have made reference to Amadeo accepting as true the contents (or specified contents) of the minutes of evidence, and the court's form order could have appropriately referenced the minutes. By these examples, this court is not prescribing how a guilty plea form or how court order forms[7] must be prepared in order to establish a record of a factual basis, but is simply illustrating the simplicity with which a "record" of the factual basis for a guilty plea could have been established.

The dissent by the honorable Judge Potterfield correctly illustrates the point that the record does not reveal the facts upon which the court relied to conclude that a factual basis exists to accept the guilty plea. The problem is that

[7] The development and use of standardized guilty plea forms, orders accepting pleas, and judgment entry forms have the advantage of prompting consideration of a wide range of variables and factors that are often necessary to ensure that the mandates of constitutions, statutes, and rules have been satisfied, and of enhancing efficiencies in this service delivery system.

there is no other record. There is nothing that postconviction counsel could do in a postconviction relief case that can demonstrate what the trial court was thinking when it accepted the plea. There is no strategy defense counsel could demonstrate that would diminish or relieve his responsibility. Defense counsel owed to defendant a duty to effectuate the guilty plea that defendant wished to enter, to assure there was in fact a factual basis, and to establish that factual basis on the record: easily done in the content of the written guilty plea submitted to the court.

It is also important to remember that "[a] guilty plea is normally understood as a lid on the box, whatever is in it, not a platform from which to explore further possibilities." *Kyle v. State*, 322 N.W.2d 299, 304 (Iowa 1982); *Long v. Brewer*, 253 N.W.2d 549, 554 (Iowa 1977); *Zacek v. Brewer*, 241 N.W.2d 41, 49 (Iowa 1976) (all citing and quoting *United States v. Bluso*, 519 F.2d 473, 474 (4th Cir. 1975)). The point is that a guilty plea is supposed to be tendered and accepted in such a manner that there is finality in the district court as to the question of guilt. The dissenting opinions would not achieve finality but would invite appellate challenges to guilty pleas and appellate fact finding missions to try to determine the existence of the facts upon which the district court relied, or would invite postconviction relief proceedings. In written guilty plea cases, finality as to the question of guilt can be easily achieved by the district finding a factual basis for the guilty plea and making a record—verbatim or in writing—of the facts upon which the court relied in accepting the plea. Finality for the parties and for the victim as to the question of guilt, and judicial economy, would result.

We conclude that the record before us is complete, that preservation of an ineffective assistance claim could add nothing to change the record that exists, and that Amadeo received ineffective assistance of counsel. We therefore vacate the sentence and remand the case to the district court to allow the State an opportunity to establish a factual basis.[8] *See Philo*, 697 N.W.2d at 488; *Ryan v. Iowa State Penitentiary*, 218 N.W.2d 616, 620 (Iowa 1974). If at a remand hearing a factual basis is shown, Amadeo should be resentenced. *See Randall*, 258 N.W.2d at 362. On the other hand, if a factual basis is not shown, the guilty plea should be set aside.[9] *See id.*; *Williams*, 224 N.W.2d at 18.

SENTENCE VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

All judges concur except Vogel, J., Potterfield, J., Doyle, J., and Tabor, J. dissent.

[8] This case does not present a situation where a defendant is charged with the wrong crime, necessitating dismissal of the charge. *See Schminkey*, 597 N.W.2d at 792.

[9] We note again that Amadeo concedes that the existing record provides a factual basis for the first two elements of the charge, the essential elements of simple misdemeanor assault pursuant to Iowa Code section 708.2(6).

TABOR, J. (dissenting)

I respectfully dissent. Amadeo appeared with counsel, entered a guilty plea to domestic abuse assault with intent to inflict serious injury—an aggravated misdemeanor—and waived the right to have the plea colloquy reported. He admitted assaulting Kimberly Cross "by choking her and causing her bruises." The trial information and minutes of evidence alleged that Amadeo and Cross lived together and had children in common. On this record, Amadeo is unable to prove by a preponderance of the evidence that his trial counsel provided ineffective assistance by allowing him to plead guilty or by not filing a motion in arrest of judgment.

Amadeo's written admission to strangling his victim supplies an adequate factual basis for the crime of assault with intent to inflict serious injury.[10] The majority turns to a dictionary definition of the word "choke" to determine that Amadeo's lay description of his assault did not meet the factual basis for specific intent to inflict serious injury. The majority's reliance on the defendant's word choice minimizes the severity of the assault as revealed by the record. Experts in the field of domestic violence urge professionals to use the term "strangulation" when referring to external compression of the neck and "choking" when discussing internal airway blockage. *See* Gael Strack & Casey Gwinn*, On the*

[10] Domestic violence experts explain: "Today, it is known unequivocally that strangulation is one of the most lethal forms of domestic violence. When a victim is strangled, she is at the edge of a homicide. Unconsciousness may occur within seconds and death within minutes." *See* Gael Strack & Casey Gwinn*, On the Edge of Homicide: Strangulation as a Prelude,* 26 Crim. Just. 32, 33 (Fall 2011). Recognizing the risk of serious injury posed by strangulation, more than thirty states—now including Iowa—have passed felony strangulation laws. *See id.* at 35; *see* 2012 Iowa Legis. Sen. S. F. 93 (effective July 1, 2012).

Edge of Homicide: Strangulation as a Prelude, 26 Crim. Just. 32, 34 (Fall 2011) (noting that when a victim, perpetrator or witness uses the term "choking," "in nearly all cases, they are describing strangulation").

On appeal, the defendant contends the plea record revealed a factual basis for his act, but not his intent. He acknowledges that, under some circumstances, strangulation "may be evidence of an intention to inflict serious injury," but that here if he "did indeed intend to inflict serious injury, he certainly could have done so and didn't." The fact that Amadeo stopped strangling the mother of his children when she started gagging does not mean that the district court lacked a reasonable basis upon which to conclude that he had the requisite intent to inflict serious injury when he placed his hands around the victim's throat.[11]

Our supreme court has consistently held that the record in a guilty plea case does not need to show "the totality of evidence necessary to support a guilty conviction, but it need only demonstrate *facts* that support the offense." *Ortiz*, 789 N.W.2d at 768 (emphasis added). A defendant's admission on the record of a fact supporting an element is sufficient to provide a factual basis for that element. *Philo*, 697 N.W.2d at 486. The plea-taking court is not required to "extract a confession from the defendant." *Keene*, 630 N.W.2d at 581. The court must be satisfied that the facts support the crime, "not necessarily that the defendant is guilty." *Id.* The factual basis requirement for accepting a guilty plea

[11] The district court could also find support for Amadeo's intent from police reports attached to the minutes of evidence showing that Amadeo called the victim a "whore" and punched her on the right side of the head before strangling her, leaving "visible injuries to both areas." A supplemental police report documented that the victim was "vomiting clear bile" after being assaulted by her boyfriend.

may be satisfied by "less evidence than would be needed to sustain a conviction at trial." 1A Charles Alan Wright et al., Federal Practice and Procedure § 179 (4th ed. 2011) (analyzing quantum of evidence question under comparable federal rule); *see also United States v. Marks*, 38 F.3d 1009, 1012 (8th Cir. 1994) (holding that factual basis is established if the court determines there is sufficient evidence upon which it may reasonably determine that the defendant "likely committed the offense" and deeming that determination is satisfied where the record "describes the acts to which the defendant pleaded guilty").

Amadeo does not allege that he did not understand the essential elements of the crime charged when he entered his guilty plea. *See* Iowa R. Crim. P. 2.8(2)(b)(1). One of those essential elements was that he intended to inflict serious injury.[12] He cannot prove his counsel was ineffective by arguing on appeal that it is *possible* to commit the assault offense without that intent. Because it is also possible, and even probable, that a person who manually strangles an intimate partner does have the intent to cause serious injury, I do not believe that Amadeo's trial counsel breached a material duty in allowing him to be sentenced on the aggravated misdemeanor offense. Amadeo signed a written plea in which he stated: "I am knowingly and intelligently pleading guilty to the above charge(s) because I am guilty. I ask the Court to accept my plea." His trial counsel had no reason to question that the facts Amadeo admitted in the written plea supported the intent element for the offense charged.

[12] The definition of serious injury includes a bodily injury which creates a substantial risk of death. Iowa Code § 702.18(1)(b)(1).

Amadeo also challenges the factual basis for the domestic relationship element of the offense. Under Iowa Code sections 708.2A and 236.2(2), a domestic relationship exists if the defendant and victim were family or household members who lived together at the time of the crime or were parents of the same minor child. The police reports incorporated into the minutes of evidence established the pair lived together and had children in common.

The majority opinion concludes that we cannot rely on the minutes where the plea-taking court has not specified that it considered them. It is true that in *Philo*, our supreme court stated:

> It has been held that "if the district judge finds it necessary to look to evidence other than the defendants' statements to establish the factual basis for the plea in any situation, these additional facts or evidence must be specifically articulated on the record."

Philo, 697 N.W.2d at 486 (citing *United States v. Wetterlin*, 583 F.2d 346, 353 (7th Cir. 1978)). In *Philo*, the supreme court reviewed the transcript of a reported guilty plea hearing where it was clear what the plea-taking court considered and what it did not. *Id.* Here, we have only a written guilty plea. In that written plea, Amadeo waived his "right to have a court reporter make a verbatim record of these proceedings."

In a written order dated August 4, 2011, the district court found that a factual basis existed for Amadeo's guilty plea based on its "direct conversation with the Defendant on the record." The majority asserts that any conversation between the court and the defendant "was in fact not 'on the record'" because the defendant waived court reporting. The majority also observes that the

prosecution and court "acquiesced in that waiver" and notes that the parties have not submitted a statement of the evidence under rule 6.806(1).

Neither observation supports the majority's position. First, a statement can be made "on the record" without the benefit of court reporting. Our supreme court has defined "on the record" as "requiring some in-court colloquy or personal contact between the court and the defendant." *See State v. Liddell*, 672 N.W.2d 805, 812 (Iowa 2003) (clarifying term in context of jury trial waiver). Such contact between the court and the defendant does not require a verbatim transcription. If the court had an unreported conversation with Amadeo in which Amadeo admitted his domestic relationship with Cross, that admission would be a part of the plea record regardless of the presence of a court reporter. Likewise, if the plea-taking court told Amadeo that it was considering the minutes in determining the existence of a factual basis, the court's declaration would be a part of the record even if it were not available for transcription. Second, the parties do not share the blame for the absence of a reported guilty plea. "[A] defendant claiming error has an obligation to provide the court with a record that discloses the error claimed." *State v. Ruiz*, 496 N.W.2d 789, 791 (Iowa Ct. App. 1992) (faulting defendant for not seeking a bill of exceptions); *see also State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995) (holding in sentencing context that it is "defendant's obligation to provide this court with a record affirmatively disclosing the error relied upon."). We presume the district court acted properly in finding a factual basis for Amadeo's plea in the absence of a reporter's transcript showing otherwise. *See State v. McKee*, 223 N.W.2d 204, 206 (Iowa 1974).

The majority finds *Mudra* is inapposite because that case dealt with trial error rather than ineffective assistance of counsel. The procedural distinction actually creates a harder case for Amadeo. In alleging ineffective assistance, Amadeo must show both that counsel breached a material duty and that he suffered prejudice as a result of counsel's error. *See Brooks*, 555 N.W.2d at 448. Defense counsel violates an essential duty and prejudice is presumed when counsel allows a defendant to enter a guilty plea and waive the right to file a motion in arrest of judgment where there exists no factual basis for the charge. *See Ortiz*, 789 N.W.2d at 764. On the other hand, "where a factual basis exists for the plea, counsel usually will not be found ineffective for allowing the defendant to plead guilty." *See Brooks*, 555 N.W.2d at 448 (citing with approval *Morgan v. State*, 582 P.2d 1017, 1022 (Alaska 1978) where even if original indictment was defective, State had ample evidence to support defendant's reindictment). In considering whether a factual basis existed for Brooks's guilty plea, our supreme court announced that it would consider "the entire record before the district court" including the minutes of testimony. *Id*. at 448-49; *see also State v. Carter*, 582 N.W.2d 164, 166 (Iowa 1998) (describing "pivotal issue" as the factual basis for Carter's guilty plea and stating: "In deciding this issue, we consider the entire record before the district court, including any plea colloquy."). The majority's refusal to look beyond the court's August 4, 2011 order memorializing Amadeo's written guilty plea runs counter to the directive in *Brooks* to consider the "entire record before the district court."

We should not find defense counsel professionally delinquent when we have the objective ability to see from the record as a whole that counsel reasonably allowed his client to enter a guilty plea to domestic abuse assault with intent to inflict a serious injury. Because Amadeo has not proved that his attorney was ineffective in allowing him to plead guilty on this record, I would affirm.

Vogel, J., joins this dissent.

POTTERFIELD, J. (dissenting)

I also dissent, but write separately to express my disagreement with the majority's conclusion that the record made consisting of the form plea and order accepting the plea allows a finding that defense counsel failed in a fundamental duty to the defendant. For these same reasons, I disagree with Judge Tabor that we should make the opposite finding.

While the majority and Judge Tabor disagree on the content of the record, both agree the guilty plea and sentencing forms do not reveal whether the court took into account the minutes of testimony in the court file. The additional information in the court file, including the minutes of testimony, was neither referenced in the court's order, nor in the defendant's written plea. The majority cites *Philo* for the proposition that information necessary to complete the factual basis in addition to the defendant's statements must "'be specifically articulated on the record.'"[13] *Philo*, 697 N.W.2d at 486 (quoting *Wetterlin*, 583 F.2d at 353). Judge Tabor cites *Brooks* for the proposition that the appellate court can consider "the entire record before the district court." *Brooks*, 555 N.W.2d at 448. Both of those felony cases were presented for appellate review with a transcript of the guilty plea proceedings. *Id*. at 448; *Philo*, 555 N.W.2d at 484. The associate courts in Iowa seldom have the luxury of a verbatim guilty plea record.

[13] It is worth noting that our supreme court did not in fact adopt the language cited by the majority, but simply noted "It has been held that '. . . these additional facts or evidence must be specifically articulated on the record.'" *Philo*, 697 N.W.2d at 486 (quoting *Wetterlin*, 583 F.2d at 353). Instead, the standard reiterated by our supreme court time and again that "the record, as a whole, must disclose facts to satisfy all elements of the offense" is of precedence here. *Ortiz*, 789 N.W.2d at 766–68; *see also Rodriguez*, 804 N.W.2d at 849–50 ("Instead, we look to the rest of the record including the minutes of testimony to see whether sufficient facts *were available to justify counsel in allowing a plea and the court in accepting it*." (emphasis added)); *Keene*, 630 N.W.2d at 581.

Because of this reality, our supreme court found in the context of jury trial waivers that "on the record" need not be in writing. *Liddell*, 672 N.W.2d at 812 ("[W]e think 'on the record' is better understood as requiring some in-court colloquy or personal contact between the court and the defendant, to ensure the defendant's waiver [of jury trial] is knowing, voluntary and intelligent."). As such, though further evidence indicating a factual basis for each element of the crime did not appear in the written plea or the court's order, this is not definitive proof there was no such factual basis in the record for Amadeo's guilty plea. We have no information about the extent of the court's review of the court file before accepting the guilty plea. Because the record we have before us does not disclose whether the trial court was aware of a factual basis for every element of the offense, including the defendant's intent and whether a domestic relationship existed, the claim of ineffective assistance of counsel cannot be adjudicated by this court.

Where the record is inadequate for this court to conduct its de novo review of a claim of ineffective assistance of counsel, we preserve the issue for future postconviction proceedings. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (citing Iowa Code § 814.7). I would not make a finding of constitutional error on the basis of an inadequate record, but would preserve this issue for future postconviction proceedings.

Doyle, J., joins this dissent.