SUPREME COURT NO. 99883-3
COA NO. 37043-7-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SREGZINSKI,

Petitioner.

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

The Honorable M. Scott Wolfram, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Robert Sregzinski asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Sregzinski requests review of the decision in State v. Robert Gage Sregzinski, Court of Appeals No. 37043-7-III (slip op. filed May 13, 2021), attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Whether Sregzinski should be allowed to withdraw his guilty plea because he did not have an understanding of the facts in relation to the law on the second degree assault charge and there is no factual basis for the allegation that he assaulted the identified victim with a deadly weapon, an essential element of the crime?

D. STATEMENT OF THE CASE

Sregzinski pleaded guilty to one count of first degree manslaughter committed against Gabriel Ledezma Rodriguez and one count of second degree assault committed against Sarah Morse Hickman. CP 18-30. The statement of defendant on plea of guilty, signed by Sregzinski, states:

> I Have Been Informed and Fully Understand That:
>
> . . .

(b) I am charged with:

> COUNT 1 - MANSLAUGHTER 1ST DEGREE, RCW 9A.32.060(10(A), CLASS A FELONY
>
> The elements are: On April 22, 2016, Defendant did recklessly cause the death of Gabriel Ledezma Rodriguez, a human being. This took place in Walla Walla County, Washington.
>
> COUNT 2 - ASSAULT 2ND DEGREE, RCW 9A.36.021, CLASS B FELONY
>
> The elements are: On April 22, 2016, Defendant did assault Sarah M. Morse Hickman in a degree not amounting to 1st Degree. This took place in Walla Walla County, Washington. CP 18.

The written statement further provides "I plead guilty to count 1 and 2 in the amended Information. I have received a copy of that Information" and "I make this plea freely and voluntarily." CP 27.

Paragraph 11 states:

> The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement:
>
> On April 22, 2016, I did recklessly cause the death of Gabriel Ledezma Rodriguez, a human being. On April 22, 2016, I did assault Sarah Hickman in a degree not amounting to 1st degree. This took place in Walla Walla County, Washington.
> CP 27.

Paragraph 12, in boilerplate language, states:

> My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment, if applicable. 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 27.

Boxes were checked that "The defendant had previously read the entire statement above and that the defendant understood it in full" and "The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full." CP 28.

A plea colloquy took place. 1RP[1] 3-9. The judge went through the plea statement with Sregzinski. 1RP 3-9. The judge recited the elements of first degree manslaughter and second degree assault by reading from the plea statement, describing the elements of assault as "you did assault Sarah M. Morse Hickman in an amount not amounting to First Degree" on the same date and location as the manslaughter. 1RP 3-4. The judge asked if Sregzinski understood "that these are the two counts and charges and elements of those charges that you are pleading guilty to today?" 1RP 4. Sregzinski answered "Yes, sir." 1RP 4.

[1] The verbatim report of proceedings is cited as follows: 1RP – one volume consisting of 5/5/19 and 7/31/19; 2RP – 7/15/19.

After going over other provisions in the plea statement, including the standard range and maximum penalty, the judge asked if Sregzinski had "gone through all this form with your lawyer?" 1RP 8. Sregzinski said he had. 1RP 8. Sregzinski's personal statement of what made him guilty, as set forth in the plea statement, was read into the record. 1RP 8. Sregzinski pleaded guilty to the two counts. 1RP 8-9. The judge then stated:

> Based on our colloquy here today I'll find the defendant's plea of guilty is made knowingly, voluntarily intelligently and voluntarily [sic]. I find Mr. Sregzinski understands the charges and what the consequences are of pleading guilty. I'm familiar with this file, have been since the beginning, and find that there is a factual basis for the plea as set forth in the Certificate of Probable Cause. And therefore, I do find him guilty as charged as to these two counts.
> 1RP 9.

At the subsequent sentencing hearing, the court imposed a total of 280 months in confinement, to run consecutive to the sentence imposed in a previous Oregon case. CP 80; 1RP 29.

Sregzinski raised various arguments on appeal, including that he should be allowed to withdraw his plea because it violated due process and lacked a factual basis. The Court of Appeals affirmed the convictions but remanded for resentencing. Slip op. 5-6. Sregzinski seeks review of the plea issue.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

SREGZINSKI DID NOT ENTER A KNOWING, VOLUNTARY AND INTELLIGENT PLEA AND THERE IS NO FACTUAL BASIS FOR IT.

The record does not show the conduct admitted by Sregzinski constitutes the offense of second degree assault charged in the information. And the plea lacks a factual basis. Sregzinski seeks review under RAP 13.4(b)(3).

"Due process principles are offended by the entry of a guilty plea without an affirmative showing in the record that the plea was made intelligently and voluntarily." State v. S.M., 100 Wn. App. 401, 413, 996 P.2d 1111 (2000) (citing State v. Holley, 75 Wn. App. 191, 196, 876 P.2d 973 (1994) (citing State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980) (citing Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3.

Regarding the assault charge, Sregzinski admitted in his plea statement that “I did assault Sarah Hickman in a degree not amounting to 1st degree." CP 27. However, the plea statement omitted the requirement in RCW 9A.36.021(1)(c) that, to be guilty of second degree assault, there must be an assault of another with a deadly weapon.

"[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). The record does not show Sregzinski, in pleading guilty, understood the facts in relation to the law.

To this end, the trial court must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information[.]" In re Pers. Restraint of Bratz, 101 Wn. App. 662, 672, 5 P.3d.759 (2000) (quoting McCarthy, 394 U.S. at 467). "Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty plea." State v. R.L.D., 132 Wn. App. 699, 705-06, 133 P.3d 505 (2006).

Reliable evidence in the record at the time of the plea does not establish that Sregzinski's conduct toward Hickman constituted assault with a deadly weapon. His plea to the second degree assault charge was therefore involuntary.

A trial court "shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is

necessary to correct a manifest injustice." CrR 4.2(f). An involuntary plea constitutes a manifest injustice. State v. Codiga, 162 Wn.2d 912, 923, 175 P.2d 1082 (2008).

The criminal rules reflect the due process principle that a guilty plea must be knowing, voluntary and intelligent by dictating that a court must 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." Id. at 922 (quoting CrR 4.2(d)). "In addition, the court must be satisfied 'that there is a factual basis for the plea.'" Id. (quoting CrR 4.2(d)). The lack of a factual basis impacts a defendant's understanding of the facts in relation to the law. State v. A.N.J., 168 Wn.2d 91, 118-19, 225 P.3d 956 (2010). The trial court violates due process in accepting a guilty plea under such circumstances. Id.

The judge must determine "'that the conduct which the defendant admits constitutes the offense charged in the indictment or information.'" S.M., 100 Wn. App. at 413 (quoting In re Pers. Restraint of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting McCarthy, 394 U.S. at 467). For a plea to be voluntary and knowledgeable, not only must a defendant be apprised of the nature

of the charges, he must also be aware the facts support his guilt under those charges. Keene, 95 Wn.2d at 209. "[T]he purpose behind the factual basis requirement is to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge, but without realizing that his conduct does not actually fall within the charge." State v. Berry, 129 Wn. App. 59, 65, 117 P.3d 1162 (2005) (quoting 13 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 3713, 91-92 (3rd ed. 2004)), review denied, 158 Wn.2d 1006, 143 P.3d 829 (2006).

The lack of factual basis prevented Sregzinski from understanding how his conduct constituted second degree assault. The written plea statement provides that Sregzinski was informed and fully understood that the elements of count 2 to which he pleaded guilty are "On April 22, 2016, Defendant did assault Sarah M. Morse Hickman in a degree not amounting to 1st Degree. This took place in Walla Walla County, Washington." CP 18. Sregzinski's description of "what I did in my own words that makes me guilty of this crime" uses the same language. CP 27.

That the act did not amount to first degree assault is not an element of second degree assault. State v. Keend, 140 Wn. App.

858, 862, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041, 187 P.3d 270 (2008). Assault with a deadly weapon is an element of the crime of second degree assault. RCW 9A.36.021(1)(c); State v. Skenandore, 99 Wn. App. 494, 499, 994 P.2d 291 (2000). That is the means of committing the crime at issue, since the State charged Sregzinski by amended information with assaulting Hickman with a deadly weapon, to wit: a shotgun. CP 16. The plea statement, though, nowhere sets forth a fact showing Sregzinski assaulted Hickman with a deadly weapon.

The Court of Appeals opined the probable cause affidavit, in combination with "Sregzinski's admissions," established the factual basis for the plea. Slip op. at 5. There are two problems with that conclusion.

First, the plea statement does not contain any language permitting the trial court to rely on the facts set forth in the certificate of probable cause in accepting the plea. CP 18-28. The plea colloquy likewise does not reflect an agreement to consider the certificate. 1RP 3-10. Documents like the probable cause certificate can furnish the factual basis for a plea if the defendant agrees the court may rely on it in accepting the plea. Codiga, 162 Wn.2d at 917 (trial court could review the police reports and

statement of probable cause for the factual basis for the plea because Codiga agreed to such in the plea form); State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991) (certificates of probable cause could be relied on as reliable source of information where Saas stipulated that the court could consider each of the State's three certifications for determination of probable cause in determining whether to accept the guilty plea). In the absence of Sregzinski's agreement, the probable cause certificate cannot furnish the factual basis for the plea.

Second, even assuming the certificate can be considered to be reliable evidence in the absence of defense agreement, it does not establish that Sregzinski assaulted Hickman with a deadly weapon. The certificate does not identify Hickman by name. CP 1-4. Rather, the certificate uses letters in place of witness names: witnesses A, B, C, D, E and F. CP 1-4. It is not possible to ascertain from the certificate which letter corresponds to Hickman. At one point, the certificate states: "During the car ride to Rose Lane Apartments, both Witness A and Witness B were fearful that they were going to be killed by Sregzinski." CP 2. Even assuming Hickman is Witness A or B, this passage does not show Sregzinski assaulted her with a deadly weapon.

The probable cause certificate alleges (1) Sregzinski and "Witness B" were in the front room when Rodriguez came out of the bathroom; (2) Sregzinski confronted Rodriguez with a shotgun and told him to sit down; (3) Rodriguez refused, told Sregzinski that he was going to have to shoot him, and walked toward Sregzinski; and (4) Sregzinski shot Rodriguez at short range. CP 2. The affidavit further states "Witness B was near Sregzinski and [Rodriguez] but turned their head prior to the shotgun blast. Blood spatter from the forceful impact of the close range gun shot went onto Witness B's clothing, hair, and face." CP 2.

Even if the record on which the court could rely for the factual basis showed "Witness B" was Hickman, the certificate still does not factually establish that Sregzinski committed second degree assault with a deadly weapon against her.

"Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm." State v. Stevens, 158 Wn.2d 304, 311, 143 P.3d 817 (2006).

"To prove assault by attempt to cause injury, the State must show specific intent to cause bodily injury but need not provide evidence of injury or fear in fact." State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577, 578 (1996) (citing State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). "Assault by attempt to cause fear and apprehension of injury requires specific intent to create reasonable fear and apprehension of bodily injury." Id. To sustain a second degree assault conviction based on putting another in apprehension of harm, the State must prove the victim was in fact put in fear. Id. at 504.

The facts alleged in the certificate do not establish that Sregzinski, using a deadly weapon, had a specific intent to cause Hickman bodily harm or the specific intent to create an apprehension of harm in Hickman. Those facts make plain that Sregzinski's use of the deadly weapon was entirely directed at Rodriguez. CP 2. Hickman was not physically injured. There was no fact set forth in the certificate showing Sregzinski pointed the gun at Hickman or intended to fire the gun at Hickman. Nor is there any evidence set forth in the certificate that Hickman was in fact placed in apprehension of bodily harm. Nowhere is it stated that she felt such apprehension.

The trial court's determination that a factual basis exists for the plea requires sufficient evidence to sustain a jury finding of guilt. S.M., 100 Wn. App. at 414. On this record, there is insufficient evidence for a jury to find Sregzinski guilty of assaulting Hickman with a deadly weapon. His conduct does not actually fall within the charge. The Court of Appeals decision nowhere explains how it does.

The plea statement acknowledges that Sregzinski pleaded guilty to count 2 in the amended information and had received a copy of it. CP 27. The second amended information alleges for count 2 that Sregzinski "on or about April 22, 2016, did assault Sarah M. Morse Hickman, a human being, with a deadly weapon, to-wit: a shotgun." CP 16. However, referencing the elements of charged crimes at most only shows Sregzinski was aware of those elements. That is different than stating a factual basis for those elements. "A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements." R.L.D., 132 Wn. App. at 705.

The court conducted a plea colloquy. 1RP 3-9. But the colloquy does not address how Sregzinski's alleged conduct satisfied the deadly weapon element of the second assault crime.

Instead, the court walked Sregzinski through the plea statement, which itself does not set forth any fact showing Sregzinski's conduct constituted assault with a deadly weapon. The facts before the court insufficiently demonstrate the requisite assault with a deadly weapon to support a second degree assault conviction. The trial court thus erred in finding a factual basis for the plea. CP 28.

Because Sregzinski's plea to second degree assault lacked a factual basis and was involuntary, he should be allowed to withdraw the entirety of his plea agreement. Where a plea agreement is invalid, as in this case, the defendant may generally choose to withdraw the plea. State v. Walsh, 143 Wn.2d 1, 8-9, 17 P.3d 591, 593 (2001). Sregzinski is entitled to withdraw his plea as to both the assault and the manslaughter counts because the plea is indivisible. A plea agreement is indivisible when the defendant pleads guilty to multiple charges in a single proceeding and the pleas are described in the same agreement. State v. Turley, 149 Wn.2d 395, 400, 402, 69 P.3d 338 (2003). The assault and manslaughter counts are described in the same documents and Sregzinski pleaded guilty to them as part of the same proceeding. CP 18-30; 1RP 3-9. Because the invalid plea is indivisible, this

Court should remand to allow Sregzinski to withdraw his plea to both counts.

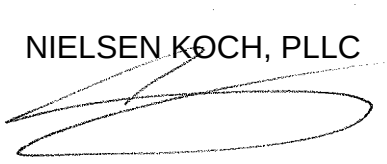
F. CONCLUSION

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

DATED this 11th day of June 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ROBERT GAGE SREGZINSKI, Appellant.	)))))))))	No. 37043-7-III UNPUBLISHED OPINION

PENNELL, C.J. — Robert Gage Sregzinski appeals his convictions and sentence for first degree manslaughter and second degree assault. We affirm Mr. Sregzinski's convictions but remand for resentencing.

FACTS

The State initially charged Mr. Sregzinski with crimes relating to the death of Gabriel Ledezma Rodriguez. A probable cause certificate filed with the original information alleged Mr. Sregzinski shot Mr. Ledezma Rodriguez "over a drug debt" with a shotgun "at close range." Clerk's Papers (CP) at 1-2. When describing the events surrounding the homicide, the State generally referred to individuals other than Mr. Sregzinski or Mr. Ledezma Rodriguez anonymously as witnesses A, B, C, D, E, or F.

An individual identified as Witness B was mentioned throughout the probable cause certificate. Witness B was in a room with Mr. Sregzinski and Mr. Ledezma Rodriguez at the time of the shooting. The shooting left blood spatter on Witness B's clothing, hair, and face.

The original charges against Mr. Sregzinski were pending for over a year. The State then filed an amended information with nine charges, including first degree murder while armed with a firearm, first degree unlawful possession of a firearm, first degree attempted robbery while armed with a firearm, first degree assault while armed with a firearm, reckless endangerment, two counts of intimidating a witness while armed with a firearm, second degree murder while armed with a firearm, and unauthorized removal or concealment of a body.

Several months after the amended information was filed, Mr. Sregzinski agreed to plead guilty to one count of first degree manslaughter and one count of second degree assault. The amended information stated Mr. Sregzinski was charged with second degree assault under RCW 9A.36.021(1)(c) and "did assault Sarah M. Morse Hickman, a human being, with a deadly weapon, to-wit: a shotgun." CP at 16. Mr. Sregzinski's guilty plea statement, on the other hand, phrased this charge as Mr. Sregzinski "did assault Sarah M. Morse Hickman in a degree not amounting to 1st Degree." *Id*. at 18. When describing

in his "own words" what made him guilty of second degree assault in his plea statement, Mr. Sregzinski reiterated, "I did assault Sarah Hickman in a degree not amounting to 1st degree." *Id*. at 27.

At the change of plea hearing, the trial court reviewed the written plea statement with Mr. Sregzinski. The court also confirmed Mr. Sregzinski had reviewed the plea statement with his attorney.

After Mr. Sregzinski entered his guilty pleas, the trial court made the following findings:

> Based on our colloquy here today I'll find the defendant's plea of guilty is made knowingly, voluntarily intelligently and voluntarily. I find Mr. Sregzinski understands the charges and what the consequences are of pleading guilty. I'm familiar with this file, have been since the beginning, and find that there is a factual basis for the plea as set forth in the Certificate of Probable Cause. And therefore, I do find him guilty as charged as to these two counts.

Report of Proceedings (RP) (May 20, 2019) at 9.

At sentencing, Mr. Sregzinski was determined to have an offender score of 9+ and a total range of 210 to 280 months' imprisonment. Mr. Sregzinski's offender score was based, in part, on a juvenile conviction for simple possession of controlled substances. The trial court imposed a high-end sentence of 280 months. It also imposed community

custody conditions, a civil antiharassment protection order, and various legal financial obligations.

Mr. Sregzinski timely appeals.

ANALYSIS

Involuntary guilty plea

Mr. Sregzinski claims his plea was invalid because it did not meet the criteria of CrR 4.2(d). This court rule generally requires two things: (1) a plea be "made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea" and (2) the court be satisfied there is a factual basis for the plea. To succeed on his challenge to his plea, Mr. Sregzinski bears the "burden of showing manifest injustice sufficient to warrant withdrawal of [the] plea . . . ." *State v. Codiga*, 162 Wn.2d 912, 929, 175 P.3d 1082 (2008).[1]

With respect to the first prong of CrR 4.2(d), all the information in the record indicates Mr. Sregzinski understood his plea. The amended information governing Mr. Sregzinski's plea specified that his second degree assault charge involved a shotgun

[1] Because Mr. Sregzinski's CrR 4.2(d) challenge implicates constitutional standards of due process, we will review it for the first time on appeal. RAP 2.5(a)(3).

and that the victim was Sarah Morse Hickman. The change of plea form stated Mr. Sregzinski was pleading guilty to the amended information and that he had received a copy of the information. His attorney also confirmed Mr. Sregzinski's plea "comport[ed] to the Amended Information." RP (May 20, 2019) at 2. Nothing in the record suggests confusion on Mr. Sregzinski's part or an inability to understand the proceedings. Given these circumstances, there is no basis to overturn the plea based on voluntariness concerns.

The trial court also had an adequate factual basis for the plea. The court stated it had found a factual basis for the plea based on information set forth in the certificate of probable cause. Because the certificate of probable cause was part of the record, the court was entitled to reference it under CrR 4.2(d). *See State v. Osborne*, 102 Wn.2d 87, 95, 684 P.2d 683 (1984) (The factual basis may be "any reliable source . . . so long as the material relied upon by the trial court is made a part of the record."). Although the certificate of probable cause did not explicitly identify Ms. Morse Hickman as Witness B, the contents of the certificate coupled with Mr. Sregzinski's admissions were sufficient for the trial court to make this inference.

Mr. Sregzinski's convictions by way of guilty plea are affirmed.

Sentencing

The parties agree Mr. Sregzinski is entitled to resentencing pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). We accept this concession. Mr. Sregzinski has raised several additional arguments related to his sentence. Those claims may be raised at resentencing.

CONCLUSION

Mr. Sregzinski's convictions are affirmed. This matter is remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, C.J.

WE CONCUR:

Lawrence-Berrey, J.

Fearing, J.

NIELSEN KOCH P.L.L.C.

June 11, 2021 - 2:22 PM

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