SUPREME COURT NO. 90958-0
COA NO. 69423-5-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROY JACKSON, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Hollis R. Hill, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Roy Jackson asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Jackson requests review of the decision in State v. Roy Purcell Jackson, Jr., Court of Appeals No. 69423-5-I (slip op. filed Aug. 11, 2014), attached as appendix A. The Court of Appeals entered an order denying reconsideration on September 4, 2014 (attached as appendix B).

C. ISSUE PRESENTED FOR REVIEW

Whether Jackson must be allowed to withdraw his guilty plea because he was misinformed of a direct consequence of his plea, namely that a mandatory minimum term of confinement would be imposed as part of his sentence?

D. STATEMENT OF THE CASE

Jackson entered a plea of guilty to first degree assault with a firearm enhancement under count I and second degree assault with a firearm enhancement under count II. CP 14-38; 2RP 3-17. The "Statement of Defendant on Plea of Guilty," lists a number of paragraphs under the heading "I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT . . ." CP 14-23.

Paragraph (4)(i) of the plea form states:

> The crime of Assault 1 has a mandatory minimum sentence of at least 5 years of total confinement. The law does not allow any reduction of this sentence. For crimes committed on or after July 24, 2005, this does not apply to juveniles tried as adults pursuant to a transfer of jurisdiction under RCW 13.40.110 (see RCW 9.94A.540(3)). [If not applicable, this paragraph should be stricken and initialed by the defendant and judge RJ.]

CP 18.

This paragraph is crossed out and initialed by Jackson but not the judge. CP 18. In the margin of the plea form, a handwritten bracket encompasses the paragraph with the word "Applies." CP 18.

The plea form signed by Jackson states "My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this 'Statement of Defendant on Plea of Guilty.' I have no further questions to ask the judge." CP 24.

The prosecutor went through the plea form with Jackson at the plea colloquy hearing. 2RP[1] 5-13. At one point, the prosecutor asked Jackson "Do you understand that paragraph I -- and this is on page 5 -- applies? So that assault in the first degree does have a mandatory minimum sentence

[1] The verbatim report of proceedings is referenced as follows: 1RP - one volume consisting of 11/23/11, 3/7/12, 8/2/12, 10/12/12, & 11/21/12; 2RP - 5/15/12.

of five years. Do you understand this?" 2RP 9. Jackson answered, "Yes." 2RP 9.

The trial court subsequently confirmed Jackson had enough time to go over the statement on plea of guilty with his attorney and that his attorney had read the entire statement to him. 2RP 13-15. After concluding Jackson understood the nature of the charges and the consequences of the plea, the court accepted the plea as knowing, voluntary and intelligent. 2RP 16-17.

Before sentencing, Jackson moved to withdraw his plea. CP 65-75. Jackson argued (1) he did not understand the evidence against him and counsel did not conduct adequate investigation; (2) he pled guilty because he felt confused about the evidence, his attorney pressured him to take the plea, and his attorney applied pressure on his family to push him to take the plea; and (3) he has a long history of mental illness, including ADHD and possible mild mental retardation, which requires accommodation by those who need to convey important information to him, and his attorney did not provide proper accommodation. Id.

The court denied the motion to withdraw the plea. CP 89-91. The court sentenced Jackson to a total term of confinement of 258 months. CP 79. Jackson was not sentenced to a minimum term of confinement on count I. CP 76-85. No one mentioned a term of minimum confinement at

the sentencing hearing. 1RP 82-88, 110-14, 120-22. Neither the prosecutor nor the judge pointed out the plea agreement retained a minimum term of confinement provision and that Jackson had been advised of that consequence during the plea colloquy. Id.

On appeal, Jackson argued he should be allowed to withdraw his plea because he was misadvised that he would receive a mandatory minimum sentence, a direct consequence of the plea. Brief of Appellant 11-20; Reply Brief at 1-5. The Court of Appeals held Jackson was accurately informed of the direct sentencing consequences of his plea because he was never informed the court would make the necessary findings to support imposition of the mandatory minimum term. Slip op. at 9. Jackson filed a motion to reconsider, pointing out Jackson was never informed that a finding needed to be made; rather, he was informed without qualification that a mandatory minimum term would be imposed. Motion to Reconsider at 1-4. The Court of Appeals, instead of engaging Jackson's argument, denied the motion to reconsider without comment. App. B. Jackson seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

WHETHER A GUILTY PLEA IS INVALID BASED ON MISINFORMATION ABOUT A MANDATORY MINIMUM SENTENCE IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW WARRANTING REVIEW.

Review is warranted under RAP 13.4(b)(3) because this case presents a significant question of constitutional law. The question is whether a plea complies with due process where a defendant is unconditionally misinformed a direct sentencing consequence will be imposed and is not informed that the consequence requires a factual finding as a prerequisite to its imposition.

Here, Jackson was misinformed without reservation that a mandatory minimum sentence would be imposed for the first degree assault conviction. No one informed him that a special factual finding needed to be made before the mandatory minimum could lawfully be imposed. Jackson is entitled to withdraw his plea because he was misinformed of a direct consequence of his plea.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. A guilty plea is otherwise invalid. Boykin v. Alabama. 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v.

Branch, 129 Wn.2d 635, 642, 919 P.2d 1228(1996). This standard is reflected in CrR 4.2(d), "which mandates that the trial court 'shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). "Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). "An involuntary plea produces a manifest injustice." Isadore, 151 Wn.2d at 298.

A guilty plea is not knowingly made when it is based on misinformation regarding a direct sentencing consequence. Mendoza, 157 Wn.2d at 584, 590-91. A sentencing consequence is direct when "the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Ross, 129 Wn.2d at 284 (internal quotation marks omitted) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)).

A mandatory minimum term of confinement is a direct consequence of a plea. State v. Conley, 121 Wn. App. 280, 285, 87 P.3d 1221 (2004) (citing State v. McDermond, 112 Wn. App. 239, 244-45, 47 P.3d 600 (2002)); State v. Johnston, 17 Wn. App. 486, 490, 564 P.2d 1159

(1977) (citing Wood v. Morris, 87 Wn.2d 501, 513, 554 P.2d 1032, 1039 (1976)). A mistake over the mandatory minimum sentence entitles a defendant to withdraw the plea. State v. Miller, 110 Wn.2d 528, 528-30, 537, 756 P.2d 122 (1988), overruled on other grounds by State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011).

The wrinkle in Jackson's case is that he was informed as a consequence of his plea that he would be sentenced to a mandatory minimum term of confinement but no mandatory minimum term was imposed as part of his sentence. Before such a sentence could lawfully be imposed, RCW 9.94A.540(1)(b)[2] requires a specific factual finding that the offender used force or means likely to result in death or intended to kill the victim. State v. McChristian, 158 Wn. App. 392, 402-03, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011). In the absence of stipulation, a jury needed to make that finding to comply with the Sixth Amendment. See Alleyne v. United States, __U.S.__, 133 S. Ct. 2151, 2155, 186 L.Ed.2d 314 (2013) (following logic of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), any fact

[2] RCW 9.94A.540(1)(b) provides in relevant part "the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535: . . . An offender convicted of the crime of assault in the first degree . . . where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years."

that increases the mandatory minimum must be submitted to the jury). Jackson did not stipulate to the fact necessary to support a mandatory minimum sentence under RCW 9.94A.540(1)(b) and the necessary fact was not otherwise found.

There is no published authority in Washington addressing whether a defendant is entitled to withdraw a plea when he is told a mandatory minimum term will be imposed but such term is not ultimately imposed at sentencing. Supreme Court precedent, however, supports Jackson's argument that withdrawal of the plea is the remedy in such a circumstance.

A guilty plea is deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentence received was more or less onerous than anticipated. Mendoza, 157 Wn.2d at 590-91. Thus, the defendant in Mendoza was entitled to withdraw his plea based on a miscalculated offender score resulting in a lower standard range than anticipated by the parties when negotiating the plea. Id. Misinformation that purports to increase punishment invalidates a plea in the same manner as misinformation that purports to reduce punishment. Id.

The same reasoning applies to Jackson's case. The plea form and colloquy show Jackson was affirmatively misinformed about a direct consequence in the form of the minimum term. The parties anticipated a

more onerous sentence than what was actually imposed. To prevail, Jackson need not show reliance on the incorrect minimum term provision set forth in the plea form and confirmed during the plea colloquy. "[A] defendant who is misinformed of a direct consequence of pleading guilty is not required to show the information was material to his decision to plead guilty." Mendoza, 157 Wn.2d at 589. The defendant need not establish a causal link between the misinformation and the plea decision. State v. Weyrich, 163 Wn.2d 556, 557, 182 P.3d 965 (2008)

Jackson ultimately received a standard range sentence that was above the five year mandatory minimum term he was informed he would receive. CP 79. The plea is still invalid because the misinformation need not have a practical effect on the sentence. In re Pers. Restraint of Bradley, 165 Wn.2d 934, 939-41, 205 P.3d 123 (2009) (even though the defendant's concurrent sentences meant he would never serve the lower standard range about which he was misinformed, the defendant was still not properly advised on the direct consequences of his plea).

Comparison with cases involving misinformation about the statutory maximum term is instructive. The statutory maximum sentence for a charged crime, like the statutory minimum, is a direct consequence of a plea. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 594-95, 316 P.3d 1007 (2014); State v. Kennar, 135 Wn.App. 68, 74-75, 143 P.3d 326

(2006), review denied, 161 Wn.2d 1013, 166 P.3d 1218 (2007). Misinformation regarding the statutory maximum provides a basis to withdraw the plea when challenged on direct appeal. Stockwell, 179 Wn.2d at 595; Weyrich, 163 Wn.2d at 557. The plea is rendered involuntary even where a defendant is sentenced to a standard range that does not reach or exceed the statutory maximum. Weyrich, 163 Wn.2d at 556-57 (defendant allowed to withdraw pleas despite State's argument that the mistaken maximum sentence had no actual bearing on the plea because the trial court sentenced Weyrich within the correct standard range).

Jackson was sentenced to a standard range that was above the five year mandatory minimum, but his plea was still involuntary. He stands in the same situation as a defendant who is misadvised of a statutory maximum even though the standard range does not reach the maximum.

The Court of Appeals nevertheless refused to allow Jackson to withdraw his plea. Because a factual finding that a defendant meets the requirements of RCW 9.94A.540(1)(b) must be made before imposing the mandatory minimum, the Court of Appeals claimed "*nothing in the record supports Jackson's claim that he was informed that the court would in fact make the necessary findings* and impose this minimum sentence. Jackson identifies no place in the record where he was told, either orally or in

writing, that the court would impose a minimum sentence of five years." Slip op. at 9 (emphasis added).

But Jackson never claimed "he was informed that the court would in fact make the necessary findings." His claim is that he was misinformed that a mandatory minimum sentence would be imposed as part of his guilty plea, without regard to whether any finding needed to be made. And that is precisely what happened. Jackson was never informed that the first degree assault conviction was subject to the mandatory minimum sentence only if the court made a factual finding pursuant to RCW 9.94A.540(1)(b). Rather, he was informed, without qualification, that the first degree assault conviction carried a mandatory minimum sentence of five years in confinement. CP 18; 2RP 9.

The State bears the burden of showing that the defendant knew of all direct consequences of his plea. Ross, 129 Wn.2d at 287. Contrary to the Court of Appeals' claim, the record shows Jackson was told the first degree assault conviction carried a mandatory minimum term. Paragraph (4)(i) of the plea form states:

> *The crime of Assault 1 has a mandatory minimum sentence of at least 5 years of total confinement. The law does not allow any reduction of this sentence.* For crimes committed on or after July 24, 2005, this does not apply to juveniles tried as adults pursuant to a transfer of jurisdiction under RCW 13.40.110 (see RCW 9.94A.540(3)). [If not

applicable, this paragraph should be stricken and initialed by the defendant and judge RJ.]

CP 18 (emphasis added).

This paragraph is crossed out and initialed by Jackson but not the judge. CP 18. In the margin of the plea form, a handwritten bracket encompasses the paragraph with the word "Applies." CP 18. Significantly, the plea form says nothing about the ability of the court to enter a mandatory minimum term of confinement only if a factual finding is made to support it.

During the plea colloquy, the prosecutor asked Jackson with reference to the plea form "Do you understand that paragraph I -- and this is on page 5 -- applies? So that assault in the first degree does have a mandatory minimum sentence of five years. Do you understand this?" 2RP 9. Jackson answered, "Yes." 2RP 9. Neither the prosecutor nor the judge said a mandatory minimum term of confinement would be imposed only if a factual finding were made to support it.

The trial court could have imposed a mandatory minimum if Jackson had waived his right to a jury trial on the issue and the court had made the requisite finding. But this appeal is not about what *could* have happened. It's about what *did* happen. Had Jackson been informed that the mandatory minimum term applied only if the necessary factual finding

were made, then the plea would be valid. But that is not what happened. Jackson was informed the first degree assault conviction carried a mandatory minimum term without any sort of qualification that he was subject to that minimum term only if it was supported by the requisite factual finding.

If a defendant is unconditionally told he will receive an exceptional sentence as part of his plea and then does not receive it, that plea is involuntary. See State v. Winborne, 167 Wn. App. 320, 330, 273 P.3d 454, review denied, 174 Wn.2d 1019, 282 P.3d 96 (2012) (an affirmative misrepresentation that defendant would receive an exceptional sentence downward if he pleaded guilty would be a basis for permitting withdrawal of his plea). It makes no difference whether the court entered the necessary factual finding to support an exceptional sentence.

Jackson's situation is analogous. Where a guilty plea is based on misinformation regarding the direct consequences of the plea, the defendant may withdraw the plea based on involuntariness. Mendoza, 157 Wn.2d at 584. Jackson should be allowed to withdraw his plea for this reason.

F. CONCLUSION

For the reasons stated, Jackson requests that this Court grant review.

DATED this 6th day of October 2014.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROY PURCELL JACKSON, JR., Appellant.	)	NO. 69423-5-I DIVISION ONE UNPUBLISHED OPINION FILED: August 11, 2014

LEACH, J. — Roy Jackson Jr. appeals his conviction for assault in the first degree and assault in the second degree. He claims that his guilty plea was involuntary because he received misinformation about the sentencing consequences of this plea. Jackson also claims that the trial court abused its discretion when it denied his request for a competency evaluation and that the court had no authority to impose a lifetime no-contact order. Because Jackson shows no error, we affirm.

FACTS

On April 20, 2011, while riding a Metro bus, Jackson shot passenger Antoine Greenhaigh twice in the stomach. Jackson then pointed the gun at the bus driver, Margaret Caster, and told her to open the door to let him out. After Caster complied, Jackson ran away.

The State charged Jackson with first degree assault against Greenhaigh and second degree assault against Caster. The State sought firearm enhancements on both counts.

After Jackson's arraignment, Dr. Kenneth Muscatel, an expert from the King County Office of the Public Defender, evaluated Jackson "to see if . . . [Jackson] had a defense of diminished capacity." Muscatel described Jackson as "a paranoid, suspicious but also rather cagey individual," who claimed no memory of the shooting initially based upon the "misplaced belief that not remembering what occurred was sufficient for a mental defense." Muscatel determined that Jackson "has chronic paranoid features and was high on Sherm and marijuana at the time of the alleged incident." He opined that Jackson had the "capacity to form the general intent to pull, point and shoot the gun at the victim" and that "there is insufficient information to conclude he was so impaired he couldn't form the intent to assault." Muscatel concluded that Jackson "does not meet the level of Diminished Capacity." In his report, Muscatel stated that he had "little doubt" that Jackson "engaged in this conduct due to factors of mental health and substance abuse. Such factors meet the criteria for a court to consider as mitigating factors in rendering a sentence if Mr. Jackson were found guilty of this offense."

On November 23, 2011, defense counsel Kris Jensen asked for a competency evaluation at Western State Hospital because Jackson was "inconsistent in his communicating" with Jensen. Jensen stated that his

conversations with Jackson "have always been . . . hit or miss. Sometimes he is with me, sometimes he is not [with] me; sometimes we have nutty discussions, and sometimes they are kind of on point." He told the court that his initial requests to visit Jackson in jail were unsuccessful. Because Jackson was "being very uncooperative," jail personnel would not bring him out. Jensen stated that on November 14, 2011, he visited Jackson, who was "completely off his rocker." Jensen explained that although Jackson recognized Jensen during that visit, Jackson was yelling, punching the glass, "pointing to a Band-Aid on the inside of his arm, saying that, They are doing things to him. Look at, they took my blood. They stabbed me with things. You can't believe what they are doing to me—kind of yelling around the room." Jensen acknowledged that Jackson understood the charges against him and was sometimes helpful in analyzing the case.

The State opposed the defense request for a competency evaluation. The prosecutor noted, "The question before the Court is whether Mr. Jackson, sitting before the Court today, is competent to be here." The State played a recorded jail phone call from November 7, 2011, in which Jackson stated, "I am going to tell you more when you come here to visit me because I don't know, I might try to pump—act like I am—thinking I ought to win, and then just wait for a visit, you know what I'm saying?" The prosecutor told the court, "That would be the relevant part of the conversation where he says 'I am going to act like'—and he uses kind of lingo for crazy . . . . 'I am going to act like I am crazy and wait for a better offer.'" The State also played a recorded jail phone call from November

14, 2011, the day that defense counsel characterized Jackson as "off his rocker." In this call, which Jackson had someone place on his behalf, the caller communicated Jackson's message that "he is hoping to go to Western." The State noted that Jackson appeared lucid in both of these phone calls.

The trial court denied Jackson's motion for a competency evaluation. The court reasoned,

> I certainly think that there are some issues here that are appropriately before the Court, in terms of what has been diagnosed as a polysubstance dependence—some kind of paranoid features, and so forth—but it sounds to me like the defendant is able to understand the nature of the charges against him, and it sounds to me like the defendant is reasonably able to assist in his—in his defense—by talking with counsel.
>
> The fact that he may be paranoid, at times, does not suggest to me that he is unable to communicate with counsel; the fact that he had an episode on the 22nd—no, that was November 14, two weeks ago, does not suggest to me that he would not be able to confer with counsel.
>
> It may in fact involve special meeting times and so forth and so on, and may be a truncated schedule, but I don't see anything that suggests, on this record, that he is unable to assist the defense.
>
> And again, really—the forensic psychological evaluation from Dr. Muscatel suggests that there could be some convenient lapses in judgment on the part of the defendant, and that would not support the request to have him evaluated.

On May 15, 2012, Jackson pleaded guilty as charged. Paragraph 6(i) of Jackson's statement on the guilty plea stated,

> IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA(S), I UNDERSTAND THAT:
>
> . . . .
>
> The crime of Assault 1 has a mandatory minimum sentence of at least 5 years of total confinement. The law does not allow any reduction of this sentence. . . . [If <u>not</u> applicable, this paragraph should be stricken and initialed by the defendant and judge.]

Jackson crossed out and initialed this paragraph, but the judge did not. In the margin of the document, a handwritten bracket appears around this paragraph along with the word "Applies."

At the plea colloquy hearing, Jackson told the court that he had an opportunity to review the plea form with his attorney. The court asked Jackson if he understood "paragraph i—and this is on page 5—applies? So that assault in the first degree does have a mandatory minimum sentence of five years. Do you understand that?" Jackson replied, "Yes." The court found the plea to be knowing, intelligent, and voluntary.

Before sentencing, Jackson moved to withdraw his guilty plea based upon ineffective assistance of counsel. He told the court,

> Well, I feel like I was really manipulated into taking this plea agreement or whatever, and basically a while back, Kris Jensen, he stated that if I showed the prosecutor this thing that I did with this doctor named Muscatel . . . . that I could get 15 years, you know what I'm saying? And basically that didn't happen, it was said 15 years to 21, and I feel like that is against my rights, and I would like to be able to stand trial, and I asked Kris Jensen to file motions for me, and he said that he would not file these motions for me—to get into Western State, and things of that nature, because I really have mental problems, and he wouldn't do any of those motions.

The court appointed additional counsel to advise Jackson if a legal basis existed on which to withdraw his guilty plea.

On September 19, 2012, Jackson's new attorney filed a motion to withdraw his guilty plea. Jackson claimed that he "was confused about the proceedings and about the evidence against him" and that he "had not enough time to talk to his attorney about the case but was pressured to take the deal by

his attorney and his family." He alleged that Jensen failed to "accommodate Mr. Jackson's mental illnesses and ensure his comprehension of complex legal and factual matters." Jackson also asserted that Jensen "did not conduct the necessary investigation in order to provide Mr. Jackson with sufficient information to make a knowing and intelligent waiver."

At a hearing on this motion, Jackson alleged that he did not have enough information to make a valid waiver. His attorney argued,

> [H]e has been provided with some discovery, but not all of it; he had a couple of witnesses interviewed, but not all of them; and the defense position is that because not all of the information was provided to Mr. Jackson, and not all of the important witnesses were interviewed in this case, Mr. Jackson was not able to make a valid waiver of his rights at the time that he did the guilty plea.

The court determined that Jackson failed to show ineffective assistance of counsel sufficient to withdraw his guilty plea. The court reasoned, "There is nothing in the record to indicate that he was coerced or forced into pleading guilty—but perhaps most importantly, there is absolutely nothing in the record to show prejudice in this case." The court concluded, "Mr. Jackson has admitted to committing these heinous crimes, he has waived his trial rights, and stated that he voluntarily was making his plea of guilty, so the motion to withdraw the guilty plea is denied."

The court imposed standard range sentences of 162 months on the first degree assault count and 43 months on the second degree assault count, to run concurrently, and firearm enhancements of 60 months and 36 months, respectively, to run consecutively. The court also imposed 36 months of

community custody and an order prohibiting contact with Greenhaigh and Caster for life.

Jackson appeals.

ANALYSIS

Jackson raises three issues. First, he claims that his guilty plea is invalid because "he was misinformed that a mandatory minimum sentence would be imposed for the first degree assault conviction under count I." Second, he asserts, "The court violated due process and statutory mandate in using the wrong standard of proof to deny a competency evaluation." Third, Jackson claims, "The court exceeded its authority in ordering no contact with the victim under count II for a period of time that exceeds the statutory minimum for the offense."

Jackson first claims that he is entitled to withdraw his guilty plea because he "was misinformed about a direct consequence of his plea because he was informed he would receive a mandatory minimum sentence but did not receive a mandatory minimum sentence."[1] A guilty plea is valid if it is intelligently and voluntarily made and if the defendant knows that he will waive certain rights.[2] A

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[1] Jackson may raise this issue for the first time on appeal because "a defendant's misunderstanding of the sentencing consequences when pleading guilty constitutes a 'manifest error affecting a constitutional right.'" State v. Mendoza, 157 Wn.2d 582, 589, 141 P.3d 49 (2006) (internal quotation marks omitted) (citing State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001)).

[2] State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

plea is not knowingly made if it is based upon misinformation about the sentencing consequences.[3]

The court must allow a defendant to withdraw a guilty plea if it appears necessary to correct a manifest injustice.[4] A manifest injustice exists if (1) the defendant did not ratify the plea, (2) the plea was not voluntary, (3) counsel was ineffective, or (4) the plea agreement was not kept.[5] This injustice must not be obscure; it must be obvious, directly observable, and overt.[6] "The defendant's burden when seeking to withdraw a plea is demanding because ample safeguards exist to protect the defendant's rights before the trial court accepts the plea."[7]

Jackson contends "he was informed he would receive a mandatory minimum sentence but did not receive a mandatory minimum sentence." The record does not support this claim. The provision in Jackson's statement on plea of guilty pertinent to his claim provides, "The Crime of Assault 1 has a mandatory minimum sentence of at least 5 years of total confinement. The law does not allow any reduction of this sentence." Under the facts of this case, this correctly stated the applicable law.

RCW 9.94A.540(1) provides,

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[3] In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) (citing State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988)).

[4] CrR 4.2(f).

[5] State v. DeClue, 157 Wn. App. 787, 792, 239 P.3d 377 (2010) (citing State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001)).

[6] DeClue, 157 Wn. App. at 792 (quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)).

[7] DeClue, 157 Wn. App. at 792 (citing Taylor, 83 Wn.2d at 596-97).

> [T]he following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:
>
> . . . .
>
> (b) An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

Although the trial court must make factual findings that a defendant meets the requirements of the statute before imposing this minimum,[8] Jackson does not challenge the State's assertion that the record would support the necessary finding easily. But nothing in the record supports Jackson's claim that he was informed that the court would in fact make the necessary findings and impose this minimum sentence. Jackson identifies no place in the record where he was told, either orally or in writing, that the court would impose a minimum sentence of five years. Instead, the record explains why the court imposed a different sentence and affirmatively demonstrates that Jackson was properly informed about the direct consequences of his plea.

With Jackson's criminal history, the standard range for his conviction for assault in the first degree was 162 to 216 months. The firearm enhancement added an additional consecutive 60 months. The firearm enhancement for the assault in the second degree conviction added another consecutive 36 months. Thus, Jackson's plea exposed him to an actual minimum standard range of 258 months. Jackson's plea agreement informed him of this and also allowed his

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[8] State v. McChristian, 158 Wn. App. 392, 402-03, 241 P.3d 468 (2010).

counsel to request a downward deviation to 180 months "per failed mental defense."

The sentencing court noted, "This was a vicious, pointless crime against an innocent person, putting the lives of numerous innocent people at risk, a crime against a bus driver trying to do her job who was terrified half to death that she was about to die—no reason for the crime." The court declined Jackson's request to impose a sentence below the standard range and imposed the State's recommended sentence. Because Jackson fails to show any representation that the court would impose a five-year minimum sentence on the first degree assault count, he fails to show a manifest injustice. We deny his request to withdraw his guilty plea.

Jackson also claims, "The court violated due process and statutory mandate in denying the motion for a competency evaluation because it used the wrong standard of proof." He alleges that the court erroneously applied a "preponderance of the evidence" instead of a "reason to doubt" standard when deciding his request. After the trial court denied Jackson's motion for a competency evaluation, Jackson did not raise this issue again. He did not raise this issue in his motion to withdraw his guilty plea.

A decision to order a competency evaluation rests generally within the trial court's discretion.[9] A court abuses its discretion if it bases that decision upon untenable or manifestly unreasonable grounds.[10]

Because Jackson did not preserve this issue in the trial court, he must show a manifest error affecting a constitutional right.[11] We must determine if the alleged error suggests a constitutional issue and if the error is manifest—if the asserted error had practical and identifiable consequences in Jackson's case.[12] We address the merits of the constitutional issue only if the claimed error is manifest.[13] If we find a manifest constitutional error, we then apply a harmless error analysis.[14]

The due process clause of the Fourteenth Amendment to the United States Constitution prohibits the conviction of a person who is not competent to stand trial.[15] Under Washington law, an incompetent person may not be tried, convicted, or sentenced for committing an offense so long as the incapacity continues.[16] To be legally competent, a criminal defendant must be able to

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[9] In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001) (citing State v. Thomas, 75 Wn.2d 516, 518, 452 P.2d 256 (1969)).

[10] State v. Jamison, 105 Wn. App. 572, 590, 20 P.3d 1010 (2001).

[11] RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

[12] State v. Harris, 154 Wn. App. 87, 94, 224 P.3d 830 (2010) (citing State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

[13] Harris, 154 Wn. App. at 94 (citing Lynn, 67 Wn. App. at 345).

[14] Harris, 154 Wn. App. at 94 (citing Lynn, 67 Wn. App. at 345).

[15] Fleming, 142 Wn.2d at 861 (citing Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)).

[16] Fleming, 142 Wn.2d at 862 (quoting RCW 10.77.050).

understand the nature of the charges against him and must be capable of assisting in his defense.[17] The competency standard for pleading guilty is the same as the competency standard for standing trial.[18]

> When a reason exists to doubt a defendant's competency,
>
> the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.[19]

To determine whether or not to order a competency evaluation, a trial court may consider the defendant's appearance, demeanor, conduct, personal and family history, past behavior, mental and psychiatric reports, and statements from defense counsel.[20]

If the court orders a competency hearing, a defendant has the burden of proving by a preponderance of the evidence that he is incompetent to stand trial.[21] "Preponderance of the evidence means that considering all the evidence, the proposition asserted must be more probably true than not true."[22]

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[17] Fleming, 142 Wn.2d at 862 (citing State v. Hahn, 106 Wn.2d 885, 894, 726 P.2d 25 (1986); State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985)).

[18] Fleming, 142 Wn.2d at 862 (citing Godinez v. Moran, 509 U.S. 389, 399, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993)).

[19] Former RCW 10.77.060(1)(a) (2004).

[20] Fleming, 142 Wn.2d at 863 (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)).

[21] Medina v. California, 505 U.S. 437, 450-51, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); State v. P.E.T., 174 Wn. App. 590, 597, 300 P.3d 456 (2013), petition for review filed, No. 89157-5 (Wash. Aug. 2, 2013).

[22] State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009) (citing State v. Ginn, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005)).

"[A] court is not obliged to determine a defendant's competency when there is no factual basis for doubting it in the first place."[23] The mere existence of a mental disorder does not establish incompetency.[24] And the ability to assist defense counsel does not require the defendant to be able to choose or suggest trial strategy.[25] In State v. Hicks,[26] the court determined that the fact the defendant was angry with his attorney and not fully cooperative did not mean that he was incompetent to stand trial.

When asked about the proper standard and burden of proof to order a competency hearing, the prosecutor cited City of Seattle v. Gordon[27] in stating, "Before a determination of competency is required, the Court must make a threshold determination that there is reason to doubt his competency." Jensen stated that he did not know the proper standard. The court later stated, "I believe that the standard is a preponderance of the evidence."

Jackson fails to show a manifest error warranting appellate review. Even if the court applied the incorrect standard, Jackson's communications with his attorney provide no indication that he failed to understand the charges against him or was unable to assist his attorney when he pleaded guilty. And Muscatel's report presented no evidence that Jackson was incompetent to stand trial or to

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[23] State v. DeLauro, 163 Wn. App. 290, 296, 258 P.3d 696 (2011) (citing State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991); City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985)).

[24] State v. Smith, 74 Wn. App. 844, 850, 875 P.2d 1249 (1994).

[25] State v. Benn, 120 Wn.2d 631, 662, 845 P.2d 289 (1993); Ortiz, 104 Wn.2d at 483-84.

[26] 41 Wn. App. 303, 309, 704 P.2d 1206 (1985).

[27] 39 Wn. App. 437, 441, 693 P.2d 741 (1985).

plead guilty. The State's evidence suggests that Jackson was lucid and tried to appear incompetent to benefit his case. Indeed, Jensen told the court that Jackson understood the charges against him and was sometimes helpful in analyzing the case. Nothing in the record about Jackson's appearance, demeanor, or conduct during the proceedings suggests incompetence.

Finally, Jackson alleges that the trial court abused its discretion when it imposed an order prohibiting contact with Caster for life. We also review sentencing conditions for an abuse of discretion.[28] This court will usually uphold sentencing conditions if they are reasonably crime related.[29]

RCW 9.94A.505(8) permits a court to impose and enforce crime-related prohibitions as part of any sentence. A "crime related prohibition" is a court order "prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted."[30] A court may impose crime-related prohibitions "for a term of the maximum sentence to a crime, independent of conditions of community custody."[31] Crime-related prohibitions may include orders prohibiting contact with witnesses.[32]

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[28] State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (citing State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)).

[29] Warren, 165 Wn.2d at 32.

[30] RCW 9.94A.030(10).

[31] Warren, 165 Wn.2d at 32 (citing State v. Armendariz, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007)).

[32] State v. Janda, 174 Wn. App. 229, 235, 298 P.3d 751 (2012) (citing RCW 9.94A.505(8), review denied, 176 Wn.2d 1032, cert denied, 134 S. Ct. 221 (2013); Armendariz, 160 Wn.2d at 110); State v. Ancira, 107 Wn. App. 650, 656, 27 P.3d 1246 (2001).

Jackson pleaded guilty to first degree assault against Greenhaigh and second degree assault against Caster. The maximum sentence for first degree assault is life and the maximum sentence for second degree assault is 10 years.[33] Because Caster witnessed Jackson's assault against Greenhaigh and the assault against her arose from the assault against Greenhaigh, the trial court did not abuse its discretion when it prohibited contact with Caster for life.

CONCLUSION

Because Jackson fails to establish grounds entitling him to withdraw his guilty plea, a manifest error affecting a constitutional right allowing him to challenge the trial court's denial of his motion for a competency evaluation, or that the trial court abused its discretion when it prohibited contact with Caster for life, we affirm.

Leach, J.

WE CONCUR:

Trickey, J

Cox, J.

[33] RCW 9A.36.011(2); RCW 9A.20.021(1)(a); RCW 9A.36.021(2)(a); RCW 9A.20.021(1)(b).

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROY PURCELL JACKSON, JR., Appellant.	)	NO. 69423-5-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Roy Purcell Jackson, Jr., having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 4th day of September, 2014.

FOR THE COURT:

Leach, J.
Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 69423-5-I
	)	
ROY JACKSON,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF OCTOBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROY JACKOSN
DOC NO. 334536
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF OCTOBER 2014.

X Patrick Mayovsky