NO. 46892-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

HOKESHINA LEE TOLBERT,

Appellant.

OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court erred by accepting Mr. Tolbert's guilty plea without ensuring that it was knowing, voluntary, and intelligent and that Tolbert understood elements of the crime to which he was pleading.

2. The trial court erred by accepting Mr. Tolbert's guilty plea on an insufficient factual basis.

3. The trial court erred by accepting Mr. Tolbert's plea and sentencing him without resolving the legitimate question of competency raised by defense counsel.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1.a. Was sufficient evidence established on the record to ensure that Mr. Tolbert understood the law as it related to the facts and meet the factual basis requirement of CrR4.2(d)?

1.b. Should the trial court have taken Mr. Tolbert's age, maturity, and degree of literacy into account when determining whether his plea was knowing, voluntary, and intelligent?

2. Did the admission that Mr. Tolbert retrieved the gun from the garage coupled with the separate statement that "I knew Michael was going to use it to shoot somebody" constitute a sufficient factual basis for a conviction of second degree murder, even though there is no indication that when Mr. Tolbert retrieved the gun, he knew that Mr. Mee intended to

kill another human being, or that Tolbert intended to assist or encourage this killing by retrieving the gun?

3. Defense counsel indicated that a competency evaluation should be ordered and evidence in the record supported this request. Once raised, was the court required to resolve the issue of competency before a valid plea could be entered and sentence imposed?

STATEMENT OF THE CASE

This case arose out of a drive-by shooting which resulted in the tragic death of 32-year-old Tracy Steele. Hokeshina Tolbert was not an occupant of the car from which the shooting took place – instead, the act which gave rise to his criminal liability was his compliance with his older cousin's request to retrieve a gun from the garage of the house where they were both residing.

I. The Facts of the Crime

At age 16, Hokeshina Tolbert was living in the detached garage at the residence of his cousin, Camille Bluehorse. Camille's younger brother, Dan Bluehorse, age 20, was also living at the residence.

On the night of the murder, Mr. Tolbert and Mr. Bluehorse were drinking beer and liquor at the Bluehorse residence with Marjorie Morales, and brothers Jose and Jesus Cota Ancheta. *See State v. Mee*, 168 Wn. App. 144, 275 P.3d 1192 (2012).

Meanwhile, Michael Mee was at a party at a different location and became involved in a fight. He was upset because one of his fellow gang members, Charles Pitts, was also present at that party, but did not come to his aid during the altercation. CP:18-19. Mee got the worst of the fight and was knocked to the ground. CP:19. He left the scene in a car driven by Tanya Satack along with three female passengers. *Id.* Mee was angry that he had been jumped and that Pitts had not come to his aid. CP:19-20.

Mee directed Satack to drive to the Bluehorse residence; once there Mee exited the car and approached the residence alone. CP:20. Mee did not go inside the Bluehorse residence, but while standing at the door, stated that he had been "jumped" and needed their help. *Id.* He was primarily speaking to Dan Bluehorse, and specifically asked Bluehorse for the "thing," meaning the rifle. *Id.* Bluehorse turned to Tolbert and told him to go get the "thing" from the garage. *Id.* Tolbert complied, retrieving the gun where it had been hidden in the rafters of the garage, and returned to the house. *Id.*

Mee, Bluehorse, Morales, and both Cota Ancheta brothers got in Ms. Morales' car and headed back towards the party; Jesus was driving and Mee was in the front passenger seat with the rifle. CP:20. Meanwhile, Tolbert got into Ms. Satack's car, still containing three other passengers, and Satack followed Mee's vehicle. CP:21.

While riding by the house where he'd been "jumped," Mee fired two shots from the rifle. CP:21. At least one shot struck Tracy Steele, and he died a short time later from this wound. CP:21.

Satack had lost sight of the Mee vehicle before it arrived at the crime scene; after hearing gun shots nearby, she turned her car around and drove away. *Mee*, 168 Wn.2d at 150. Moments later, Satack caught sight of the Mee vehicle and followed it back to the Bluehorse residence. *Id.* The two vehicles returned to the Bluehorse residence, and everyone dispersed. CP:21.

II. The Charges and Plea Hearing

Mr. Tolbert was charged as an adult under the automatic decline statute, RCW 13.04.030(1)(e)(v)(A). He was initially charged by an Information filed on July 2, 2008, with one count of first-degree murder and one count of second-degree unlawful possession of a firearm. CP:1-2. The state offered to reduce the charges to one count of second-degree murder in exchange for a guilty plea and Tolbert's testimony at his co-defendants' trials. *See* Plea Agreement, CP:41-44.

Tolbert accepted the deal and pled guilty to the amended information on January 28, 2009. The Statement of Defendant on Plea of Guilty reads:

> On May 10, 2008, in Pierce Co Washington Michael Mee came to my cousin's house and asked for a gun. I went and got a 30-30 rifle from the garage. Michael Mee took the gun, and went to the residence where Tracy

> Steele was at. I was in a car following another car Michael Mee was riding in. I watched Michael Mee fire two shots at the house. Tracy Steele was hit by the bullets and died.
>
> Jesus Cota Ancheta was driving the car Michael Mee fired the shots from. I knew Michael Mee was going to use the gun to shoot someone.

Statement of Defendant on Plea of Guilty, CP:39.

The first paragraph of the statement is signed with Tolbert's full name. The second paragraph appears to be added later, and is initialed "HLT." CP:39.

A plea hearing was held on January 28, 2009. Defense counsel began the hearing by explaining that he had reviewed the Statement on Plea of Guilty and the Plea Agreement with Mr. Tolbert the night before at the jail. 1/28/09 TR:3-4. The court confirmed with Tolbert that he had reviewed the forms with his lawyer, and that they had had enough time to talk about them. *Id.* at 5. Throughout the hearing, Tolbert responded to all of the court's questions with a "yes" or "no" answer. 1/28/09 TR:3-11.

Regarding the factual basis of the plea, the court made the following inquiry:

> THE COURT: And in the 11th paragraph, it's written what you did that supports this plea. Did you go over and read what was written in paragraph 11? It starts out, "On May 10th, 2008, in Pierce County," and then talks about what happened.
>
> THE DEFENDANT: Yes, sir.

THE COURT: Is that a true statement?

THE DEFENDANT: Yes, sir.

THE COURT: Basically, it says that your role in this was providing the rifle that became the murder weapon; is that right?

THE DEFENDANT: Yes, sir.

1/28/09 TR:8-9.

Sentencing was set for April 3, 2009. Tolbert was held without bail, and the proceedings concluded. 1/28/09 TR:10-11.

III. Mr. Tolbert's Attempts to Withdraw His Plea Prior to Sentencing

Although the sentencing hearing had been set for April 3, at the state's request the sentencing was held over seven times, and Tolbert was not sentenced until March 12, 2010, well over a year after the plea hearing. During that lengthy interval, Tolbert attempted to withdraw his plea twice, complaining that he could not contact his lawyer, he had been coerced into taking the plea, and his lawyer had mislead him about his possible sentencing exposure.

Tolbert filed a "Declaration ... Regarding Plea Bargain" on March 18, 2009, CP:45-46. This Declaration states:

1. My lawyer Dana Ryan mislead me into taking a 10 year max deal when I signed I found out it was 18 year max if I knew that I wouldve never signed.

2. I feel my lawyer is trying to force me to take this deal by not communicating with me.

3. I believe I was coerced into making statements on July, first, 2008.

There is no response in the record to Tolbert's pro se declaration.

Mr. Tolbert also filed a request for a new attorney styled as an "Order of dismissal and quashing of service of process – insufficent service" on October 7, 2009, CP:47.

That Motion/Order stated:

> I Hokeshina Tolbert … order dissmissal and quashing of service of process, INSUFFICENT SERVICE. My Basis for insufficent counsel is my attorney Dana Ryan has Performed inadequately. I have asked him to schduele a incomatency hearing he has not. I've asked him to do numerous things to no avail. He has not informed me of my case's status and Refuse's to answer my and my mothers calls. I Believe he is not doing his Job as well as he could be. he has not helped me in my case. I Request to be appointed a new attorney.

The record does not reflect any action being taken on this second pro se filing, either.

IV. Sentencing

At the sentencing hearing held March 12, 2010, the state explained that they originally agreed to recommend a sentence at the high end of the range, 220 months. But after speaking to the detectives on the case, considering the amount of help that Tolbert provided, and the fact that

Tolbert was going against the "gang code" by testifying at risk of harm to himself, the state reduced their recommendation to 150 months. 3/12/10 TR:4.

The state also reviewed Tolbert's actual actions:

> [T]he defendant wasn't in the car that the shooting occurred from. He did at the direction of Mr. Bluehorse, an older gang member, go to that garage and get the gun, bring it out, put it in the grass and the defendant [Mee] picked it up and went and committed the murder.

3/12/10 TR:4-5.

Tolbert's mother spoke at sentencing, and described the difficulties her son had experienced:

> He's been diagnosed with ADHD and PTSD, a couple more things, so – and he was court ordered to take meds and he wouldn't take his meds. I know that that had a lot to play – part to play in what happened because he's a really good – he's got a very good heart and he's a good baby. That's my baby, that's my last baby.
>
> I sent him to Montana for a while with my brother but I brought him back because my brother was, I thought, too strict, abusive – to the point of abuse. … I also suffer from addiction and I kind of got caught up in addiction. … I know that what happened really – that it really got him, you know, it got to him because he told me, I've never seen – you don't know what I've seen, mom.
>
> … I did a lot of praying for my son because right after that had happened, he got shot twice down on Portland Avenue and I really felt like that summer that I was going to bury my son before the summer was over …

> …I didn't approve of what he did but he's very hot headed and then not taking his meds that probably – you know, he did a lot of drinking and drugging too so, you know.

3/12/10 TR:6-7.

Tolbert also spoke and expressed his remorse for his actions. He stated that "even if I do get time, it'll give me time to rethink my ways and rethink what I was doing and be able to get my education and get back on track, start walking the right road instead of doing what I was doing out there, drinking, smoking, doing all that. And it's time to change." 3/12/10 TR:8.

The court recognized that Mr. Tolbert's testimony at Mee's trial had been "very credible and forthright," and that he had been "critical to the conviction in that case." 3/12/10 TR:8. Judge Serko adopted the lower state recommendation and sentenced Tolbert to 150 months in prison. *Id.*, at 8-9. She stated that this was an appropriate sentence because "your actions played a huge role in the death of a human being." *Id.*, at 9.

ARGUMENT

I. Mr. Tolbert's Guilty Plea Was Not Knowing, Voluntary or Intelligent

At the plea hearing, the court reviewed what Tolbert was admitting to that supported the plea: "[b]asically, it says that your role in this was

providing the rifle that became the murder weapon; is that right?" Tolbert responds, "Yes, sir." 1/28/09 TR:9. This is insufficient to show that Tolbert understood the elements of the crime and how they related to the facts at issue.

A. *A Defendant Must Understand Not Only the Legal Elements of the Charge, But Also How the Facts Relate to those Elements*

A defendant's guilty plea must be voluntary, knowing, and intelligent. *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *In re Pers. Restraint of Isadore,* 151 Wn.2d 294, 297, 88 P.3d 390 (2004). These constitutional requirements are implemented by court rule in Washington: "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." CrR 4.2(d).

A plea must be supported by a sufficient factual basis to be considered voluntary. *In re Evans,* 31 Wn. App. 330, 332, 641 P.2d 722 (1982). To satisfy the CrR 4.2(d) factual basis requirement, there must be sufficient evidence for a jury to conclude that the defendant is guilty and this evidence must be developed on the record at the time the plea is taken. *In re Personal Restraint of Keene,* 95 Wn.2d 203, 210, 622 P.2d 360 (1980). The defendant must not only demonstrate an understanding of the

elements of the charges, but also an understanding of the law in relation to the facts for the crime of which he was charged. *State v. Rigsby*, 49 Wn. App. 912, 916, 747 P.2d 472 (1987). *See Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (plea invalid when defendant unaware his conduct failed to satisfy element of offense); *In re Personal Restraint of Hews*, 99 Wn.2d 80, 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).

The factual basis requirement helps guarantee a truly knowledgeable and voluntary plea by "project[ing] the admitted misconduct against the backdrop of the violated statute, allowing a thorough and final check on the understanding of the defendant." *In re Taylor*, 31 Wn. App. 254, 258, 640 P.2d 737 (1982). When Tolbert's guilty plea was accepted by the court, the evidence established on the record was insufficient to meet this factual basis requirement of CrR 4.2(d).

B. *Mr. Tolbert Did Not Understand the Requirements of the Law in Relation to the Facts*

The elements are described in the Statement of Defendant on Plea of Guilty: "on or about the 10th day of May 2008 with intent to cause the death of another person act as an accomplice in the shooting death of Tracy Steele." CP:32. This description does not explain the meaning of the legal term "accomplice." There must be a link between Tolbert's intent, his personal actions, and the actions of others for him to be liable as an accomplice. *See generally State v. Roberts,* 142 Wn.2d 471, 14 P.3d 713 (2000); *State v. Cronin,* 142 Wn.2d 568, 14 P.3d 752 (2000). However, Tolbert was not informed about the requirements of the law in relation to these facts.

Tolbert's Statement of Defendant on Plea of Guilty reads:

> On May 10, 2008, in Pierce Co Washington Michael Mee came to my cousin's house and asked for a gun. I went and got a 30-30 rifle from the garage. Michael Mee took the gun, and went to the residence where Tracy Steele was at. I was in a car following another car Michael Mee was riding in. I watched Michael Mee fire two shots at the house. Tracy Steele was hit by the bullets and died.
>
> Jesus Cota Ancheta was driving the car Michael Mee fired the shots from. I knew Michael Mee was going to use the gun to shoot someone.

CP:39.

The statement does not say that at the time Tolbert went and got the gun, he knew Mee was going to use it to kill Tracy Steele. In fact, the state, at sentencing, described Tolbert's actions as: "He did at the direction of Mr. Bluehorse, an older gang member, go to that garage and get the gun, bring it out, put it in the grass and the defendant picked it up and went and committed the murder." 3/12/10 TR:4-5.

It is clear that Tolbert got the gun from the garage after Dan Bluehorse told him to; that Mee used that gun in the shooting; and that Tolbert did not ride in the same car as Mee on the way to the crime scene.

What is not clear is how much Tolbert heard Mee say before getting the gun; whether he thought he was getting the gun for Bluehorse, Mee, or someone else; and when in the sequence of events did he become aware that Mee was planning to shoot someone. Tolbert *might* be liable as an accomplice if *he knew at the time he retrieved the gun from the garage* that Mee planned to use it to kill another human being, and he was retrieving the gun with the purpose of assisting him accomplish that crime. However, there is no indication from the Statement of Defendant, or statements at the plea hearing, that this was the case. Tolbert agreed with the judge's summation that he "provided" the gun used in the shooting, (1/28/09 TR:8-9) although his actual role was limited to following his

older cousin's direction to fetch the gun from its hiding place in the rafters of his cousin's garage (3/12/10 TR:4-5).

The recent decision in *Rosemond v. United States,* 134 S.Ct. 1240, 1249, 188 L.Ed.2d 248 (2014) has confirmed that accomplice liability can depend on the timing of the defendant's knowledge: knowledge of the principal's intent must be acquired early enough to "enable him to make the relevant legal (and indeed, moral) choice." *Id.*

Neither the prosecutor's statements nor the trial court's questions at the plea hearing make it clear that Tolbert understood the intent requirement clearly – that, *at the time he retrieved the gun,* he knew Mee intended to kill another human being with it, and that he retrieved the gun to assist in this killing.

C. *Mr. Tolbert's Age and Background Weigh Against Finding His Plea Knowing, Voluntary, and Intelligent*

Mr. Tolbert's youth and lack of education make it even more likely that he did not understand the legal requirements as they related to the facts.

A child's age is far "more than a chronological fact." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *accord, J.D.B. v. North Carolina,* 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (holding that age is relevant when determining police custody for

Miranda purposes); *Gall v. United States*, 552 U.S. 38, 58, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); *Roper* v. *Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). It is a fact that "generates commonsense conclusions about behavior and perception." *J.D.B.*, 131 S.Ct. at 2403 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 654, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) (Breyer, J., dissenting))

The Supreme Court made the following observations on the impact youth and immaturity can have on an adolescent's interaction with the legal system:

> …the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. … Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. … These factors are likely to impair the quality of a juvenile defendant's representation.

Graham v. Florida, 560 U.S. 48, 78, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

Findings of the MacArthur Foundation show that a significant percentage of youth are unable to participate competently in their own

trials due to their developmental immaturity.[1] Younger individuals were more likely to endorse decisions that comply with what an authority seemed to want as measured by their willingness to confess and plea bargain. *Id.* In addition, younger teens were significantly less likely to recognize the risks in various decisions, and they were less likely to comprehend the long-term consequences of their decisions.

Adolescents – like Mr. Tolbert – who are victims of emotional or physical trauma may suffer from a delay in brain maturation because of the disruption in brain development. *See* RCW 70.305.010.[2] This delay renders them less mature relative to their same-age peers.

Tolbert had reached the age of 18 by the time sentence was finally imposed; however it is likely that the emotional and physical traumas he had endured throughout his childhood and his mental and neurological difficulties rendered him less mature than his same age peers and less able to exhibit mature cognitive and reasoning functions. This further weighs against finding a voluntary, knowing, and intelligent plea.

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[1] MacArthur Foundation Research on Adolescent Development and Juvenile Justice, Issue Brief 1: *"Adolescent Legal Competence in Court."*
[2] *See also* National Juvenile Justice Network, *Using Adolescent Brain Research to Inform Policy: A Guide for Juvenile Justice Advocates,* 2012. (citing Rebecca L. McNamee, *"An Overview of the Science of Brain Development,"* University of Pittsburgh, May 2006.)

Tolbert's language skills and lack of education likely also impacted his ability to understand the requirements of the law in relation to the facts. "The juvenile and criminal justice systems operate on an implicit assumption that, barring a severe mental defect or other extraordinary obvious condition, most human beings understand most of what they are told …"[3] Yet the very people overrepresented in the criminal and juvenile justice systems – individuals with ADHD and learning disabilities, individuals labeled as "behavior problems," and individuals who grew up in extreme poverty – have been found to exhibit an unusually high rate of communication and language impairments. *Id.*, p. 3. Tolbert falls into all three of those categories of individuals exhibiting a high rate of impairments. Further, at the time of his sentencing, he had not completed eighth grade. His pro se filings (CP:45-47) also demonstrate extremely poor language skills.

This high likelihood of language impairment is significant because of the immense negative impact that communication deficits can have when navigating the legal system. Competency to stand trial requires sufficient present ability to consult with counsel "with a reasonable degree of rational understanding" and possession of a

[3] Michele LaVigne and Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters.* 15 UC Davis J. Juv. L. & Pol'y 37 (Winter, 2011).

"rational as well as factual understanding of the proceedings." *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). By its very terms, the *Dusky* standard links language competence and competency to stand trial. In *Cooper v. Oklahoma,* the Supreme Court reinforced the connection by further defining the ability to consult with counsel standard as the ability to "communicate effectively with counsel." *Cooper v. Oklahoma,* 517 U.S. 348, 351-52, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996).

Similarly, meeting the "knowing, intelligent and voluntary" standard requires certain language and communication skills. In the context of a guilty plea, this means that defendants understand their right to a trial, how a trial operates, what is being lost and what is being gained by pleading guilty, the elements of the offense and how their conduct meets those elements, any potential defenses, the role of the judge in the plea process, the potential sentence, and the collateral consequences of the conviction. A recent study in Massachusetts tested adolescents who pled guilty in juvenile court in order to determine how well the juveniles understood the rights they had just waived and the consequences of their pleas. Seventeen-year-olds were likely to be confused and mistaken as to key legal words and concepts, and were only slightly more likely to understand than thirteen-year-olds – even

after the words and concepts had been explained, and even among those who had previous juvenile court experience.[4] The authors of the study conclude that all parties, including the juvenile defendants themselves, believe the juveniles understand more than they actually do about court proceedings and the rights they are waiving:

> Although the study indicates that experience and instruction improve performance, the instructed group provided only 5 correct definitions out of a possible 36. This dismal lack of comprehension should be a wake-up call for attorneys, judges, and other court personnel who interact with court-involved children. They cannot rely on the child's affirmative response to the question "Do you understand?" when discussing rights the child is waiving or the disposition he or she is accepting.[5]

At the plea hearing, the court never asked Tolbert to "state in your own words," or engaged in any sort of back and forth questioning. Tolbert responded "Yes, Sir" a total of nineteen times; and "No, Sir" four times. 1/28/09 TR:3-11. Tolbert agreed with the judge's summation that he "provided" the gun used in the shooting, although his actual role was limited to following his older cousin's direction to fetch the gun from its hiding place in the rafters of his cousin's garage. Given that the court was

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[4] Barbara Kaban & Judith Quinlan, *TRENDS & DEVELOPMENTS IN THE JUVENILE COURT: Rethinking a "Knowing, Intelligent, and Voluntary Waiver" in Massachusetts' Juvenile Courts*, 5 J. CENTER FOR FAM. CHILD. & CTS. 35 (2004).

[5] *Id.*, p. 48. The authors include a suggested colloquy for a judge to more accurately gauge an adolescent's comprehension.

already aware of a possible issue of competency, together with Tolbert's age, this was insufficient to ensure his understanding the elements of the charge; it is not a sufficient "factual basis" or admission for conviction, since it provides no link between his intent, his personal actions, and the actions of others. Convicting Tolbert based on these admissions, and no more, undermined the voluntariness of the plea.

II. The Trial Court Erred by Accepting Mr. Tolbert's Guilty Plea on an Insufficient Factual Basis

There was an insufficient factual basis for Mr. Tolbert's plea because he lacked the specific intent to kill Mr. Steele, or to help Mee kill Mr. Steele.

A. *Mr. Tolbert was Found Liable as an Accomplice to a Specific Intent Crime*

Tolbert was found liable for the acts of Mee as an accomplice: he pled guilty to second-degree murder, a specific intent crime: "*with intent to cause the death of another person, TRACY L. STEELE*, act as an accomplice in the shooting death of Tracy L. Steele…" CP:32 (emphasis added).

For accomplice liability, a defendant must, with knowledge that that it will promote or facilitate the commission of the crime, aid or agree to aid such other person in planning or committing it. RCW 9A.08.020(3). But, accomplice liability only applies when the accomplice acts with

knowledge of the specific crime that is eventually charged, rather than with generalized knowledge of criminal activity. *State v. Holcomb*, 180 Wn. App. 583, 590, 321 P.3d 1288, *review denied*, 180 Wn.2d 1029 (2014); *Cronin*, 142 Wn.2d at 578-79; *Roberts*, 142 Wn.2d at 512. "And the required aid or agreement to aid the other person must be 'in planning or committing [the crime].'" *Holcomb*, 180 Wn. App. at 590 (quoting RCW 9A.08.020(3)(a)(ii)).[6]

B. *The Crime Committed by the Principal Actor Did Not Require Specific Intent, and Tolbert's Plea Contains No Other Factual Basis to Support that Intent Element*

Although Tolbert pled guilty to the specific intent crime of second degree murder, the principal, Michael Mee, was charged and convicted of "first degree murder by extreme indifference,"[7] which lacks the element of intent. *State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991) (RCW 9A.32.030(1)(b) does not require a specific intent to kill and may not serve as a basis for the crime of attempt).[8] The elements of that crime are that

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[6] *See also State v. Parker*, 60 Wn. App. 719, 725, 806 P.2d 1241 (1991) ("[A]n accomplice must be associated 'with the venture and participate in it as something he wishes to bring about and by his action make it succeed.'") (quoting *State v. Jennings*, 35 Wn. App. 216, 220, 666 P.2d 381, *review denied*, 100 Wn.2d 1024 (1983)).

[7] *See Mee*, 168 Wn. App. 144.

[8] *See also In re Personal Restraint of Richey*, 162 Wn.2d 865, 175 P.3d 585 (2008) (offense of attempted first degree felony murder does not exist in Washington; it is illogical to burden the State with the necessity of

(1) Mee acted with extreme indifference, an aggravated form of recklessness; (2) he created a grave risk of death to others; and (3) his actions caused the death of a person. RCW 9A.32.030(1)(b). Recklessness amounts to a form of gross negligence, rather than purposeful conduct. RCW 9A.08.010(1)(c). It is logically inconsistent for a defendant to intend a crime that is based on recklessness – essentially, accidental or grossly negligent conduct.

Accomplice liability requires the defendant to have knowledge of the crime to be committed, and also know that his acts will help to make it come about. *In re the Welfare of Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161, 1164 (1979). Since Mee did not have the specific intent to murder Mr. Steele, it is logically impossible for Tolbert to have had the knowledge that producing the gun from the garage would facilitate that murder, as required for accomplice liability. *See* RCW 9A.08.020(3)(a)(ii).

Mr. Tolbert's case is distinguishable from *State v. Guzman*,[9] in which the defendant was convicted as an accomplice to first-degree murder by extreme indifference, the same crime as the principal. Mr. Guzman argued that he could not be convicted as an accomplice to murder

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proving that the defendant intended to commit a crime that does not have an element of intent).

[9] 98 Wn.App. 638, 990 P.2d 464 (1999).

by extreme indifference because he could not "know" he was committing a nonintent crime. The appellate court affirmed his conviction, finding that the facts need merely show that he knew that his actions were extremely dangerous, and yet he was indifferent to the consequences. *Guzman,* 98 Wn. App. at 645-46.

What distinguishes Mr. Tolbert's case from *Guzman* is that he did not plead guilty to the same crime as the principal. Second degree murder does not include a means of committing murder through recklessness, but instead requires the intent to cause a death. The principal here did not intend to kill another human being, but instead acted with extreme recklessness that resulted in another's death. Since Mee did not have the specific intent to cause the death of Tracy Steele, it is illogical to say that Tolbert intended to cause the death of Mr. Steele by retrieving a gun from his cousin's garage at his cousin's request – but that is the crime to which Mr. Tolbert entered a guilty plea.

Further, Tolbert never stated that he wanted Mr. Steele (or another human being) to be killed, or to help Mee kill. Thus, he lacked the specific intent necessary for second degree murder.

The Supreme Court has repeatedly affirmed that "'mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" *United States v. United States Gypsum Co.*, 438

U.S. 422, 436, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) (quoting *Dennis v. United States*, 341 U.S. 494, 500, 71 S.Ct. 857, 95 L.Ed. 1137 (1951)). Highlighting this point, the Supreme Court explained over 70 years ago that:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. United States, 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

In short, it is a bedrock principle of American Constitutional law that "intent generally remains an indispensable element of a criminal offense." *U.S. Gypsum Co.*, 438 U.S. at 437. The trial court erred by accepting Mr. Tolbert's plea based on an insufficient factual basis for the intent element; he should be permitted to withdraw his plea.

III. The Trial Court Erred by Accepting Mr. Tolbert's Guilty Plea Without Resolving the Issue of His Competency

To be valid, guilty pleas must be knowing, voluntary, and intelligent. *State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010). To meet this standard, the defendant must be competent to make the plea. *Godinez v. Moran*, 509 U.S. 389; 113 S. Ct. 2680; 125 L. Ed. 2d 321

(1993). Washington law provides that "[n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. The issue was raised as to whether Mr. Tolbert was competent, and this issue was not resolved before the trial court accepted his guilty plea.

A. *Legitimate Questions Were Raised Regarding Mr. Tolbert's Competency*

On the January 5, 2009, Order on Omnibus Hearing, the box is checked that "defendant needs a competency hearing." CP:16. This Order is signed by the judge, prosecuting attorney, defense counsel, and defendant Tolbert. A status conference was set for January 23, 2009. On that date a change of plea hearing was set for January 28, 2009. However, the court made no finding in regard to Mr. Tolbert's competency at the plea hearing on January 28, 2009. 1/28/09 TR:1-11.

There is also support elsewhere in the record that Mr. Tolbert needed a competency evaluation. At sentencing, Tolbert's mother described some of the mental health issues he had been experiencing:

> He's been diagnosed with ADHD and PTSD, a couple more things, so – and he was court ordered to take meds and he wouldn't take his meds. I know that that had a lot to play – part to play in what happened because he's a really good – he's got a very good heart and he's a good baby. That's my baby, that's my last baby.

> I sent him to Montana for a while with my brother but I brought him back because my brother was, I thought, too strict, abusive – to the point of abuse. … I also suffer from addiction and I kind of got caught up in addiction. … I know that what happened really – that it really got him, you know, it got to him because he told me, I've never seen – you don't know what I've seen, mom.
>
> … I did a lot of praying for my son because right after that had happened, he got shot twice down on Portland Avenue and I really felt like that summer that I was going to bury my son before the summer was over …
>
> …I didn't approve of what he did but he's very hot headed and then not taking his meds that probably – you know, he did a lot of drinking and drugging too so, you know.

3/12/10 TR:6-8.

Mr. Tolbert's two pro se declarations cast doubt on his understanding of his legal situation and his ability to assist in his own defense. The first, filed March 18, 2009, states "I feel my lawyer is trying to force me to take this deal by not communicating with me." CP:45. This was two months after the change of plea hearing. This quoted statement strongly suggests that Mr. Tolbert did not really understand what had gone on at that hearing, despite his polite monosyllabic assurances to the judge.

In the second declaration, Mr. Tolbert states (as written):

> I Hokeshina Tolbert … order dissmissal and quashing of service of process, INSUFFICENT SERVICE. My Basis for insufficent counsel is my attorney Dana

> Ryan has Performed inadequately. I have asked him to schduele a incomatency hearing he has not. I've asked him to do numerous things to no avail. He has not informed me of my case's status and Refuse's to answer my and my mothers calls. I Believe he is not doing his Job as well as he could be. he has not helped me in my case. I Request to be appointed a new attorney.

CP:47. Mr. Tolbert lists himself as "dependent" and Dana Ryan as "attorney for dependant." He filed the original declaration in the Pierce County Juvenile Court. All of those things indicate that he did not comprehend how the legal process was working in his case.

B. *Once a Legitimate Question Was Raised Regarding Mr. Tolbert's Competency, the Court was Required to Resolve that Question Before Accepting a Guilty Plea or Imposing Sentence*

The Omnibus Order, CP:14-16, indicates the court anticipated ordering a competency evaluation, yet it never followed through before accepting Mr. Tolbert's plea or imposing sentence.

Procedures of the competency statute (chapter 10.77 RCW) are mandatory and not merely directory.[10] "Thus, once there is a reason to doubt a defendant's competency, the court must follow the statute to determine his or her competency to stand trial." *City of Seattle v. Gordon,* 39 Wn. App. 437, 441, 693 P.2d 741 (1985). This means that once a legitimate question has been raised, "the court *must* order an expert to

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[10] *In re Personal Restraint of Fleming,* 142 Wn.2d 853, 16 P.3d 610 (2001); *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982).

evaluate the defendant's mental condition. RCW 10.77.060." *State v. Coley*, 180 Wn.2d 543, 552, 326 P.3d 702 (2014) (emphasis added). Failure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process.[11]

The determination of whether a competency examination should be ordered rests generally within the discretion of the trial court. *State v. Thomas,* 75 Wn.2d 516, 518, 452 P.2d 256 (1969). "In this unique area, the statutes also assign a duty to the court to question competency, even if no party is challenging it." *Coley*, 180 Wn.2d at 555 n.1. The factors a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967). The factors raised here include defense counsel's own concerns, Mr. Tolbert's pro se filings, and the medical and psychiatric information raised at sentencing. Once a legitimate question as to Mr. Tolbert's competence was raised, the mandatory procedures of the competency statutes required the trial court

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[11] *State v. O'Neal,* 23 Wn. App. 899, 901, 600 P.2d 570 (1979) (citing *Drope v.Missouri*, 420 U.S. 162, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975); *Pate v. Robinson,* 383 U.S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836(1966)).

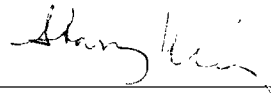
to resolve that question before accepting a guilty plea or imposing sentence.

CONCLUSION

Based on the foregoing, Mr. Tolbert should be permitted to withdraw his plea of guilty.

DATED: September 29, 2015

Respectfully submitted,



Stacy Kinzer, WSBA No. 31268
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CERTIFICATE OF SERVICE

I certify that on the 29th day of September, 2015, a true and correct copy of the foregoing OPENING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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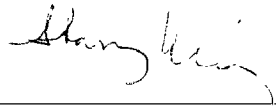

Stacy Kinzer

STACY KINZER LAW OFFICE

September 29, 2015 - 12:01 PM

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Court of Appeals Case Number: 46892-1

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