No. 45509-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAYLIN JEROME IRISH,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Jaylin Irish pled guilty to first degree assault and first degree rendering criminal assistance. Shortly after entering the plea, he notified his attorney that he wanted to withdraw it because counsel had pressured him into making the plea. At that point, a conflict of interest arose between Mr. Irish and his attorney because counsel would likely be a witness against Mr. Irish. Counsel had an obligation to notify the court in a timely manner and withdraw as counsel but did not do so until sentencing, at which point the court denied the motion. Once Mr. Irish was sentenced, he lost his right to the assistance of appointed counsel to help him file a motion to withdraw the guilty plea.

The conflict of interest between Mr. Irish and his attorney caused a lapse in representation that resulted in a denial of Mr. Irish's Sixth Amendment right to the effective assistance of counsel. His case must be remanded to the trial court and he must be allowed to move to withdraw his guilty plea with the assistance of appointed counsel.

Also, the information did not contain all the essential elements of rendering criminal assistance and the plea was involuntary because it was based on a misunderstanding of those elements. For these additional reasons, Mr. Irish must be allowed to withdraw his plea.

B. ASSIGNMENTS OF ERROR

1. Jaylin Irish was denied his Sixth Amendment right to counsel because his attorney had a conflict of interest.

2. Mr. Irish's constitutional right to notice was violated because the information omitted an essential element of the crime of rendering criminal assistance.

3. The court's finding that Mr. Irish understood the nature of the charges is not supported by the evidence.

4. Mr. Irish's guilty plea was involuntary in violation of constitutional due process because it was based on a misunderstanding of the elements of the crime of rendering criminal assistance.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment right to the effective assistance of counsel encompasses the right to representation free from conflicts of interest. A conflict of interest arises when a defendant moves to withdraw his guilty plea based on his attorney's actions because the attorney is likely to become a witness against the defendant. The attorney must withdraw in a timely manner so that substitute counsel can pursue a motion to withdraw the guilty plea. Here, Mr. Irish asserted that he wished to withdraw his guilty plea based on his

attorney's actions but his attorney did not move to withdraw until sentencing, at which point the court denied the motion. Was Mr. Irish denied his constitutional right to conflict-free counsel?

2. A charging document is constitutionally deficient if it does not contain all essential elements of the crime. An essential element of the crime of rendering criminal assistance is that the accused acted with knowledge of the crime committed by the person he assisted. Is the information constitutionally deficient where it omitted this essential element?

3. A guilty plea is involuntary in violation of constitutional due process if the defendant is not apprised of the elements of the crime the State would have to prove if the case went to trial. Here, Mr. Irish pled guilty to rendering criminal assistance but was never informed that in order to prove the charge, the State would have to prove he acted with knowledge of the crime committed by the person he allegedly assisted. Is his guilty plea involuntary in violation of due process?

D. STATEMENT OF THE CASE

Mr. Irish was charged with one count of first degree assault, RCW 9A.36.011(1)(a), and one count of first degree rendering criminal assistance, RCW 9A.76.050(3) and 9A.76.070(2)(a). CP 12-13. The

charges arose out of an altercation that occurred in Tacoma involving several young men. CP 4. The State alleged that a man named Demarcus Pate attempted to punch two men and then fired a handgun at them as he chased them through an alley. CP 4. The State alleged that Mr. Pate then jumped into a car driven by Mr. Irish. CP 4. A witness reported hearing two additional gunshots as the car drove away from the scene. CP 4.

After extended negotiations, Mr. Irish pled guilty to the charges pursuant to a plea agreement with the State. CP 14-23; RP 70-75, 84.

About one month later, the court and the parties convened for sentencing. At the outset of the hearing, defense counsel asserted that shortly after Mr. Irish pled guilty, he had contacted counsel and stated that he wanted to withdraw his plea because "he had been pressured into entering the plea." RP 84. Counsel told the court that if Mr. Irish moved to withdraw the plea, counsel would become a witness based on Mr. Irish's allegations that counsel had pressured him into pleading guilty. RP 84. Counsel had contacted the Department of Assigned Counsel in an attempt to have another attorney appointed to represent Mr. Irish. RP 84. He thought another attorney had substituted but apparently that did not happen. RP 84. Counsel stated the court should

appoint new counsel "because I think I have a conflict because I'm a witness one way or the other in this case if, indeed, it comes to a hearing or if any other information about the proceedings leading up to the plea is at issue." RP 85. Counsel further asserted, "whether the conflict exists is really the issue, and if it does, then I don't believe that I can represent him further." RP 85.

The court stated it could not continue sentencing because no motion to continue had been filed. RP 85. The court denied counsel's motion to withdraw, stating, "at this point, the Court does not have anything firm that causes the Court to understand that there is a conflict that would prevent us from going ahead with sentencing today." RP 85-86. The court immediately proceeded to sentencing. CP 26-37.

E. ARGUMENT

1. Mr. Irish was denied his constitutional right to the effective assistance of counsel when the trial court denied his attorney's motion to withdraw after counsel alerted the court that Mr. Irish wished to withdraw his guilty plea based on counsel's actions

a. A criminal defendant has a constitutional right to representation free from conflicts of interest

The constitutional right to the effective assistance of counsel applies at all "critical stages" of a criminal proceeding. Missouri v.

Frye, __ U.S. __, 132 S. Ct. 1399, 1405, 182 L. Ed. 2d 379 (2012); State v. Nguyen, 178 Wn. App. 1027, 319 P.3d 53, 58 (2013); U.S. Const. amend. VI; Const. art. I, § 22. It is well settled that a presentence motion to withdraw a guilty plea is a "critical stage" for purposes of the right to the effective assistance of counsel. Nguyen, 319 P.3d at 58.

The constitutional right to counsel encompasses the right to the assistance of an attorney who is free from any conflict of interest. State v. Dhaliwal, 150 Wn.2d 559, 566, 70 P.3d 432 (2003); Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981).

An attorney has an obligation to avoid conflicts of interest and to advise the court promptly when a conflict of interest arises. Cuyler v. Sullivan, 446 U.S. 335, 346, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). The trial court, in turn, has a duty to investigate potential attorney-client conflicts of interest if it knows or reasonably should know that a potential conflict exists. Mickens v. Taylor, 535 U.S. 162, 167-72, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) (citing Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)). "The trial court should protect the right of an accused to have the assistance of counsel." Holloway, 435 U.S. at 484. Thus, "an

attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted." Id. at 485.

A conviction must be reversed due to a violation of the constitutional right to counsel if the defendant can show that his attorney had an "actual conflict of interest." Dhaliwal, 150 Wn.2d at 571; Mickens, 535 U.S. at 171-72; Sullivan, 446 U.S. at 349-50. An "actual conflict" is "a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties." Mickens, 535 U.S. at 171. Thus, "a defendant asserting a conflict of interest on the part of his or her counsel need only show that a conflict adversely affected the attorney's performance to show a violation of his or her Sixth Amendment right." Dhaliwal, 150 Wn.2d at 571.

A conflict adversely affected an attorney's performance if, "during the course of the representation, the attorney's and the defendant's interests diverge[d] with respect to a material factual or legal issue or to a course of action." State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783 (2008) (internal quotation marks and citation omitted). Reversal is required if the defendant shows the conflict (1) "cause[d] some lapse in representation contrary to the defendant's

interests" or (2) "likely affected particular aspects of counsel's advocacy on behalf of the defendant." Id. (internal quotation marks and citations omitted).

Once a defendant demonstrates an "actual conflict of interest," he need not show prejudice in order to be entitled to relief. Id. In other words, he need not show the outcome of the trial would have been different but for the conflict. Mickens, 535 U.S. at 173-75.

These conflict of interest rules apply in *any* situation where defense counsel represents conflicting interests. State v. McDonald, 143 Wn.2d 506, 513, 22 P.3d 791 (2001); Regan, 143 Wn. App. at 426-27. Thus, they apply in cases where counsel is to be called as a witness against the defendant. Regan, 143 Wn. App. at 427.

Whether the circumstances demonstrate an actual conflict of interest is a question of law reviewed *de novo*. Id. at 428.

b. In order to avoid a conflict of interest, an attorney has an obligation to advise the court promptly and move to withdraw as counsel when his client asserts he wishes to withdraw his guilty plea based on counsel's actions

A conflict of interest may arise between a defendant and his attorney in any case where the attorney is a witness. Regan, 143 Wn. App. at 430-31. An attorney must promptly withdraw when it is likely

he or she will present testimony related to substantive contested matters. State v. Nation, 110 Wn. App. 651, 659, 41 P.3d 1204 (2002). The Rules of Professional Conduct provide that an attorney may not ethically act as an advocate at a trial in which the attorney is likely to be a witness on substantive, contested matters, unless certain narrow exceptions apply. See RPC 3.7(a).[1]

A trial court should grant a motion to withdraw when alerted to the likelihood that the attorney will present such testimony. "A superior court has the authority and duty to see to the ethical conduct of lawyers in proceedings before it and, upon proper grounds, can disqualify an attorney." State v. Sanchez, 171 Wn. App. 518, 546, 288 P.3d 351 (2012). A court should grant a motion to withdraw pursuant to RPC 3.7(a) if the attorney shows (1) he or she will give evidence material to the determination of the issues being litigated, (2) the

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[1] RPC 3.7(a) provides:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case;
>
> (3) disqualification of the lawyer would work substantial hardship on the client; or
>
> (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

evidence is unobtainable elsewhere, and (3) the testimony is or may be prejudicial to the testifying attorney's client. Id. at 545.

Courts recognize that an attorney must be permitted to withdraw in order to avoid having to testify against his client when the defendant seeks to withdraw his guilty plea based on allegations that counsel coerced him into entering the plea or was otherwise ineffective.[2] In such cases, counsel is placed in the untenable position of defending his own conduct while at the same time trying to represent his client's interests. "Although an attorney should not argue his own inadequacy or that of his office, he is under a duty to withdraw as counsel when the issue arises." People v. Norris, 46 Ill. App. 3d 536, 541, 361 N.Ed.2d 105 (1977). "It is obvious that a lawyer cannot act as an advocate on behalf of his client, and yet give testimony adverse to the interests of that client in the same proceeding." Riley v. District Court In & For Second Judicial Dist., 181 Colo. 90, 95, 507 P.2d 464 (1973).

Thus, courts hold that in order to avoid a conflict of interest that violates the constitutional right to counsel, when a defendant seeks to

[2] A defendant may withdraw a guilty plea whenever necessary to correct a manifest injustice. CrR 4.2(f); Nguyen, 319 P.3d at 58. Withdrawal may be necessary to correct a manifest injustice if the defendant establishes he received ineffective assistance of counsel or the plea was involuntary. CrR 4.2(f); Nguyen, 319 P.3d at 58.

withdraw his guilty plea based on counsel's conduct, the attorney must be permitted to withdraw and a new attorney appointed. See People v. Freeman, 55 Ill. App. 3d 1000, 1006, 371 N.Ed.2d 863 (1977) (right to counsel violated where defendant moved to withdraw guilty plea based on allegation that his attorney coerced him into pleading guilty, and he was represented on the motion by a public defender from the same office); Norris, 46 Ill. App. 3d at 541-42 (error to deny motion to withdraw guilty plea based on allegation that attorney coerced defendant into entering guilty plea where defendant was represented at hearing by attorney who represented him at time of plea); People v. Cruz, 244 A.D.2d 564, 565, 664 N.Y.S.2d 360 (N.Y. App. Div. 1997) (trial court should have assigned new counsel before deciding defendant's motion to withdraw guilty plea on ground that counsel coerced him into entering plea); People v. Rodas, 238 A.D.2d 358, 359, 656 N.Y.S.2d 54 (N.Y. App. Div. 1997) (right to counsel violated where counsel continued to represent defendant who moved to vacate guilty plea on basis that counsel coerced him into entering plea); Riley, 181 Colo. at 95 (defense counsel must be permitted to withdraw and new attorney appointed where defendant sought to withdraw guilty plea

based on allegation that plea was induced by inadequate representation).

c. An "actual conflict of interest" occurred in this case because the likelihood that counsel would be called as a witness caused a lapse in counsel's representation that was contrary to Mr. Irish's interests

Reversal is required when a defendant can show a conflict of interest (1) "cause[d] some lapse in representation contrary to the defendant's interests" or (2) "likely affected particular aspects of counsel's advocacy on behalf of the defendant." Regan, 143 Wn. App. at 428 (internal quotation marks and citations omitted).

In Regan, the trial court ruled that the State could call one of the two defense attorneys as a witness on a bail jumping charge, in order to show that counsel told Mr. Regan to arrive early for court on the day in question. Id. at 424. At a pretrial hearing, the attorney's co-counsel agreed to a continuance, against her client's wishes, so that her co-counsel would not be subject to a material witness warrant while on his vacation. Id. at 430. The Court of Appeals held counsel's conduct was "a classic example of a choice between alternative courses of action that was helpful to defense counsel's own interests and harmful to Mr. Regan." Id. Thus, the trial court's decision to compel counsel's

testimony led to an "actual conflict of interest" that adversely affected Mr. Regan's representation. Id. Reversal was required without a showing of prejudice. Id.

Similarly, here, the conflict that arose when Mr. Irish asserted his desire to withdraw his guilty plea based on counsel's conduct caused a lapse in representation that was contrary to Mr. Irish's interests. Soon after pleading guilty, Mr. Irish told his attorney that he wanted to withdraw the plea because counsel had "pressured" him into it. RP 84. At that point, counsel had an obligation to alert the court and file a timely motion to withdraw so that he could avoid having to testify against Mr. Irish while also representing him. Sullivan, 446 U.S. at 346. But counsel delayed. Counsel did not move to withdraw until the sentencing hearing more than one month later. RP 84-85. By then it was too late. The court would not continue the sentencing hearing because no motion to continue had been filed. RP 85.

The conflict of interest caused a lapse in representation contrary to Mr. Irish's interests in another way as well. Because of the conflict of interest, counsel apparently concluded he could not file a motion to withdraw the guilty plea on Mr. Irish's behalf. Instead, he attempted to

obtain substitute counsel but was unsuccessful in doing so. RP 84. Thus, no motion to withdraw the guilty plea was ever filed.

Counsel's lapses in not filing a timely motion to withdraw as counsel or to withdraw the guilty plea on Mr. Irish's behalf were harmful to Mr. Irish and contrary to his interests. Once Mr. Irish was sentenced, he lost his right to have an attorney appointed to help him file a motion to withdraw his guilty plea. See Nguyen, 319 P.3d at 58.

In these ways, the conflict of interest that arose between Mr. Irish and his attorney when Mr. Irish asserted his desire to withdraw his guilty plea based on counsel's actions led counsel to make choices between alternative courses of action that were helpful to counsel's own interests but harmful to Mr. Irish's. Thus, an "actual conflict of interest" occurred, requiring reversal of the conviction. See Regan, 143 Wn. App. at 428.

Finally, reversal is also warranted because the trial court did not fulfill its duty to ensure that Mr. Irish's constitutional right to the effective assistance of counsel was protected. A trial court has a duty to investigate potential attorney-client conflicts of interest if it knows or reasonably should know that a potential conflict exists. Mickens, 535 U.S. at 167-72. This duty stems from the court's general

obligation to protect the right of an accused to have the assistance of counsel. Holloway, 435 U.S. at 484. "[A]n attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted." Id. at 485.

Counsel told the court that he had a conflict of interest and asked to withdraw because Mr. Irish said he had been pressured into pleading guilty. RP 85. But despite counsel's representations, the court stated it "d[id] not have anything firm that causes the Court to understand that there is a conflict that would prevent us from going ahead with sentencing today." RP 85-86. The reason the court did not have this information was because the attorney's conflict prevented him from giving the court the information it needed. Instead of inquiring into the conflict and determining how best to protect Mr. Irish's right to counsel, the court immediately proceeded with sentencing. Once he was sentenced, Mr. Irish lost his right to have an attorney appointed to help him file a motion to withdraw the guilty plea. Thus, the court did not adequately protect Mr. Irish's constitutional right to counsel, which warrants reversal of the conviction so that Mr. Irish may move to withdraw his guilty plea with the assistance of counsel.

2. Mr. Irish's constitutional right to notice was violated because the information omitted an essential element of the crime of rendering criminal assistance

a. Mr. Irish may challenge the constitutional sufficiency of the information even though he pled guilty to the crime

Ordinarily, a plea of guilty constitutes a waiver by the defendant of his right to appeal. State v. Majors, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). But a guilty plea does not preclude a defendant from raising collateral questions such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made. Id. In Auburn v. Brooke, 119 Wn.2d 623, 625, 635-36, 836 P.2d 212 (1992), for example, the Washington Supreme Court addressed the constitutional sufficiency of a charging document in a case where the defendant pled guilty to the charge.

Thus, as in Brooke, Mr. Irish may challenge the sufficiency of the charging document even though he pled guilty to the charge.

b. The constitutional right to notice requires that all essential elements of the crime be included in the charging document

It is a fundamental principle of criminal procedure, embodied in the state and federal constitutions, that an accused person must be

informed of the criminal charge he is to meet at trial and cannot be tried for an offense not charged. U.S. Const. amend. VI;[3] Const. art. I, § 22;[4] State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). All essential elements of the crime must be included in the information so as to apprise the accused of the charge and allow him to prepare a defense, and so that he may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge. Vangerpen, 125 Wn.2d at 790.

When an information is challenged for the first time on appeal, it is to be construed liberally and will be deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. Although it is not necessary "to use the exact words of a statute in a

---

[3] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation."

[4] Article I, section 22 provides: "In criminal prosecutions the accused shall have the right to . . . demand the nature and cause of the accusation against him [and] to have a copy thereof."

charging document," an information will be deemed sufficient only if "words conveying the same meaning and import are used." Id. at 108. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Moavenzadeh, 135 Wn.2d 359, 362-63, 956 P.2d 1097 (1998) (internal quotation marks and citation omitted).

c. An essential element of the crime of rendering criminal assistance is that the accused acted with knowledge of the crime committed by the principal

Mr. Irish was charged with one count of first degree rendering criminal assistance. CP 12-13. "A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense." RCW 9A.76.070(1). A person "renders criminal assistance" if

> with intent to prevent, hinder, or delay the apprehension or prosecution of another person *who he or she knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility*, he or she:
>
> (1) Harbors or conceals such person; or
>
> (2) Warns such person of impending discovery or apprehension; or

> (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or
>
> (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or
>
> (5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or
>
> (6) Provides such person with a weapon.

RCW 9A.76.050 (emphasis added).

Thus, to prove the crime of rendering criminal assistance, the State must prove beyond a reasonable doubt that the accused knew that the principal committed a crime. Id. "By its plain terms, RCW 9A.76.050 provides that a person can be convicted of rendering criminal assistance only if he or she knows, at the time of rendering assistance, that that the principal has committed a crime or juvenile offense, is being sought by law enforcement for the same, or has escaped from a detention facility." State v. Anderson, 63 Wn. App. 257, 260, 818 P.2d 40 (1991). To prove rendering criminal assistance in the first degree, the State must prove the principal committed a class A felony. RCW 9A.76.070. The State need not prove the accused *knew* the principal committed a class A felony. Anderson, 63 Wn. App. at 260. But the State must nonetheless prove the accused "ha[d]

knowledge of the principal's crime," even if it cannot prove he had knowledge "of facts disclosing the degree of that crime." Anderson, 63 Wn. App. at 260.

As with accomplice liability, the State must prove not only that the accused knew the principal committed *a* crime, it must also prove he had knowledge of *the specific crime* committed by the principal. The concepts of complicity embedded in the rendering criminal assistance statute are similar to those in the accomplice liability statute. Id. The accomplice liability statute provides that a person is guilty as an accomplice if he acts "[w]ith knowledge that" his actions "will promote or facilitate the commission of the crime" committed by the principal. RCW 9A.08.020. To prove accomplice liability, the State must prove beyond a reasonable doubt the accused "acted with knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged." State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). The State need not prove the accused had knowledge of every element of the principal's crime, but it must prove the accused had knowledge of the specific crime committed by the principal. State v. Roberts, 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000).

Similarly, to prove the crime of rendering criminal assistance, the State need not prove the accused had knowledge of every element of the principal's crime, but it must prove the accused acted with knowledge of the specific crime committed by the principal. Anderson, 63 Wn. App. at 260.

d. The information omitted the essential "knowledge" element of first degree rendering criminal assistance

The information alleged:

> That JAYLIN JEROME IRISH, in the State of Washington, on or about the 24th day of March, 2012, did unlawfully and feloniously render criminal assistance to Demarcus Pate, a person who committed or was being sought for First Degree Assault, a Class A felony, by providing such person with money, transportation, disguise, or other means of avoiding discovery or apprehension, contrary to RCW 9A.76.050(3) and 9A.7.070(2)(a), and against the peace and dignity of the State of Washington.

CP 12-13. The information contains the essential element that the principal, Demarcus Pate, "committed or was being sought for First Degree Assault, a Class A felony." Id. But the information is constitutionally deficient because it does not allege that Mr. Irish *knew* Mr. Pate committed or was being sought for First Degree Assault, or for any particular crime. Id.

When knowledge is an element of the crime, it must be alleged in the information. Kjorsvik,117 Wn.2d at 100. The question on appeal is whether the element "appears in any form, or by fair construction can be found" on the face of the document. Id. at 108. The information need not contain the exact words of the statute as long as words conveying the same meaning and import are used. Id. But the language must be clear enough "*to enable a person of common understanding to know what is intended.*" Id. at 110 (internal quotation marks and citation omitted, emphasis in Kjorsvik).

In cases similar to this one, the Washington Supreme Court has held the charging language was inadequate to allege the element of knowledge under the liberal construction standard. In Moavenzadeh, 135 Wn.2d at 361, the information alleged that the defendant "did possess stolen property," but it did not allege that he *knowingly* possessed stolen property. The court held the information was defective because it failed to allege that the defendant knew the property was stolen. Id. at 363-64.

Similarly, in State v. Simon, 120 Wn.2d 196, 197-98, 840 P.2d 172 (1992), the information alleged that the defendant "did knowingly advance and profit by compelling Bobbie J. Bartol by threat and force

to engage in prostitution; and did advance and profit from the prostitution of Bobbie Bartol, a person who was less than 18 years old." One element of the crime, which was not alleged, was knowledge that Bartol was under the age of 18. The court reversed the conviction, reasoning that "[n]o one of common understanding reading the information would know that knowledge of age is an element of the charge of promoting prostitution of a person under 18." Id. at 199.

The Court of Appeals has also found charging documents deficient where they did not allege the element of knowledge. In State v. Sutherland, 104 Wn. App. 122, 126, 15 P.3d 1051 (2001), the information alleged Sutherland "did commit FELONY HIT AND RUN, in that being the driver of a vehicle involved in an accident resulting in the death of Matthew Saeger, a human being, did fail to remain at the scene of the accident." Relying on Simon, the Court held the information was deficient because it did not allege that Sutherland knew he was in an accident. Id. at 132; see also State v. Courneya, 132 Wn. App. 347, 352-53, 131 P.3d 343 (2006) (holding information charging hit and run was constitutionally deficient because it did not allege that the accused knew he was in an accident).

As in these cases, the information charging Mr. Irish with first degree rendering criminal assistance is constitutionally deficient because it does not contain the essential element that he acted with knowledge that the principal committed a crime. CP 12-13; RCW 9A.76.050; Anderson, 63 Wn. App. at 260.

In some cases, the words "unlawfully" or "feloniously" may be sufficient to allege the element of "knowingly." In State v. Cuble, 109 Wn. App. 362, 367, 35 P.3d 404 (2001), for instance, the information alleged that Cuble "did unlawfully and feloniously own, have in his possession, or under his control a firearm." The Court held this language was sufficient to allege that Cuble knew he possessed the firearm. Id. Similarly, in State v. Snapp, 119 Wn. App. 614, 618, 82 P.3d 252 (2004), the information alleged that Snapp "did feloniously violate a No Contact Order." Again, the Court held this language was sufficient to allege that Snapp "knowingly" violated the order. Id.

But unlike in Cuble and Snapp, the words "unlawfully and feloniously" contained in the information in this case were insufficient to allege the knowledge element. The information alleged that Mr. Irish "did unlawfully and feloniously render criminal assistance to Demarcus Pate, a person who committed or was being sought for First

Degree Assault." CP 12-13. This language was not sufficient to allege that Mr. Irish knew the person he was assisting had committed or was being sought for a crime. It was also insufficient to allege that Mr. Irish knew the *specific crime* committed by the principal.

Because the information does not contain the essential knowledge element of the crime of rendering criminal assistance, it is constitutionally deficient. Kjorsvik, 117 Wn.2d at 100-02.

e. The conviction must be reversed

If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425. The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State's ability to re-file the charge. Vangerpen, 125 Wn.2d at 792-93. Because the information omitted an essential element of the crime of rendering criminal assistance, the conviction must be reversed.

3. Mr. Irish's guilty plea was involuntary in violation of constitutional due process because it was not based on a full understanding of the nature of the crime

a. A guilty plea is not knowing, intelligent and voluntary unless it is based on an understanding of the elements of the crime

It is a violation of constitutional due process to accept a guilty plea without an affirmative showing that the plea was made knowingly, intelligently and voluntarily. State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); U.S. Const. amend. XIV; Const. art. I, § 3. Not only must the record disclose that the defendant understood the rights he was giving up, it must also show he possessed an understanding of the law in relation to the facts. Boykin, 395 U.S. at 244. A defendant who does not understand how the law applies to the behavior he admits committing, cannot be said to be entering the plea voluntarily. Id.

"A guilty plea cannot be voluntary in the sense that it constitutes an intelligent admission unless the defendant is apprised of the nature of the charge." In re Pers. Restraint of Keene, 95 Wn.2d 203, 207, 622 P.2d 350 (1981); see also CrR 4.2(d) ("The 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."). This is "'the first and most universally recognized requirement of due process.'" Keene, 95 Wn.2d at 207 (quoting Henderson v. Morgan, 426 U.S. 637, 645, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976)).

To be made sufficiently aware of the nature of the offense, the defendant must be given "notice of what he is being asked to admit." State v. Holsworth, 93 Wn.2d 148, 153, 607 P.2d 845 (1980). At a minimum, the defendant must be informed of "the acts and the requisite state of mind in which they must be performed to constitute a crime." Id. at 153 n.3.

This requirement of due process is satisfied only if the record demonstrates the defendant was notified of all the "critical elements" of the crime to which he pled guilty. In re Pers. Restraint of Hews, 108 Wn.2d 579, 593, 741 P.2d 983 (1987). In Hews, the defendant was charged with and pled guilty to second degree murder. Id. at 580-81. Because intent is a "critical element" of that crime, the plea could not be considered voluntary unless Hews was advised of that element. Id. at 593.

As in Hews, Washington courts have consistently held that a defendant pleading guilty must be apprised of any element that encompasses the *mens rea* of the charged offense. See, e.g., Keene, 95 Wn.2d at 208 ("intent to injure or defraud" is "critical element" of crime of forgery); State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (defendant pleading guilty to second degree felony murder based on underlying felony of assault must be informed that "knowledge" is element of crime).

Thus, due process requires more than a showing that the defendant was made aware of the factual assumptions on which the court and the State were proceeding. Osborne, 102 Wn.2d at 94. The record must also show the defendant was informed of the "critical" *mens rea* elements the State would be required to prove if the case went to trial. Id.

Mr. Irish may challenge the voluntariness of his guilty plea for the first time on appeal. State v. Knotek, 136 Wn. App. 412, 422-23, 149 P.3d 676 (2006) ("Alleged involuntariness of a guilty plea is the type of constitutional error that a defendant can raise for the first time on appeal"); RAP 2.5(a).

b. Mr. Irish's plea was involuntary because it was based on a misunderstanding of the critical elements of the crime of first degree rendering criminal assistance

"[T]he record of the plea hearing must affirmatively disclose 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, 503, 554 P.2d 1032 (1976). The trial judge has an obligation to "make direct inquiries of the defendant as to whether he understands the nature of the charge and the full consequences of a guilty plea." Id. at 511. Thus, the record at the time the plea was entered must demonstrate the defendant's understanding of the nature of the charge against him. Id.

If the critical element is contained in the information, the defendant pled guilty as charged in the information, and the record shows the defendant was informed of the contents of the information, this creates a presumption that the plea was knowing, intelligent and voluntary. Hews, 108 Wn.2d at 596; Osborne, 102 Wn.2d at 94; Keene, 95 Wn.2d at 208-09. The presumption does not apply in this case, however, as the critical elements are not contained in the information. As discussed in the previous section, the information

omitted the critical "knowing" element of first degree rendering criminal assistance.

Moreover, the record of the plea hearing does not disclose that Mr. Irish was otherwise made aware of that critical element. Counsel asserted that he went over the guilty plea statement with Mr. Irish and "he understands the document." RP 71. But the guilty plea statement does not set forth the "knowledge" element of rendering criminal assistance. The guilty plea statement set forth the elements of first degree rendering criminal assistance as follows:

> In the State of Washington, the defendant did unlawfully and feloniously render criminal assistance to Demarcus Pate, a person who committed or was being sought for First Degree Assault, a Class A felony, by providing such person with money, transportation, disguise, or other means of avoiding discovery or apprehension.

CP 14. As with the charging document, the guilty plea statement does not contain the element that Mr. Irish had knowledge of the crime committed by the principal.

The court affirmed that Mr. Irish was aware he was charged with "rendering criminal assistance in the first degree." RP 72. The court asked him if he understood the elements of the offense and he said, "yes." RP 72. But the record does not affirmatively disclose that he was ever informed of the critical knowledge element of the crime.

Thus, his guilty plea was involuntary in violation of constitutional due process. Keene, 95 Wn.2d at 207; Wood, 87 Wn.2d at 503, 511. Boykin, 395 U.S. at 244.

c. Mr. Irish must be permitted to withdraw his entire plea

An involuntary guilty plea produces a manifest injustice and due process requires that the defendant be permitted to withdraw the plea. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004).

When a defendant pleads guilty pursuant to a plea agreement, the agreement is indivisible if the charges were made at the same time, described in one document, and accepted in a single proceeding. State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). When a defendant shows manifest injustice as to one charge in an indivisible plea agreement, he may move to withdraw the agreement. Id.

Here, the plea agreement is indivisible because the charges were made at the same time, described in one document, and accepted in a single proceeding. CP 12-13; RP 71-75.

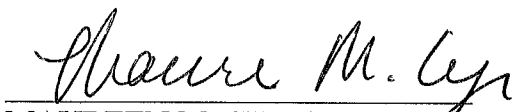
An indivisible plea agreement is a "package deal." State v. Bisson, 156 Wn.2d 507, 519, 130 P.3d 820 (2006). Thus, if Mr. Irish

chooses to withdraw the plea agreement, the plea in its entirety must be withdrawn. Id.

F. CONCLUSION

Mr. Irish must be permitted to withdraw his guilty plea because (1) his attorney had a conflict of interest that adversely affected his representation, and (2) the plea was involuntary in violation of due process because it was based on a misunderstanding of the critical elements of the charge.

Respectfully submitted this 12th day of May, 2014.



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

STATE OF WASHINGTON, Respondent, v. JAYLIN IRISH, Appellant.	)))))))))	NO. 45509-9-II

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