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bodily injury. We therefore reverse the district court's order affirming the ex parte domestic abuse protection order and remand the matter with directions that the district court enter an order dismissing the domestic abuse protection order against Mike.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOSE JESUS LLERENAS-ALVARADO, APPELLANT.

827 N.W.2d 518

Filed February 26, 2013. No. A-12-131.

1. **Pleas: Appeal and Error.** A ruling on a withdrawal of a plea will not be disturbed on appeal absent an abuse of discretion.
2. ____: ____. The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
3. **Pleas: Waiver.** To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime for which he or she is charged. A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record.
4. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.
5. **Constitutional Law: Waiver: Records.** A court may conclude that an accused has waived a constitutional or statutory right if the waiver, knowingly and intelligently made, appears affirmatively on the record.
6. **Pleas: Waiver: Proof.** Even if a defendant was not sufficiently advised of his or her rights under Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2008), failure to give the advisement is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn pursuant to § 29-1819.02(2). A defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given.

Appeal from the District Court for Madison County: JAMES G. KUBE, Judge. Affirmed.

Charles W. Balsiger for appellant.

Jon Bruning, Attorney General, Carrie A. Thober, and James D. Smith for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Jose Jesus Llerenas-Alvarado appeals from the judgment of the district court for Madison County convicting him of attempted kidnapping, a Class II felony, after a plea of no contest. Llerenas-Alvarado submitted a motion to withdraw the plea prior to sentencing, and after a hearing on the issue, the motion was denied. For the reasons that follow, we affirm.

BACKGROUND

Llerenas-Alvarado was originally charged in the county court for Madison County with kidnapping, a Class IA felony. Prior to his initial arraignment, he was provided with an interpreter who read to him the complaint and a rights advisory form. The rights advisory informed him of, among other things, the right to assistance of counsel, the right to confront witnesses, the right to a jury trial, and the privilege against self-incrimination. It also included the following immigration advisement:

> [I]f you were not a citizen of the United States of America at the time the crime was alleged to have been committed, you are hereby advised that a conviction for this crime could result in your removal from this country and that any request for citizenship be denied, as well as it may also affect any present and future proceeding before Immigration.

The court-appointed interpreter from the county court proceedings certified that she read the rights advisory to Llerenas-Alvarado in the Spanish language and asked him if he understood it and that Llerenas-Alvarado responded he did. It was the interpreter's opinion that Llerenas-Alvarado understood the rights advisory and the possible pleas.

Llerenas-Alvarado appeared before the county court on June 7, 2011. With the assistance of an interpreter, the court

advised Llerenas-Alvarado of his rights, as well as the nature of the charge, the possible penalties, and the effect of conviction on noncitizens. The case was then bound over to the district court.

When Llerenas-Alvarado appeared for the first time in the district court for proceedings in this case, he was provided with a different court-appointed interpreter. The interpreter stated he believed that Llerenas-Alvarado was in need of interpretive services and that he continued to require interpretive services throughout the pendency of the case. The same interpreter assisted Llerenas-Alvarado each time he appeared in district court.

On July 14, 2011, Llerenas-Alvarado appeared before the district court for Madison County for a group arraignment. The district court advised the group of their rights, including the right to counsel, the right to confront witnesses, the right to a jury trial, and the privilege against self-incrimination. It also gave the following immigration advisement: "[I]f you're not a United States citizen, the conviction for the offense or the offenses for which you have been charged may have the consequence of removal from the United States or the denial of naturalization pursuant to the laws of the United States."

After the group arraignment, the district court identified Llerenas-Alvarado and advised him of the following, through an interpreter:

> THE COURT: . . . .
>
> . . . Sir, did you — were you in the courtroom when the court explained to the group your statutory and constitutional rights?
>
> . . . LLERENAS-ALVARADO: Yes.
>
> THE COURT: And do you have any questions about those?
>
> . . . LLERENAS-ALVARADO: No.
>
> . . . .
>
> THE COURT: Did you also hear and understand the advisement I gave about the possibility of deportation from the United States?
>
> . . . LLERENAS-ALVARADO: Yes.

Llerenas-Alvarado pled not guilty, and the case was set for trial.

On August 29, 2011, the parties appeared for a pretrial conference. Pursuant to a plea agreement, the State requested and was granted leave to file an amended information. However, Llerenas-Alvarado was not ready to enter a plea at that time, so the State withdrew the amended information and the matter was continued.

The parties came before the court again on September 1, 2011, and the parties indicated a plea agreement had been reached. In exchange for Llerenas-Alvarado's plea, the State amended the charge to attempted kidnapping. The district court then reiterated its prior advisements to Llerenas-Alvarado as follows:

> THE COURT: . . . And, sir, when we were in court on July 14th of 2011 I explained to you your statutory and constitutional rights. Do you recall that?
>
> [Llerenas-Alvarado]: (By Interpreter) Yes.
>
> THE COURT: Do you want me to repeat any of that information for you?
>
> [Llerenas-Alvarado]: (By Interpreter) No, that's not necessary.
>
> THE COURT: I also on that date advised you of the possibility of deportation from the United States. Do you recall that?
>
> [Llerenas-Alvarado]: (By Interpreter) Yes.
>
> THE COURT: Do you need for me to repeat that advisement for you at this time?
>
> [Llerenas Alvarado]: (By Interpreter) No, it's not necessary.

The court then advised Llerenas-Alvarado of his right to wait 24 hours after service of the amended information before entering his plea. He indicated that he was ill and wished to continue the hearing until the following day.

The parties appeared the next day, September 2, 2011. After Llerenas-Alvarado indicated that he was ready to proceed, the court continued the plea hearing from the point where the proceedings had been stopped the previous day. The district court explained to Llerenas-Alvarado the nature of the amended

charge, the possible penalties, and the four pleas he could enter. Llerenas-Alvarado indicated he understood and entered a plea of no contest to attempted kidnapping.

The court questioned Llerenas-Alvarado about his plea. The court asked whether the no contest plea was given freely and voluntarily, and Llerenas-Alvarado answered, "Yes." The court asked whether Llerenas-Alvarado was under the influence of drugs or alcohol and whether anyone made threats of force or promises to him, other than the plea agreement. Llerenas-Alvarado answered, "No." The court asked whether Llerenas-Alvarado understood his rights, including the right to a jury trial, the right not to incriminate himself, and the right to confront and cross-examine any witnesses. The court explained that by pleading no contest, Llerenas-Alvarado would be waiving those rights. Llerenas-Alvarado indicated that he understood. He also indicated he understood that by pleading no contest, he would also be waiving any defenses, the presumption of innocence, the right to subpoena witnesses and evidence on his behalf, and any technical defects on the record. Llerenas-Alvarado indicated he understood. Finally, the court asked whether it was still his desire to plead no contest to the charge of attempted kidnapping, a Class II felony, and Llerenas-Alvarado responded, "Yes."

The State provided evidence of the factual basis for the charged offense. This included evidence that on June 4, 2011, Llerenas-Alvarado propositioned a 14-year-old boy and his 12-year-old brother to have sex with him for $20 and $100. The boys refused and walked away, but Llerenas-Alvarado grabbed the older boy and forced him into his vehicle by threatening him with violence. All of those events took place in Madison County, Nebraska. Llerenas-Alvarado then drove the boy out of town to a gravel road in Boone County, Nebraska, where Llerenas-Alvarado took off his shirt, unzipped his pants, and then attempted to take off the boy's shirt and pants. The boy began hitting Llerenas-Alvarado and escaped from the vehicle. He ran through fields to a farmhouse, and the homeowner took him to a local fire station. In addition to the present attempted kidnapping charge in Madison County, Llerenas-Alvarado also pled no contest to

attempted sexual assault of a child in Boone County in connection with this offense.

The district court announced its findings beyond a reasonable doubt that (1) there was a factual basis for Llerenas-Alvarado's no contest plea; (2) his plea was intelligently, voluntarily, and knowingly entered; (3) he understood and voluntarily waived his statutory and constitutional rights; and (4) he understood the nature of the charge, the consequences of his plea, and the possible penalties. The court accepted Llerenas-Alvarado's plea and found him guilty beyond a reasonable doubt of attempted kidnapping, a Class II felony.

Prior to sentencing, Llerenas-Alvarado filed a motion to set aside and vacate his no contest plea, alleging that his plea was not knowingly, intelligently, and voluntarily made. A hearing was held on the motion on November 18, 2011. The parties agreed that the motion should be addressed as a motion to withdraw his plea, rather than a motion to vacate and set aside his plea, and the court agreed to construe it as such. Llerenas-Alvarado was the sole witness for the defense at the hearing.

Llerenas-Alvarado testified, through an interpreter, that he was a resident alien from Mexico. The defense also offered five exhibits into evidence: (1) the court's journal entry from the hearing held on September 1, 2011; (2) the court's journal entry from the hearing held on September 2; (3) a bill of exceptions containing all of the district court proceedings that had taken place in the case; (4) a copy of Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), setting forth the immigration advisement the court must give before accepting a plea of guilty or no contest; and (5) a copy of a federal statute governing deportation of aliens, see 8 U.S.C. § 1227 (2006). Then the defense rested.

A deputy clerk of the county court for Madison County testified for the State. The clerk described the process for ensuring foreign nationals are advised of their rights. The clerk said that when the court is aware a person needs an interpreter, the court makes sure one is available. Prior to entering the courtroom, the interpreter reads the complaint to

the defendant. The interpreter then reads a copy of the rights advisement and records a file-stamped copy of the advisement, signed by the interpreter. The rights advisement for Llerenas-Alvarado is in the record. The State asked the court to take judicial notice of the county court transcript, including the rights advisory form that was given to Llerenas-Alvarado on June 7, 2011.

After argument from both parties, the court took a short recess to review the record and relevant case law before announcing its decision with regard to the withdrawal of the plea. The district court ultimately overruled Llerenas-Alvarado's motion to withdraw the plea and sentenced him to 10 to 15 years' imprisonment.

Llerenas-Alvarado now appeals the denial of his motion to withdraw his plea.

ASSIGNMENTS OF ERROR

Llerenas-Alvarado's assignments of error, consolidated and restated, are that the court erred in denying his motion to withdraw his plea of no contest and in failing to warn him of the immigration consequences of his plea as required under the Nebraska Revised Statutes.

STANDARD OF REVIEW

[1] A ruling on a withdrawal of a plea will not be disturbed on appeal absent an abuse of discretion. *State v. Molina-Navarrete*, 15 Neb. App. 966, 739 N.W.2d 771 (2007).

ANALYSIS

Llerenas-Alvarado alleges the district court erred by overruling his motion to withdraw his no contest plea because (1) the plea was not voluntarily and intelligently made and (2) the district court failed to advise him of the immigration consequences of his plea.

[2] The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012).

Plea Voluntarily and Intelligently Made.

[3] In *State v. Lee*, 282 Neb. 652, 659, 807 N.W.2d 96, 103 (2011), the Nebraska Supreme Court set forth the requirements for determining whether a plea has been voluntarily and intelligently made:

> To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made,
>
> "'1. The court must
>
> "'a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> "'b. examine the defendant to determine that he or she understands the foregoing.
>
> "'2. Additionally, the record must establish that
>
> "'a. there is a factual basis for the plea; and
>
> "'b. the defendant knew the range of penalties for the crime for which he or she is charged.'" A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record.

Llerenas-Alvarado "readily concedes" that the court informed him of the necessary rights. Brief for appellant at 9. However, he contends the court failed to adequately examine him to determine that he understood those rights. Llerenas-Alvarado contends the circumstances indicate he did not understand all of the consequences of his plea of no contest. Such circumstances include the apparent desire to seek other counsel, the illness Llerenas-Alvarado allegedly suffered during the arraignment, and the fact that he required an interpreter because he does not speak or understand English.

The record shows that the same experienced interpreter was available to Llerenas-Alvarado each time he appeared in district court, and he proceeded with the assistance of that same interpreter in each instance in district court.

Llerenas-Alvarado was informed of his rights for the first time prior to and during his initial arraignment in the county court, also through an interpreter, on June 7, 2011. The court-appointed interpreter certified that she read the advisory to

Llerenas-Alvarado in Spanish and that she asked Llerenas-Alvarado, in Spanish, whether he understood the advisory and possible pleas. The certificate states that Llerenas-Alvarado replied he understood and that it is the interpreter's opinion he did understand.

Llerenas-Alvarado was informed of his rights during a group arraignment in the district court; the district court personally questioned him regarding his understanding of his rights, and Llerenas-Alvarado pled not guilty.

During a change of plea hearing on September 1, 2011, the court asked Llerenas-Alvarado whether he recalled the advisement of his statutory and constitutional rights. Llerenas-Alvarado responded that he remembered and that it was not necessary to repeat any of that information for him. Llerenas-Alvarado invoked his right to wait 24 hours after the service of the amended information before entering his plea. The parties reconvened to continue the proceeding the next day. Prior to asking for the plea, the district court explained to Llerenas-Alvarado the nature of the amended charge, the possible penalties, and the four pleas he could enter. Llerenas-Alvarado entered his plea of no contest, and the district court questioned him about his plea, including whether it was given freely and voluntarily; confirmed that he was not under the influence of drugs or alcohol; and confirmed that no one made threats or used force to compel his plea. The court asked whether Llerenas-Alvarado understood his rights and warned him of the consequences of waiving such rights. Finally, the court asked whether it was still his desire to plead no contest to the charge of attempted kidnapping, a Class II felony, and Llerenas-Alvarado responded, "Yes."

Throughout the record, there is no indication that Llerenas-Alvarado had difficulty understanding the rights advisory. He was given the opportunity to have his rights repeated or explained, and he stated that it was not necessary. He responded to each question in a way that indicated he understood his rights and what was being asked of him. In a few instances, Llerenas-Alvarado asked the court, and the interpreter, to repeat portions of his advisements, and after the portions were repeated, he indicated he understood and gave a response appropriate to the

question posed by the court. The evidence shows that Llerenas-Alvarado was informed of his rights multiple times and that he understood the consequences of his plea.

In this action, Llerenas-Alvarado also asserts that his plea was not voluntarily, knowingly, and intelligently made, because he required the assistance of an interpreter. However, he was provided with an experienced, sworn, and court-appointed Spanish language interpreter for every proceeding in the county and district courts. The record does not show Llerenas-Alvarado had any difficulty communicating with the interpreters, and there is no evidence the interpreters failed to accurately translate the proceedings. The mere fact that Llerenas-Alvarado required a translator is not sufficient proof that his plea was not voluntarily, knowingly, and intelligently made.

As stated above, the right to withdraw a plea previously entered is not absolute, and in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012).

We find the district court did not abuse its discretion in overruling Llerenas-Alvarado's motion on the ground that the plea was not voluntarily, knowingly, and intelligently made.

Advisement of Immigration Consequences.

[4] The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008). Section 29-1819.02 requires that a court advise a defendant, prior to accepting a plea of guilty or nolo contendere, that a conviction for the crime charged may have adverse immigration consequences.

Llerenas-Alvarado also asserts the court erred at the time of his plea of no contest on September 2, 2011, in failing to contemporaneously advise him regarding possible deportation. Specifically, he argues that the advisement was not made *immediately* prior to the plea. Llerenas-Alvarado asserts that although he was given the necessary advisement in July 2011, he was not so advised at the time of the entry of his plea of no

contest. He asserts that the failure to make the advisement on the day of the plea mandates the withdrawal of the plea and the entry of a plea of not guilty.

In *State v. Mena-Rivera*, 280 Neb. 948, 954, 791 N.W.2d 613, 619 (2010), the Nebraska Supreme Court evaluated the meaning of the word "'prior,'" in the statute, and determined it must mean "'immediately before'" the entering of a plea of guilty or nolo contendere. The Supreme Court supported this determination by interpreting the legislative intent of § 29-1819.02. The court found the Legislature's intent was twofold. First, the defendant may forget a court's advisement during the weeks or months which may pass between the initial arraignment and when the defendant enters his plea. And second, if the defendant is arraigned on a charge and then pleads to a less severe charge, the defendant may reasonably expect less severe penalties to flow from a less severe charge. The court reasoned that a defendant who pleads to a lesser charge may believe the prior advisement does not apply. *State v. Mena-Rivera, supra*.

In this case, Llerenas-Alvarado was not read the complete immigration advisement on September 1 or 2, 2011. However, on September 1, Llerenas-Alvarado was asked whether he recalled the court's explanation of his statutory and constitutional rights on July 14 and whether he would like them to be repeated. He replied that he remembered and that it was not necessary to repeat that information. He was specifically asked whether he recalled the court's advisement about the possibility of deportation from the United States. Again, he replied that he remembered and that it was not necessary to repeat that information. When the time came for Llerenas-Alvarado to enter his plea, he invoked his right to continue the matter for 24 hours to consider his plea. Llerenas-Alvarado entered his plea of no contest when the court reconvened the next day.

An evaluation of the facts reveals the legislative intent of the statute is not frustrated in this case. Llerenas-Alvarado was reminded of the advisement and acknowledged that he understood its meaning. He was specifically reminded that the immigration advisement applied, though the charge had been

amended from the time of the initial arraignment. Further, though Llerenas-Alvarado was not reminded of the advisement on the day that he entered his plea of no contest, he was specifically reminded of the advisement on the previous day, as part of the same proceeding, and the charge had not changed from September 1 to 2, 2011.

[5] In addition, a court may conclude that an accused has waived a constitutional or statutory right if the waiver, knowingly and intelligently made, appears affirmatively on the record. *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990). The record clearly shows that Llerenas-Alvarado was reminded of the rights advisements, indicated his understanding, and declined the court's offer to repeat the advisements again.

There is sufficient evidence that it was not an abuse of discretion for the court to overrule Llerenas-Alvarado's motion to withdraw his plea on the ground that he was not read the rights advisement under § 29-1819.02(1).

[6] Even if we were to determine Llerenas-Alvarado was not sufficiently advised of his rights under § 29-1819.02(1), failure to give the advisement is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn pursuant to § 29-1819.02(2). *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009). A defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given. *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

In *Mena-Rivera*, the defendant introduced into evidence a detainer from the Department of Homeland Security stating that it had initiated an investigation to determine whether he was subject to removal from the United States. The court recognized that this was sufficient to show the defendant actually faced an immigration consequence and noted that a defendant is not required to show that immigration consequences are an absolute certainty to meet this requirement. The statute uses the word "may" as opposed to "will."

In this case, Llerenas-Alvarado's motion to withdraw did not allege that he could be subject to immigration consequences.

At the hearing on the motion to withdraw his plea, he requested that the court take judicial notice of a six-page portion of the U.S. statutes. The court took judicial notice of the section titled "Immigration and Nationality" which contains numerous provisions regarding different classes of "Deportable Aliens." See 8 U.S.C. § 1227. He did not identify which section of the statute was applicable to him. The mere introduction of pages of federal statutory language is not sufficient to find Llerenas-Alvarado alleged and showed that he is subject to an immigration consequence which was not included in the advisement given. Llerenas-Alvarado failed to meet both prongs of the test required to withdraw his plea pursuant to § 29-1819.02.

CONCLUSION

We find that the district court did not abuse its discretion in overruling Llerenas-Alvarado's motion to withdraw his plea of no contest, because Llerenas-Alvarado knowingly, intelligently, and voluntarily entered his plea, and that the advisements given by the court satisfied the requirements of § 29-1819.02. The decision of the district court is affirmed.

AFFIRMED.