70294-7 70294-7

NO. 70294-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSE SOCORRO BAUTISTA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KENNETH COMSTOCK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A judge pro tempore may preside over a guilty plea hearing if the parties or their attorneys consent to the judge's appointment. The defendant and his attorney both signed a stipulation consenting to the appointment of a judge pro tempore at a hearing where the defendant was assisted by an interpreter, although the record does not affirmatively prove that the stipulation was translated for the defendant. Did the judge pro tempore have jurisdiction to take the defendant's plea?

2. A defendant is entitled to withdraw his plea if he establishes that withdrawal is necessary to correct a manifest injustice, such as an unknowing or involuntary plea. Here, the record shows that the defendant reviewed the plea statement with his attorney and an interpreter, and that he understood the provisions in the document before pleading guilty. Has the defendant failed to establish that his plea was unknowing or involuntary and must therefore be withdrawn?

B. STATEMENT OF THE CASE

When she was eleven years old, J.H. disclosed that her stepfather, Jose Socorro Bautista, had sexually abused her since

she was nine years old, including multiple incidents of molestation and rape.[1] CP 5-7. Socorro Bautista was charged with two counts of rape of a child in the first degree and two counts of child molestation in the first degree. CP 5, 9-11.

Socorro Bautista agreed to plead guilty to one count of rape of a child in the first degree in exchange for the dismissal of the other three charges. CP 17, 33. The guilty plea hearing occurred before Judge Pro Tempore Kenneth Comstock. CP 52. A court-certified Spanish interpreter interpreted the entire proceeding for Socorro Bautista. 1RP 2.[2]

1. CONSENT TO JUDGE PRO TEMPORE.

Prior to the hearing, the parties entered a written stipulation that Judge Pro Tempore Comstock could preside over the hearing. CP 52. Socorro Bautista, his attorney, and the prosecutor all signed the stipulation. CP 52. The document did not contain a certification by the interpreter that she had interpreted the

[1] These facts are drawn from the Certification for Determination of Probable Cause, to which Socorro Bautista stipulated for purposes of his Alford plea. CP 24; North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] The two volumes of the verbatim report of proceedings will be referred to as 1RP (March 4, 2013) and 2RP (April 5, 2013).

document for Socorro Bautista, and the parties did not discuss the issue on the record. CP 52; 1RP 2-14.

2. TRANSLATION OF PLEA FORM.

Prior to the plea, Socorro Bautista signed a written Statement of Defendant on Plea of Guilty to Felony Sex Offense, which laid out the rights he was giving up and the consequences of his plea. CP 12-26. During the colloquy, the court asked Socorro Bautista whether his attorneys had gone through the document with him with the assistance of an interpreter, and Socorro Bautista indicated that they had. 1RP 3. The document also contained a written certification by the interpreter that she had translated the attorney's explanation of the document for Socorro Bautista. CP 26.

At the beginning of the plea colloquy, the trial court asked Socorro Bautista if his attorneys had answered any questions he had had about the document. 1RP 3. Socorro Bautista replied "most of them," but when the judge inquired further, Socorro Bautista indicated that he did not currently have any questions about the document. 1RP 3. The trial court instructed Socorro Bautista to interrupt the plea colloquy any time he had a question,

and Socorro Bautista agreed. 1RP 3. During the colloquy, Socorro Bautista did occasionally express confusion or uncertainty; each time, the trial court took time to explain things in more detail, and did not move on until Socorro Bautista had indicated that he understood. 1RP 5-12.

At the end of the colloquy, the trial court asked Socorro Bautista if he had any remaining questions, and Socorro Bautista responded that he did not. 1RP 12-13. The trial court found that Socorro Bautista was entering his plea knowingly, intelligently, and voluntarily, and accepted the guilty plea. CP 25; 1RP 13-14. Socorro Bautista received a standard range indeterminate sentence of 103 months to life. CP 40, 43. He timely appealed. CP 50.

C. ARGUMENT

1. THE JUDGE PRO TEMPORE WAS PROPERLY APPOINTED BASED ON THE VALID CONSENT OF THE PARTIES' ATTORNEYS.

Socorro Bautista contends that the trial court lacked jurisdiction to accept his plea because his consent to the appointment of the judge pro tem was invalid due to a lack of evidence in the record that the written consent stipulation was

translated for him.[3] This claim should be rejected. The written consent of Socorro Bautista's attorney was sufficient to allow the judge pro tem to be validly appointed.

A superior court case "may be tried by a judge pro tempore" if the appointment of the judge is "agreed upon in writing by the parties litigant, or their attorneys of record . . . ." Wash. Const. art. IV, § 7 (emphasis added); RCW 2.08.180 (emphasis added). The authority of a judge pro tem to "try" a case includes the authority to accept guilty pleas and conduct other non-trial hearings. State v. Duran-Madrigal, 163 Wn. App. 608, 611, 261 P.3d 194 (2011).

Absent consent, a judge pro tem has no jurisdiction to hear the case.[4] State v. Belgarde, 119 Wn.2d 711, 718, 837 P.2d 599 (1992). Although the constitution and statute require written consent, a party who gives his or her express consent orally in open court cannot later claim that the absence of written consent invalidates the appointment of the judge pro tem. Id. at 718-19.

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[3] Tellingly, Socorro Bautista does not contend that the stipulation was not actually translated for him, or that his consent was unknowing. He merely contends that because the record does not affirmatively establish that the stipulation was in fact translated for him, neither his nor his attorney's consent was valid. Brief of Appellant at 8.

[4] There are a few exceptions to this rule, but none are applicable to this case. Wash. Const. art. IV, § 7; RCW 2.08.180.

Because the constitution and the relevant statute require only the consent of the parties "or their attorneys of record," the consent of an attorney is sufficient for the valid appointment of a judge pro tem; there is no requirement that the defendant also personally express his consent. State v. Osloond, 60 Wn. App. 584, 586-87, 805 P.2d 263 (1991); State v. Robinson, 64 Wn. App. 201, 204-05, 825 P.2d 738 (1992).[5]

Where a party does personally consent, there is also no requirement that the record contain proof of the defendant's understanding of the consequences of that decision. See Belgarde, 119 Wn.2d at 719-20 (valid consent to pro tem requires written consent or "an affirmative verbal act made in open court"). Cf. State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994) (valid waiver of right to jury trial requires only personal expression of waiver by the defendant); State v. Brand, 55 Wn. App. 780, 785-86, 780 P.2d 894 (1989) (waiver of rights fundamental to a fair

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[5] Socorro Bautista attempts to characterize these cases as holding that an attorney's "general authority to try the case" authorizes him or her to consent to a judge pro tem on behalf of a client. Brief of Appellant at 9 n.5. To the contrary, both cases relied only on the plain language of article 4, section 7 in holding that the constitution requires only the consent of either the attorney or the client. Osloond, 60 Wn. App. at 586 ("Art. 4, § 7 and/or RCW 2.08.180 do not state that a defendant's additional personal consent is necessary."); Robinson, 64 Wn. App. at 203-04 ("[T]he plain language of article 4, sec. 7 . . . expressly allows either the parties *or their attorneys* to stipulate to use of a judge pro tempore and to thereby waive the right to an elected judge.").

trial requires greater showing of defendant's knowledge of consequences than does waiver of other constitutional rights).

Here, Socorro Bautista's attorney gave written consent to the appointment of the judge pro tem. CP 52. The trial court thus would have had jurisdiction to take the guilty plea even had Socorro Bautista never signed the stipulation.[6] Osloond, 60 Wn. App. at 586-87; Robinson, 64 Wn. App. at 205. The fact that Socorro Bautista did in fact sign the stipulation consenting to the appointment only adds an additional basis for the court's jurisdiction—the fact that the document contains no certification by an interpreter does not deprive the court of the jurisdiction it had even before Socorro Bautista signed the document. See Osloond, 60 Wn. App. at 586-87; Robinson, 64 Wn. App. at 205.

Socorro Bautista relies on State v. Sain, 34 Wn. App. 553, 555-57, 663 P.2d 493 (1983), for the proposition that defense counsel's consent is insufficient for the valid appointment of a judge pro tem. Brief of Appellant at 6, 9. This reliance is misplaced. In Sain, defense counsel's consent to the judge pro tem was expressly conditioned on the defendant giving his personal consent the following day. Id. at 556. The next day, the defendant

[6] Whether an attorney's consent would be valid in the face of a defendant's express refusal to consent is not at issue in this case.

expressly refused to consent. Id. The Court of Appeals held that the defendant's refusal therefore deprived the judge pro tem of jurisdiction. Id.

Furthermore, this Court later questioned Sain's statement that a defendant has a substantial right to be tried before an elected judge that cannot be waived by his attorney over his objection. Belgarde, 119 Wn.2d at 692 (noting that Sain court equated "substantial" with "substantive," and stating that "it is debatable whether a litigant's right to an elected judge is substantive rather than procedural"). Here, defense counsel's consent was not conditional, nor did Socorro Bautista indicate a lack of consent at any time. CP 52; 1RP 2-14. Sain is thus inapposite.

Socorro Bautista also contends that the appointment of the judge pro tem is invalid because the record does not establish that he was provided interpreter services in compliance with RCW 2.43.030 "in the context of" his consent to the judge pro tem. Brief of Appellant at 8. Contrary to Socorro Bautista's contention, RCW 2.43.030 does not itself require the appointment of an interpreter. It simply requires that, "Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the

person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings." RCW 2.43.030(1) (emphasis added).

Even if Socorro Bautista's personal consent had been required for a valid appointment of the judge pro tem, here a court-certified interpreter was appointed to assist Socorro Bautista during his guilty plea hearing, before which he signed the stipulation consenting to the appointment of the judge pro tem. 1RP 2; CP 52. Socorro Bautista cites to no authority for his contention that the absence of affirmative evidence that the stipulation was translated for him renders his consent invalid. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court . . . may assume that counsel, after diligent search, has found none.").

Because explicit consent by Socorro Bautista's attorney was constitutionally and statutorily sufficient to give the judge pro tem jurisdiction to take the guilty plea, an explicit statement of consent by Socorro Bautista was not required. Wash. Const. art. IV, § 7; RCW 2.08.180; Osloond, 60 Wn. App. at 586-87. The fact that Socorro Bautista did explicitly consent only bolsters the validity of

the appointment. Affirmative evidence that the stipulation of consent was translated for the defendant is not required, and its lack does not deprive the trial court of jurisdiction. See Belgarde, 119 Wn.2d at 719-20. This Court should therefore affirm Socorro Bautista's conviction.

2. THE RECORD SHOWS THAT SOCORRO BAUTISTA PLED GUILTY KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY AFTER FULLY REVIEWING THE PLEA STATEMENT WITH HIS ATTORNEY AND AN INTERPRETER.

Socorro Bautista contends that his plea was involuntary and unknowing because the record does not affirmatively show that the Statement of Defendant on Plea of Guilty was fully translated for him. This claim should be rejected. The record shows that Socorro Bautista's attorney went through the entire plea statement with him with the assistance of a state-certified interpreter, and that Socorro Bautista entered his guilty plea knowingly, intelligently, and voluntarily.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). CrR 4.2(d) 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."

a. Socorro Bautista Has Not Demonstrated A Manifest Error And Thus May Not Raise The Issue For The First Time On Appeal.

A defendant who attempts to withdraw his plea for the first time on appeal must demonstrate a manifest constitutional error. State v. Walsh, 143 Wn.2d 1, 6-7, 17 P.3d 591 (2001); RAP 2.5. A claim that a guilty plea was involuntary indisputably alleges a constitutional error; however, not every claimed constitutional error is "manifest." Walsh, 143 Wn.2d at 8; State v. Lynn, 67 Wn. App. 339, 343-44, 835 P.2d 251 (1992) ("[I]t is important that 'manifest' be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals.").

A manifest error is "an error that is 'unmistakable, evident or indisputable,'" and that has "practical and identifiable consequences in the trial of the case." State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011) (quoting State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008)). To determine

whether a defendant's claim that his plea was involuntary raises a manifest error, "[t]he court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." Walsh, 143 Wn.2d at 8.

For the reasons set out below, the record in this case does not demonstrate an obvious or indisputable error requiring that Socorro Bautista be permitted to withdraw his plea to correct a manifest injustice. This Court should therefore refuse to allow him to raise his claim for the first time on appeal.

b. Socorro Bautista Has Not Established That Withdrawal Of His Plea Is Necessary To Correct A Manifest Injustice.

Under CrR 4.2, once a guilty plea has been accepted, the trial court must allow withdrawal of the plea only when "withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). The defendant bears the burden of proving a manifest injustice. State v. Ross, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996); State v. Teshome, 122 Wn. App. 705, 714, 94 P.3d 1004 (2004). A manifest injustice "is 'an injustice that is obvious, directly observable, overt, not obscure.'" State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting State v. Taylor, 83 Wn.2d 594, 596,

521 P.2d 699 (1974)). A defendant who establishes that his plea was involuntary or unknowing has met his burden to prove a manifest injustice. Id.; Mendoza, 157 Wn.2d at 587.

Socorro Bautista has failed to establish a manifest injustice, because the record shows that his plea was entered voluntarily with knowledge of the information contained in the Statement of Defendant on Plea of Guilty. During the plea colloquy, the trial court asked Socorro Bautista if he had "go[ne] through" the plea statement with his attorney with the assistance of an interpreter, and Socorro Bautista indicated that he had. 1RP 3. This was corroborated by a state-certified interpreter, who certified in writing that she had faithfully translated defense counsel's explanation of the document.[7] CP 26; 1RP 2.

Socorro Bautista indicated at the beginning of the plea colloquy that he had no questions at that time, but agreed to interrupt the colloquy if any questions arose. 1RP 3. Socorro Bautista faithfully did so, indicating at several points that he did not understand something; each time, the trial court stopped to explain

[7] The interpreter's modification of the pre-printed certification to specify that she interpreted the attorney's words rather than the document itself is completely understandable. To do otherwise, even if the attorney had simply read the document without interspersing explanations, would require the interpreter to monitor not just the quality of her translation but also whether the attorney was faithfully reading the document without missing a single word.

the issues in more detail, and did not move on until Socorro Bautista indicated that he understood. 1RP 5-12. At the end of the colloquy, Socorro Bautista affirmed that he had no further questions about anything in the plea statement. 1RP 12-13. The entire plea colloquy was interpreted by a state-certified interpreter. 1RP 2-14.

Socorro Bautista's argument appears to be that, because the record establishes that the interpreter interpreted defense counsel's full explanation of the plea statement but does not affirmatively show that the interpreter also interpreted the document again, word for word, independently of defense counsel's explanation, his plea was automatically unknowing and involuntary. Brief of Appellant at 13-15.

Tellingly, Socorro Bautista does not allege that there is any particular section of the plea statement that was not read to him word for word in the course of his attorney's explanation, or any section that he did not understand at the time that he pled guilty. Correspondingly, it is likely that an attorney, in explaining a plea statement to a client, would in fact read each section word for word, and there is no doubt that everything defense counsel said was translated for Socorro Bautista. 1RP 3; CP 26. The question in this case is thus whether the constitution dictates that a defendant's

plea is involuntary no matter how thoroughly the document was "explained" to him if the record does not affirmatively show that the document was also read to the defendant word for word.

Socorro Bautista's means of understanding the plea statement are analogous to those of an English-speaking but illiterate defendant. If Socorro Bautista's argument were correct, then an illiterate defendant's plea would be invalid any time the record lacked a statement that defense counsel had "read" the plea statement to the defendant, as opposed to having "gone through" the entire document. Socorro Bautista cites to no authority supporting a requirement that such magic words be used.

Instead, Socorro Bautista relies on United States v. Mosquera, 816 F.Supp. 168 (E.D.N.Y. 1993), for his contention that his plea was involuntary. His reliance is misplaced, as Mosquera has nothing to do with the voluntariness of a guilty plea or the level of explanation or interpretation of a plea statement that is required by our constitution or court rules. Id. Mosquera merely held that a federal trial court had the statutory authority to order the government to provide and pay for written translations of the indictment and other critical documents in a case involving eighteen

Spanish-speaking defendants and very limited access to interpreters.[8] Id. at 170-71.

It is not clear whether Socorro Bautista contends that his plea would have been involuntary even if the record did contain a certification that the interpreter had orally translated the plea statement into Spanish word for word, in the absence of proof that Socorro Bautista received a written translation of the document. His quotation of language in Mosquera focusing on the benefits of written translation over oral interpretation suggests that he does so contend. See Brief of Appellant at 14-15. However, such an argument would be even more devoid of support than the contention that the record must contain evidence that the plea statement was interpreted word for word independently of the attorney's explanation of the document. See CrR 4.2(g) (model plea form's interpreter certification states, "I have interpreted this document for the defendant," and does not require written translation).

[8] In Mosquera, a single interpreter interpreted court proceedings for all eighteen defendants simultaneously, preventing effective communication between individual defendants and their attorneys during the proceedings. The court noted that the Eastern District of New York had only three Spanish interpreters on staff. Mosquera, 816 F.Supp. at 170-71.

The plea colloquy establishes that Socorro Bautista went over the Statement of Defendant on Plea of Guilty with his attorney and an interpreter, that all of his questions had been answered by the end of the plea colloquy, and that he entered his guilty plea knowingly, voluntarily, and intelligently. 1RP 2-14. Socorro Bautista has thus failed to establish that the lack of different wording in the interpreter certification indicates a manifest injustice that can be corrected only by withdrawal of his plea.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Socorro Bautista's conviction.

DATED this 25th day of June, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Donnan, the attorney for the appellant, at Washington Appellate Project, 1511 3rd Ave, Suite 701, Seattle, WA, 98101, containing a copy of the BRIEF OF RESPONDENT, in State v. Jose Socorro Bautista, Cause No. 70294-7, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 26th day of June, 2014.

Name
Done in Seattle, Washington