Supreme Court No. 97623-6
(COA No. 77929-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JIMMIE YORK, II,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jimmie York, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. York seeks review of the decision by the Court of Appeals dated August 5, 2019, a copy of which is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A guilty plea is not knowing, intelligent, and voluntary when the accused person does not understand the sentencing consequences. Mr. York immediately moved to withdraw his plea when he discovered the plea rested on a sentencing error but the court told him he was bound by his plea, even though he had not been sentenced yet. Should this Court grant review to address the fundamental constitutional issues raised when the record shows the defendant did not understand the operation of sentencing laws at the time he pled guilty and he promptly moved to withdraw his plea when he learned of the error?

2. An accused person's right to effective assistance of counsel under the Sixth Amendment and article I, section 22 includes the right to an attorney who meaningfully advises the accused about the operation of sentencing laws. Mr. York's attorney did not research the relevant sentencing laws and did not explain Mr. York was waiving an available same criminal conduct argument as part of his plea. Did Mr. York receive ineffective assistance of counsel based on his lawyer's failure to understand, explain, or argue in favor of a statutorily available sentencing reduction?

3. A guilty plea is also invalid where the plea does not contain an admission to all essential elements of the offense. Mr. York's plea did not include any admission or discussion of the essential element of domestic violence, even those this essential factual claim elevates the sentencing consequences. Should this Court grant review to address whether the aggravating element of domestic violence must be included as a knowing, intelligent, and voluntary component of a guilty plea that the prosecution must prove under the due process clauses of the state and federal constitutions?

D. STATEMENT OF THE CASE

In March 2017, Jimmie York pled guilty to second degree assault by strangulation and felony harassment. CP 40.

Mr. York pled guilty based on a standard range that treated these two offenses separately in his offender score. CP 41, 247. Because each offense was charged as a "domestic violence" crime, they counted for two points under RCW 9.94A.525(21), raising his offender score from an "8" to a "10." Mr. York's Statement on Plea of Guilty and his colloquy in court do not mention domestic violence under RCW 9.94A.030, or the definitions of domestic violence. CP 40-53; (3/22/17)RP 78-80, 83. His plea statement makes no mention of the family or household nature of his relationship with the complainant, Tamicko Watts. CP 52.

Mr. York asked to withdraw his plea shortly after he entered it, before sentencing. (5/11/17)RP 97. The court appointed a new lawyer for Mr. York. (5/11/17)RP 97. His new lawyer believed Mr. York was not competent. (8/25/17)RP 108, 111. The competency issues rested on Mr. York's fixed belief that

a former lawyer Ken Harmell, [1] prosecutor Jessica Berliner, as well as a judge had stolen his identity and deprived him of access to his bank account. (6/7/16)RP 4; (12/6/17)RP 185-87, 212. After a contested competency hearing, the court ruled Mr. York was presently competent. 12/6/17RP 262.

The court held a hearing on Mr. York's motion to withdraw his guilty plea. (1/12/18)RP 271. Mr. York explained his two offenses should be treated as same criminal conduct and it was a "mutual mistake" to count these offenses separately. CP 244, 247. The attorney who represented him at the time of the plea testified that he had no notes indicating he had investigated same criminal conduct and it was not the type of issue he would have investigated until sentencing, because he thought of it as a sentencing issue and not a plea issue. (1/12/18)RP 276-77. The prosecution claimed Mr. York waived complaining about his offender score when his hi guilty plea said he faced a certain offender score. (1/12/18)RP 278; CP 277.

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[1] Mr. York also pled guilty to fourth degree assault for punching Ken Harmell one day in court, apparently due to his anger over Mr. Harmell's theft from him. CP 275. At sentencing, Mr. Harmell said Mr. York's actions stemmed from his untreated mental health problems and he should not serve any jail time for the assault.

The court ruled that Mr. York's guilty plea contained an implicit agreement that same criminal conduct did not apply because it stated the standard range and he said he understood this standard range. (1/12/18)RP 281-82. The Court of Appeals agreed, ruling Mr. York necessarily waived any error in the offender score by saying a certain standard range applied. Slip op at 7.

Mr. York also contended his attorney provided ineffective assistance. CP 243. His attorney failed to investigate a defense of diminished capacity, which defense counsel conceded. (1/12/18)RP 274-76. He also complained he received ineffective assistance from his attorney's failure to raise same criminal conduct and his attorney's ineffectiveness left him with no choice but to plead guilty. On appeal, he also explained that the plea invalidly omitted the essential factual predicate to the domestic violence aggravator.

The Court of Appeals ruled Mr. York was not entitled to withdraw his plea on any of the grounds presented.

(1/12/18)RP 285.

E. ARGUMENT

The Court of Appeals opinion impermissibly refuses to grant a timely motion to withdraw a guilty plea even though the defendant did not admit to all essential elements of the aggravated offense and his attorney admitted he did not understand sentencing laws.

1. A guilty plea is invalid when it is not knowingly, intelligently and voluntarily entered.

Due process requires a guilty plea may be accepted only if the accused person understands the plea's consequences and enters the plea knowingly and voluntarily. *State v. A.N.J.,* 168 Wn.2d 91, 117, 225 P.3d 956 (2010); *Boykin v. Alabama,* 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); U.S. Const. amend. XIV; Const. art. I, § 3.

The record must "affirmatively" show "a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea." *Wood v. Morris*, 87 Wn.2d 501, 502-03, 554 P.2d 1032 (1976); *Boykin*, 395 U.S. at 243-44 (court accepting a guilty plea must "canvas[ ] the matter with the accused to made sure he has a full understanding" of plea and "its consequence").

"A guilty plea is not knowingly made when it is based on misinformation regarding sentencing consequences." *In re Pers. Restraint of Quinn*, 154 Wn. App. 816, 835-36, 226 P.3d 208 (2010); *see also State v. Wakefield,* 130 Wn.2d 464, 472, 925 P.2d 183 (1996) ("At all times, the defendant must understand the consequences of pleading guilty"); *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988) ("A defendant must understand the sentencing consequences for a guilty plea to be valid").

Defense counsel must accurately inform the accused of the sentencing consequences of the charges. *Padilla v. Kentucky*, 559 U.S. 356, 373, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); U.S. Const. amends. VI, XIV; Const. art. I, § 22.

Counsel's failure to research the operative sentencing laws and accurately explain the consequences of pleading guilty undermines the validity of a guilty plea if there is a reasonable probability that counsel's incorrect advice affected the decision to plead guilty. *Lafler v. Cooper*, 566 U.S. 156, 163, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

2. *The Court of Appeals opinion conflicts with other decisions on when a person may withdraw a guilty plea.*

Misinformation about sentencing serves as a basis to withdraw a plea when timely raised. *State v. Mendoza*, 157 Wn.2d 582, 592, 141 P.3d 49 (2006); *see State v. Buckman*, 190 Wn.2d 51, 59, 409 P.3d 193 (2018) ("Buckman was misinformed of his possible sentencing consequences and this misinformation rendered Buckman's plea involuntary"). A criminal defendant properly preserves a plea agreement error by raising "the issue of misinformation" when he learns of the error before sentencing. *Quinn*, 154 Wn. App. at 841 ("Quinn personally attempted to raise the issue" of misinformation about sentencing consequences at plea withdrawal hearing).

A manifest injustice authorizing plea withdrawal includes denial of effective assistance of counsel, an involuntary plea, the defendant not ratifying the plea, or the prosecution not keeping the plea agreement. *State v. Moore*, 75 Wn. App. 166, 171-72, 876 P.2d 959, 962 (1994), citing *State v. Saas,* 118 Wn.2d 37, 42, 820 P.2d 505 (1991); CrR 4.2(f).

In *Moore*, the defendant and prosecution entered a plea bargain, both believing a prior deferred sentence did not count in his offender score. *Id.* at 172. Once Mr. Moore learned how the sentencing laws operated in his case, he argued his plea was involuntary because "he did not know all the consequences of the plea at the time he entered it." *Id.* The Court of Appeals held "it was manifestly unjust to deny Moore's request to withdraw his guilty plea" because he misunderstood the sentencing laws controlling his case. *Id.* at 174.

But here, the Court of Appeals did not follow *Moore*, even though Mr. York did not know when he pled guilty his offender score would decrease under same criminal conduct laws and he did not admit to the essential elements of the domestic violence aggravating factor.

a. Mr. York did not knowingly or intelligently waive the operation of same criminal conduct sentencing laws.

The Court of Appeals ruled Mr. York waived any objection to his offender score by pleading guilty. It found the plea agreement set out a specified standard range and this standard

range was in turn premised on a certain offender score. (1/12/18)RP 281-82; Slip op. at 7.

However, a waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *State v. Thang,* 145 Wn.2d 630, 648, 41 P.3d 1159 (2002) ("[w]aiver is the voluntary relinquishment of a right"). Mr. York did not knowingly or intelligently waive the right to a sentence based on same criminal conduct. On the contrary, he raised this issue when he learned of it. CP 244-47; (1/12/18)RP 289.

The court must properly calculate a person's offender score before imposing sentence. *In re Pers. Restraint of Goodwin,* 146 Wn.2d 861, 864, 50 P.3d 618 (2002). If no one raises a sentencing issue, the court may rely on unchallenged facts and information. RCW 9.94A.530(2) ("[a]cknowledgement includes not objecting . . . at the time of sentencing"). But a defendant's actual objection to his sentence does not constitute an agreement or waiver. *State v. Bergstrom,* 162 Wn.2d 87, 96, 169 P.3d 816 (2007) (defendant's pro se objection to whether prior

convictions constituted same criminal conduct constituted valid objection despite counsel's agreement to standard range).

The evidentiary hearing showed that no party to the plea agreement actually or affirmatively agreed to forgo the operation of same criminal conduct laws. CP 247; (1/12/18)RP 277, 289. Mr. York did not know about these laws. His attorney had not researched its applicability and considered it something to look into at sentencing. (1/12/18)RP 276-77. The prosecution never claimed it discussed same criminal conduct with Mr. York or his attorney and never described a mutual agreement to disregard same criminal conduct's application to the case.

When Mr. York entered his plea agreement, he did not understand that same criminal conduct laws could apply to treat his two convictions as one offense. He sought to withdraw his plea when he learned that same criminal conduct sentencing laws would reduce his offender score from "10" to "8" and lower his standard range. *Id.* Mr. York's understanding of the terms of the agreement controls the terms of the plea. He did not knowingly, intelligently, or voluntarily waive the operation of same criminal conduct laws.

b. Mr. York is entitled to withdraw his plea because his attorney did not understand or explain the controlling sentencing laws.

Defense counsel's obligation to understand the law and accurately explain it his client includes the sentencing consequences of a conviction. *See State v. McGill*, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002) (finding ineffective assistance of counsel for failing to ask for exceptional sentence downward based on multiple offense policy); *see also State v. Saunders,* 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004) (ineffective assistance of counsel for failing to ask court to treat offenses as same criminal conduct).

An attorney's failure to assist his client with understanding the important consequences of a guilty plea constitutes ineffective assistance of counsel. *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 105, 351 P.3d 138 (2015).

Defense counsel testified that he had not considered whether Mr. York's offender score would be reduced under same criminal conduct laws. (1/12/18)RP 276-77. He did not inform Mr. York he was waiving a same criminal conduct argument by pleading guilty based on a specific offender score.

Defense counsel's failure to argue same criminal conduct constitutes ineffective assistance of counsel where two crimes occurred at the same time and place, against the same victim, and the defendant's "intent was arguably similar" for both offenses. *Saunders*, 120 Wn. App. at 825; *see State v. Phong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013) (counsel ineffective for failing to argue same criminal conduct at sentencing because "there is a reasonable probability" court would have found same criminal conduct).

Here, counsel's deficient performance prejudiced Mr. York because it is reasonably probable that the offenses of conviction would be found to constitute same criminal conduct and would reduce Mr. York's offender score. The two simultaneously occurring offenses, committed against the same person, were part of the same overarching plan. There is a reasonable probability that had counsel raised this sentencing issue, he would have shown that same criminal conduct law reduced Mr. York's offender score and standard range.

Defense counsel's failure to inform Mr. York that same criminal conduct laws could reduce his offender score

demonstrate counsel's performance was deficient and prejudicial. And Mr. York's misunderstanding of the operative sentencing laws underlying the standard range invalidate the knowing, intelligent, and voluntary nature of his plea. Mr. York should have been permitted the opportunity to withdraw his plea.

3. Mr. York's guilty plea is also invalid because it was not premised on his understanding of and admission he committed the conduct essential to the charged offenses.

A guilty plea is not knowing and intelligent if the defendant does not understand the essential elements of the offense and admit his conduct satisfied those elements. *In re Pers. Restraint of Hews,* 99 Wn.2d 80, 87-88, 660 P.2d 263 (1983) (defendant must understand that his alleged criminal conduct satisfies the elements of the offense); *State v. Chervenell,* 99 Wn.2d 309, 318-19, 662 P.2d 836 (1983) (plea involuntary if defendant lacks understanding of law in relation to facts). A constitutionally invalid guilty plea gives rise to actual prejudice. *Matter of Montoya,* 109 Wn.2d 270, 277, 744 P.2d 340 (1983).

When a felony conviction is predicated on the added element of "domestic violence as defined in RCW 9.94A.030,"

this element increases a defendant's offender score. RCW 9.94A.525(21). The added points constitute additional punishment. *Id.*

To prove the element of "domestic violence," the prosecution must present sufficient evidence that the crime was committed against "family or household members." RCW 10.99.020(3). And it must also prove that the underlying offense involves a qualifying crime. RCW 26.50.010(3); RCW 10.99.020(3).

The controlling definitions of domestic violence in this context are contained in RCW 26.50.010(3) and RCW 10.99.020(3). *State v. Ross*, 183 Wn. App. 768, 355 P.3d 306 (2015). RCW 26.50.010(3) defines domestic violence as involving physical harm or fear of imminent physical harm, sexual assault, or stalking by a family or household member. RCW 10.99.020(3) defines domestic violence by listing certain qualifying predicate offenses committed by a family or household member; assault in the second degree is a listed offense but felony harassment is not. *Id.*

Mr. York's Statement on Plea of Guilty and his colloquy in court do not mention domestic violence under RCW 9.94A.030, or the definitions of domestic violence. CP 40-53; (3/22/17)RP 78-80, 83. His plea statement makes no mention of the family or household nature of his relationship with the complainant, Tamicko Watts. CP 52.

Mr. York's guilty plea includes a factual explanation of "what I did that makes me guilty." CP 52. Yet this makes no mention of the facts necessary to prove "domestic violence" as a matter of law. CP 52. It contains no reference to his relationship to the complaining witness. CP 52.

Other parts of the Statement on Plea of Guilty similarly fail to set forth the necessary factual basis for this plea to a "domestic violence" offense. The written plea statement lists the charges as "Assault II DV and Felony Harassment DV," without spelling out the abbreviations. CP 40; *see also* CP 52 (listing crimes to which Mr. York pleads guilty as "Assault 2nd –DV [and] Felony Harassment – DV."). The written agreement does not explain the punishment that is added based on a domestic violence finding. CP 40-53.

Mr. York pled guilty after several trial continuances and following Mr. York's own objections to the violation of his speedy trial rights. (12/6/16)RP 66-68 (Judge Middaugh); (12/6/16)RP 21-22 (Gain);[2] 3/22/17RP 73; CP 284-317. His actions show he expected to take his case to trial, rather than enter a plea. He later complained that he opted for a guilty plea due to his attorney's ineffectiveness in mounting a defense. Supp. CP __, sub no. 136.

The in-court plea colloquy does not discuss the elevated punishment predicated on proving domestic violence. 3/22/17RP 78-79. The prosecutor did not call Mr. York's attention to the factual predicate for adding punishment based on "domestic violence."

For a valid guilty plea, a person must "understand the critical elements of the crime and admit to conduct which satisfies those elements." *Matter of Hews,* 108 Wn.2d 579, 596, 741 P.2d 983 (1987).

Here, there was no discussion about the elements necessary to prove the domestic violence nature of the offenses.

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[2] Mr. York had two hearings on Dec. 6, 2016, in front of Judges

Mr. York's explanation of what he did that made him guilty contains no mention of what conduct satisfied this essential element. He did not knowingly, intelligently, and voluntarily plead guilty to domestic violence offenses, which were a critical component of the charges and the punishment he received. This fundamental omission undermines Mr. York's guilty plea.

This Court should grant review because the Court of Appeals decision conflicts with rulings from this Court and other Court of Appeals decisions. It also raises an issue of substantial public interest, because the aggravating sentencing elements are part of the offense and factual admissions central to the enhanced punishment must be included as an essential part of a guilty plea.

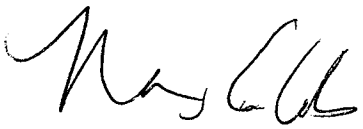
Middaugh and Gain, which are separately transcribed.

F. CONCLUSION

Based on the foregoing, Petitioner Jimmie York respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 3rd day of September 2019.

Respectfully submitted,



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APPENDIX

FILED
8/5/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JIMMIE EARL YORK, II, Appellant.	No. 77929-0-I DIVISION ONE UNPUBLISHED OPINION FILED: August 5, 2019

CHUN, J. — Jimmie York pleaded guilty to second degree assault-domestic violence, felony harassment-domestic violence, and assault in the fourth degree under an indivisible plea agreement. York later sought to withdraw his plea. The trial court denied York's motion and sentenced him based on the crimes. York appeals. We affirm his conviction and remand for the trial court to strike the DNA fee.

I. BACKGROUND

On May 22, 2016, the Kent Police Department responded to a "physical domestic report." The victim, Tamiko Watts, reported that York, a former boyfriend and the father to her 11-year-old child, had attacked her. Watts reported that upon returning home from work, York attacked her and began to punch her in the face. Watts began to yell for help. York then put one hand around Watts's neck and squeezed while saying he would kill her.

On May 23, 2016, the State charged York with one count of felony harassment-domestic violence, one count of second-degree assault-domestic violence, and one count of resisting arrest.

Another incident occurred on August 30, 2016, in which York assaulted his attorney, Kenneth Harmell. This led to a charge of third-degree assault in a separate case.

On March 22, 2017, the State agreed to reduce York's charge of third-degree assault in the case involving his attorney to fourth-degree assault if he agreed to plead guilty to amended charges in the domestic violence case. York assented and the State agreed to drop the resisting arrest charge in the domestic violence case. That same day, York pleaded guilty in both cases. In the felony plea agreement, the parties agreed that the two negotiated guilty pleas would constitute one "indivisible agreement." The scoring form listed York's offender score as 10, which gave him a sentencing range of 63 to 84 months.

Also on March 22, 2017, the trial court determined that York entered into the plea agreement knowingly, intelligently, and voluntarily. The court accepted York's guilty plea.

On April 28, 2017, York indicated that he wanted to withdraw his plea. Shortly thereafter, on May 11, 2017, the court held a hearing in which it ordered the Department of Public Defenders (DPD) to appoint a new attorney to represent York on his motion to withdraw his plea, as it anticipated that his former attorney might have to testify as a witness.

On January 8, 2018, York's new attorney filed a Memorandum in Support of Motion to Withdraw Guilty Plea in which he made two arguments. First, he asserted that the parties were mutually mistaken regarding the offender score calculation because the "agreement neglected the application of the same criminal conduct doctrine of RCW 9.94A.589(1)(a)."[1] York's attorney maintained that the application of same criminal conduct would count the felony assault and harassment convictions as one crime for the purpose of his offender score, and therefore would lower his sentencing range. Second, he argued that York's prior attorney's failure to mount a defense of diminished capacity constituted ineffective assistance of counsel.[2]

The trial court held a hearing on York's motion to withdraw on January 12, 2018. The court found that York knowingly, intelligently, and voluntarily pleaded guilty and that no legal error existed because the parties had agreed to the offender score. The court also rejected York's ineffective assistance of counsel claim. The court denied York's motion to withdraw the plea and proceeded to sentence him to 75 months imprisonment. The court also imposed a $100 DNA fee as part of the Judgment and Sentence.

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[1] RCW 9.94A.589(1)(a) provides:

> (1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

[2] York does not make this argument on appeal.

York appeals.

II.
ANALYSIS

A. Plea Withdrawal

York claims the trial court erred in denying his motion to withdraw his plea. He asserts that because he was unaware of the sentencing consequences pertaining to same criminal conduct, his plea was not knowing, intelligent, and voluntary. The State argues that York waived same criminal conduct when he agreed to the offender score and resulting sentencing guidelines listed in his plea agreement. We agree with the State.

Generally, a trial court's decision to deny a motion for plea withdrawal "is reviewed for abuse of discretion." State v. Nitsch, 100 Wn. App. 512, 521, 997 P.2d 1000 (2000). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Littlefield, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997).

The trial court "shall not accept a plea of guilt, 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." CrR 4.2(d). "Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004).

A trial court should permit a defendant to withdraw their guilty plea when required to correct a manifest injustice. CrR 4.2(f). A manifest injustice arises where the defendant received ineffective assistance of counsel, the defendant or

a person authorized by the defendant to ratify the plea failed to do so, the plea was involuntary, or the prosecution breached the plea agreement. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

When a defendant agrees to an offender score in a plea agreement, they cannot later change the score by arguing same criminal conduct because their offender score "range can be arrived at only by calculating the score, and thus [their] explicit statement of the range is inescapably an implicit assertion of [their] score, and also an implicit assertion that [their] crimes did not constitute the same criminal conduct." Nitsch, 100 Wn.2d App. at 522.

Here, York entered into a plea agreement in which he agreed to the calculation of his offender score that counted his assault and harassment offenses separately. York signed the felony plea agreement, which stated he agreed that the offender score listed was accurate and complete. Further, during the plea hearing, both the State and trial judge asked whether York agreed to the offender score and resulting sentencing range listed in the plea agreement. York responded "yes" to both inquiries. Because York agreed to his offender score and sentencing range, he waived the matter of same criminal conduct. In light of the foregoing, the trial court did not abuse its discretion by refusing to withdraw his plea for failure to consider same criminal conduct.

B. Ineffective Assistance of Counsel

York asserts he received ineffective assistance of counsel because his attorney failed to advise him on same criminal conduct. York says this led to his failure to understand the consequences of his guilty plea. The State counters

that defense counsel's testimony does not support York's assertion, and that York failed to demonstrate prejudice. We determine that York's ineffective assistance of counsel claim fails.

We review de novo ineffective assistance of counsel claims. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017).

A defendant may withdraw their guilty plea for manifest injustice if they received ineffective assistance of counsel. Wakefield, 130 Wn.2d at 472. A defendant's plea agreement cannot waive the right to effective assistance of counsel. In re Pers. Restraint of Schorr, 191 Wn.2d 315, 321, 422 P.3d 451 (2018).

"In a plea bargaining context, 'effective assistance of counsel' merely requires that counsel 'actually and substantially [assist their] client in deciding whether to plead guilty.'" State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)). To prove ineffective assistance of counsel, the appellant must demonstrate both that the defense counsel provided deficient representation and that such deficient representation prejudiced them. Estes, 188 Wn.2d at 457–58.

When considering prejudice to the defendant, we examine whether "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). In the context of a plea agreement, the appellant must show a reasonable probability that but for their counsel's deficient representation, they would not have pleaded guilty. State v. Garcia, 57 Wn. App.

927, 933, 791 P.2d 244 (1990). "Generally, this is shown by demonstrating to the court some legal or factual matter which was not discovered by counsel or conveyed to the defendant himself [or herself] before entry of the plea of guilty." Garcia, 57 Wn. App. at 933.

Even assuming York's counsel was deficient, his claim fails because he cannot demonstrate prejudice. In the plea agreement, York agreed to an offender score of 9+. Though he argues that his offender score would have been lower had his attorney raised same criminal conduct, this is not necessarily true. As the State points out, had York not agreed to an offender score of 9+, it may have refused to agree to the reduced charges that it offered in the plea agreement. Furthermore, without the plea agreement, the State may have sought an exceptional sentence. Thus, raising same criminal conduct would not have automatically resulted in a lower offender score as York suggests. Accordingly, he does not show that he would not have pled guilty had his attorney raised the issue of same criminal conduct. York's ineffective assistance of counsel claim fails.

C. Failure to Voluntarily Plea: Domestic Violence

York asserts his plea was not knowing, intelligent, and voluntary because he did not understand and admit to conduct essential to the domestic violence charges. The State insists the record does not support York's argument, and that York waived the issue because he did not raise the issue below. Assuming the issue is not waived, we determine the record demonstrates York knowingly, intelligently, and voluntarily pleaded guilty to the special findings of domestic

violence.

Determining the voluntariness of a plea agreement requires consideration of all of the relevant circumstances surrounding the plea. State v. Williams, 117 Wn. App. 390, 398, 71 P.3d 686 (2003). "When the judge goes on to inquire orally of the defendant and satisfies himself [or herself] on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable." State v. Perez, 33 Wn. App 258, 262, 654 P.2d 708 (1982).

The record shows York possessed the requisite information regarding domestic violence to show he understood the charges during the plea process. The First Amended Information incorporated into York's Statement of Defendant of Plea of Guilty identified both the statute defining domestic violence, as well as the charges of domestic violence itself. The trial court asked York whether he read the "Statements of Defendants on Plea of Guilty," if he went through them "paragraph by paragraph" with his lawyer, and if his lawyer answered any questions he had regarding the forms. York answered affirmatively to all three questions. During the plea colloquy between the prosecutor and York, the prosecutor asked him if he understood the elements of both felony counts of "assault in the second degree, domestic violence, and felony harassment, domestic violence," to which York answered "yes."

The Felony Plea Agreement, as signed by York, also notes the special findings of domestic violence. York further acknowledged the charge of domestic violence during his competency evaluation. While York's written factual

explanation may not state his relationship to the victim, the record clearly indicates that the victim and York previously had a two-year dating relationship and share a child in common, meeting the definitional requirement of "family or household members."[3] RCW 10.99.020.

The instances above establish York reviewed and understood the domestic violence charges and their consequences. As a result, he fails to demonstrate that he did not knowingly intelligently, and voluntarily understand the domestic violence charges and their consequences. We reject York's claim.

D. Statement of Additional Grounds for Review

In his Statement of Additional Grounds for Review, York claims the court and the prosecution violated his right to a speedy trial due to a series of continuances.[4] We conclude that by pleading guilty, York waived his ability to challenge the loss of his right to a speedy trial.

This court has held previously that a voluntary guilty plea waives the right to challenge any CrR 3.3 speedy trial right. State v. Wilson, 25 Wn. App. 891, 895, 611 P.2d 1312 (1980); State v. Phelps, 113 Wn. App. 347, 352, 57 P.3d 624 (2002). As part of York's plea agreement, he agreed to give up his right to a speedy trial.

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[3] "Family or household members" means . . . persons who have a child in common regardless of whether they have been married or have lived together at any time, . . . adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship.

RCW 10.99.020(3).

[4] York also asserts in his Statement of Additional Grounds for Review that his counsel provided ineffective assistance by failing to address the Sentencing Reform Act in regards to same criminal conduct, which this opinion addresses above.

Because York's plea agreement was voluntary, we conclude that he cannot challenge it based on his right to a speedy trial.

E. Request to Strike DNA Fee

Both parties request remand for the trial court to strike the $100 DNA fee because the State previously collected York's DNA due to prior convictions. A legislative amendment effective June 7, 2018, made a $100 DNA collection fee discretionary where "the state has previously collected the offender's DNA as a result of a prior conviction." RCW 43.43.7541. Further, the amendment prohibits courts from imposing discretionary costs on indigent defendants. RCW 10.01.160. These amendments apply prospectively to York due to his pending direct appeal at the time of the amendment's enactment. State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). As a result, we remand for the trial court to strike the DNA fee from the Judgment and Sentence.

Affirmed. Remanded to strike the DNA collection fee.

Chun, C.J.

WE CONCUR:

Leach, J.

Appelwick, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77929-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: September 4, 2019

WASHINGTON APPELLATE PROJECT

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