

NO. 46892-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

HOKESHINA LEE TOLBERT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Felnagle

No. 08-1-03122-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was Defendant's guilty plea voluntary, knowing, and intelligent when he chose to plead guilty pursuant to a plea agreement with the State, his Statement on Plea of Guilty demonstrates an understanding of the charge and the consequences of pleading guilty, and the trial court confirmed this understanding during a colloquy before accepting his plea?
2. Was there a sufficient factual basis for Defendant's guilty plea when his Statement on Plea of Guilty and the State's Declaration for a Determination on Probable Cause establish that he provided a rifle to the principal with knowledge that it would be used to intentionally shoot someone, that he assisted in the shooting by accompanying the principal to the scene of the crime, and that he reclaimed possession of the murder weapon from the principal knowing it was used to kill the victim?
3. Did the trial court properly exercise its discretion by declining to hold a competency hearing when Defendant did not present any formal evidence of incompetence as the law requires and his counsel expressly declined to request a competency hearing at his omnibus hearing?

B. STATEMENT OF THE CASE

On May 10, 2008, Michael Mee was involved in a fight with several people at a barbecue. CP 3. After leaving the barbecue, Mee drove to

another residence and met Hokeshina Lee Tolbert¹ (hereinafter “Defendant”). CP 3. Defendant went into the residence and retrieved a rifle which he gave to Mee. CP 3. Mee then left that residence and Defendant followed him in a separate car. CP 3.

They traveled to the residence where the fight had occurred. CP 3. Mee fired two rounds at the people standing in the yard of the residence, one of which struck Tracy Steele in the torso. CP 3. When police arrived, the other partygoers were attempting to keep Steele alive, but he ultimately succumbed to the gunshot wound and was pronounced dead at the hospital. CP 3. Defendant admitted that he gave Mee the rifle, that he knew the rifle was going to be used to shoot someone, that he followed Mee to the shooting, and that he retrieved the rifle from Mee after the shooting. CP 4; CP 39.

The State originally charged Defendant as an accomplice with one count of murder in the first degree (RCW 9A.32.030) and one count of unlawful possession of a firearm in the second degree (RCW 9.41.040(2)(a)(iii)). CP 1-2. As Defendant was under the age of 18 at the time of the offense, his maximum potential prison term if convicted of these charges was 25 years to life. RCW 9.94A.510. However, Defendant entered

¹ In a partially published decision affirming Mee’s conviction, this court stated that after Mee arrived at the residence, he and Defendant discussed how to retaliate for the earlier fight. *State v. Mee*, 168 Wn. App. 144, 150, 275 P.3d 1192 (2012).

into a plea agreement with the State where he agreed to plead guilty to one count of murder in the second degree in exchange for testifying against five codefendants. CP 41-44; 1/29/09 RP 3-4. Defendant satisfied his component of the plea agreement, and the State amended its information as stated in the plea agreement. CP 30; 3/12/10 RP 4-5.

Defendant pleaded guilty to the amended information on January 29, 2009. 1/29/09 RP 9-10. Before accepting Defendant's guilty plea, the trial court held an extensive colloquy where it outlined the implications of the defendant pleading guilty. 1/29/09 RP 5-10. Defendant stated that he had gone over the plea form with his attorney for a sufficient amount of time to understand the consequences of pleading guilty. 1/29/09 RP 5. Defendant acknowledged that he was aware he was waiving his right to a jury trial and to testify in his own defense. 1/29/09 RP 6. Finally, Defendant was informed of the maximum possible sentence for pleading guilty to murder in the second degree, and acknowledged the terms of his plea agreement with the State. 1/29/09 RP 6-7.

The trial court confirmed that the factual statement in paragraph 11 of Defendant's plea form was accurate. 1/29/09 RP 8-9. Finally, the trial court sought to confirm that Defendant was not pleading guilty out of confusion, fear, or simply because his attorney had told him to. 1/29/09 RP 9. Defendant replied by acknowledging that the court should have no reason to hesitate in accepting his plea. 1/29/09 RP 9.

At sentencing, the State reduced its recommendation from 220 months of incarceration to 150 months. 3/12/2010 RP 4-5. This reduction was due to Defendant's strict cooperation with the plea agreement in his codefendant's trials, as well as the fact that Defendant was breaking "gang code" by testifying. 3/12/10 RP 4. The trial court imposed a 150 month sentence in accordance with the State's more favorable recommendation. 3/12/10 RP 9. Defendant filed a notice of appeal. CP 65.

C. ARGUMENT.

1. DEFENDANT'S GUILTY PLEA WAS KNOWING, VOLUNTARY, AND INTELLIGENT AS HIS SIGNED PLEA FORM AND COLLOQUY WITH THE TRIAL COURT CONFIRM THAT HE WAS APPRISED OF THE NATURE OF THE OFFENSE AND WAS INFORMED OF THE CONSEQUENCES OF PLEADING GUILTY.

A defendant's guilty plea must be knowing, voluntary, and intelligent. *In re Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). When a defendant completes a written plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998) (citing *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982)). If the trial court orally inquires into a matter in the plea statement,

the presumption that the defendant understands this matter becomes “well nigh irrefutable.” *Perez*, 33 Wn. App. at 262.

The record contains four documents demonstrating that Defendant’s plea was knowing, voluntary, and intelligent. The first of these documents is Defendant’s written plea contract with the State. CP 41-44. This contract outlines the obligations and benefits Defendant incurred by making a plea agreement with the State. The second document pertaining to Defendant’s plea is his Statement on Plea of Guilty. CP 32-40. The third document is the incorporated Declaration for a Determination on Probable Cause, which establishes the factual basis of Defendant’s plea in tandem with his Statement on Plea of Guilty. CP 3-4. Finally, an incorporated amended information shows the reduction in charges Defendant received after testifying against his codefendants. CP 30.

- a. Defendant’s plea was voluntary as it was the result of his conscience choice to plead guilty as part of his plea agreement and was not the result of coercion.

A defendant’s guilty plea is not involuntary where the decision to plead is a calculated move on the defendant’s part to avoid what he considers a worse fate. *State v. Cameron*, 30 Wn. App. 229, 231, 633 P.2d 901 (1981) (citing *State of Missouri v. Turley*, 443 F.3d 1313, 1317 (8th Cir. 1971)). A guilty plea is only involuntary if it is obtained by mental coercion overbearing the will of the defendant. *State v. Watson*, 159 Wn.2d

162, 164-65, 149 P.3d 360 (2006) (citing *Brady v. United States*, 397 U.S. 742, 750, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)). Consistent with this standard, a guilty plea is only involuntary if it results from threats of physical harm or mental pressure applied to force the defendant to plead guilty under duress. See *State v. Osborne*, 35 Wn. App. 751, 754-55, 559 P.2d 905 (1983).

The record in this case demonstrates that Defendant voluntarily chose to plead guilty as a calculated move to reduce the charges filed against him. In his plea contract with the State, Defendant affirmatively agreed to plead guilty to murder in the second degree. CP 43. Defendant and his attorney signed this contract to indicate their satisfaction with its terms. CP 44. These facts demonstrate voluntariness as Defendant was fully apprised of his potential obligations under the plea contract before agreeing to assume those obligations. Defendant retained the right to reject the plea contract and exercise his right to go to trial until the moment he signed it to indicate his agreement with its terms.

Defendant's Statement on Plea of Guilty also demonstrates that his plea was voluntary. Paragraphs 8, 9, and 10 in his Statement on Plea of Guilty assert that he is pleading guilty voluntarily, that no one threatened him or otherwise coerced him into pleading guilty, and that he was not induced to plead guilty by any promise other than those obligations assumed

by the State in his plea contract. CP 39. Defendant and his attorney signed the Statement on Plea of Guilty to indicate their agreement with its contents, including paragraphs 8, 9, and 10. CP 40. Defendant signed and submitted this statement having asserted that he had read its terms and discussed them with his attorney. Included in its terms were express admissions that he was choosing to plead guilty voluntarily and without coercion. Defendant never sought to retract these admissions until after he had been sentenced.

Furthermore, Defendant's assertions that he was pleading guilty voluntarily were confirmed in his colloquy with the trial court. During this colloquy, Defendant confirmed that he and his attorney had read and discussed the plea statement. 1/29/09 RP 5. The trial court confirmed that Defendant understood his plea agreement with the State. 1/29/09 RP 7. The trial court also reiterated the consequences of pleading guilty by reminding the defendant of the maximum possible sentence for his crime, and that by pleading guilty he waived certain constitutional rights. 1/29/09 RP 6.

The trial court even provided Defendant with a final chance to assert he was pleading guilty against his will during the colloquy:

[TRIAL COURT]: All right. Now, here's the last thing I want to be sure about. I want to be sure that you don't come back later and say, well, the only reason I pled guilty was because I was confused or my lawyer told me to do it or I felt pressured because the trial date was coming up, or I was scared and I didn't really know what I was doing. I want to be sure you understand that, if you plead today, it's going to

stick, unless you break the plea agreement. Do you understand that?

[DEFENDANT]: Yes, sir.

...

[TRIAL COURT]: Is there any reason I should hesitate in taking your plea?

[DEFENDANT]: No, sir.

1/29/09 RP 9. This exchange represents an opportunity for Defendant to protest the voluntariness of his plea, and even provided him with examples of coercive conduct that could render his plea involuntary. However, Defendant's response confirmed his agreement with paragraphs 8, 9, and 10 of his Statement on Plea of Guilty, making the presumption that his plea was voluntary "well nigh irrefutable." *Perez*, 33 Wn. App. at 262.

The record establishes that Defendant was presented with ample opportunity to protest the voluntariness of his plea, yet he did not do so. Instead, he chose to enter into a plea agreement with the State to avoid a worse fate. Defendant affirmatively agreed to plead guilty in his plea contract, and asserted that he was pleading guilty voluntarily in his Statement on Plea of Guilty. This assertion was confirmed in his colloquy with the trial court. The record contains no evidence that his free will was ever overcome by any coercive behavior. Defendant's guilty plea was voluntary.

- b. Defendant's plea was knowing as he was apprised of the elements of his offense and understood that his conduct satisfies those elements.

For a guilty plea to be knowing, defendants must be informed of the nature of their offense. *Isadore*, 151 Wn.2d at 298; *State v. Osborne*, 102 Wn.2d 87, 92-93, 684 P.2d 683 (1984). The defendant must be aware of the acts and requisite state of mind in which they must be performed to constitute a crime. *Osborne*, 102 Wn.2d at 93 (quoting *State v. Holsworth*, 93 Wn.2d 148, 153 n. 3, 607 P.2d 845 (1980)). Notifying a defendant of the nature of the crime to which he pleads via an information creates a presumption that the plea was knowing. *In Re The Personal Restraint of Hews*, 108 Wn.2d 596, 596, 741 P.2d 983 (1987).

The record establishes that Defendant was adequately apprised of the nature of his offense to enter a knowing guilty plea. The State notified Defendant of the nature of second degree murder via an amended information. CP 30. This amended information was incorporated into Defendant's Statement on Plea of Guilty and notified Defendant that he was being charged as an accomplice, and that he must have intentionally caused the death of another person to be found guilty of murder in the second degree. CP 30. This amended information notified Defendant of the

essential elements of his offense and raises a presumption that his plea was knowing.

Defendant's Statement on Plea of Guilty confirms that he understood how his actions satisfied the essential elements of murder in the second degree provided in the amended information. In paragraph 4(b) of his Statement on Plea of Guilty, Defendant wrote that he acted as an accomplice with the intent to cause the death of another person in the shooting death of Tracy Steele. CP 32. Defendant also described his crime in his own words in paragraph 11 of his Statement on Plea of Guilty. CP 39. In paragraph 11, Defendant wrote that:

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. Defendant signed and initialed next to this written statement. CP 39.

Defendant's written statement in paragraph 11 is crafted to reflect the elements of his offense. First, Defendant admits that he provided the principal with a gun that was later used to kill someone. To be convicted as an accomplice, Defendant must understand that his criminal liability is based on him aiding the principal in the commission of a crime. RCW 9A.08.020(3)(a)(ii). Defendant's statement regarding his knowledge of the

principal's intent must be read into context of the elements contained in the incorporated amended information and paragraph 4 of the Statement on Plea of Guilty. By admitting to providing the rifle that was used to shoot the victim, Defendant acknowledged his role in the crime and the manner in which he aided the principal in committing it.

Second, Defendant admits that he knew the gun was going to be used to shoot someone. This is an important admission as Washington courts have held that firing a gun at a victim is sufficient to justify a finding of intent to kill. *State v. Hoffman*, 116 Wn.2d 51, 84-85, 804 P.2d 577 (1991) (holding that firing a weapon at a victim is sufficient to justify a finding of intent to kill). The fact that the principal shot at the victim is sufficient to find that he acted with the intent to kill, and Defendant knew the principal possessed this intent when he gave him the rifle. In this way, Defendant facilitated an intentional killing when he provided the rifle the principle used to shoot the victim.

The record establishes that Defendant was informed of the essential elements of his crime via an amended information and admitted to conduct satisfying those elements in his Statement on Plea of Guilty. As Defendant was fully apprised of the nature of his offense and understood how his actions constituted a crime, his plea was knowing.

- c. Defendant's plea was intelligent as he was fully informed of the direct consequences of pleading guilty, including the waiver of constitutional rights and his potential maximum sentence.

In order for a guilty plea to be intelligent, the defendant must be informed of all the direct consequences of pleading guilty. *Isadore*, 151 Wn.2d at 298 (citing *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). Direct consequences of a guilty plea are those that represent a definite, immediate, and largely automatic effect on the defendant's punishment. *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980) (quoting *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973)). Direct consequences of a guilty plea include the statutory maximum sentence², the applicable standard range of sentences³, and mandatory community custody.⁴

Defendant was informed of the direct consequences of his plea both in his plea contract with the State and in his Statement on Plea of Guilty. Paragraph 6(a) of Defendant's Statement on Plea of Guilty shows that he was informed of the maximum possible sentence for a second degree murder conviction, specifically life in prison and a \$50,000 fine. CP 33. Paragraph 6(a) also displays the 123 to 220 month standard range sentence

² *State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008).

³ *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001).

⁴ *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003).

that applied specifically to Defendant as his offender score was 0 at the time he pleaded guilty. CP 33. Finally, paragraph 6(a) also informed Defendant that he faced 24 to 48 months of mandatory community custody as a result of choosing to plead guilty. CP 33.

Defendant was informed of the direct consequences of pleading guilty with greater specificity in his plea contract with the State, which was incorporated by reference into paragraph 6(g) of Defendant's Statement on Plea of Guilty. CP 35. Defendant's plea contract described the State's sentencing recommendation in precise terms. In the plea contract, the State agreed to recommend 220 months of incarceration, the imposition of various legal financial obligations, and 24 to 48 months of community custody. CP 43; CP 35. This agreement provided Defendant with the precise sentencing terms the State intended to pursue and included all of the direct consequences of his guilty plea. Defendant reiterated his acceptance of those consequences by incorporating the plea contract and its terms into his Statement on Plea of Guilty in paragraph 6(g) and initialing next to that paragraph. CP 35.

Defendant was fully apprised of the direct consequences of pleading guilty when his plea contract was presented to him and he agreed to its terms. This contract provided Defendant with notice of the term of incarceration, financial penalties, and term of community custody the State

would seek in exchange for his guilty plea. Defendant indicated his agreement with this exchange both by signing the plea contract and incorporating it into his Statement on Plea of Guilty. As Defendant was made fully aware of the direct consequences of pleading guilty, his guilty plea was intelligent.

Defendant's conduct in entering into a plea agreement, incorporating that agreement into his Statement on Plea of Guilty, and confirming that he was choosing to plead guilty voluntarily during a colloquy with the trial court raises an almost irrefutable presumption that his plea was knowing, voluntary, and intelligent. Nothing in the record suggests that this presumption has been rebutted. In fact, the record contains several instances where the defendant affirmatively states that he is choosing to plead guilty on his own volition and that he understood the plea agreement and its consequences. As the defendant's plea was voluntary, knowing, and intelligent, the trial court did not err by accepting it.

2. THE TRIAL COURT ACCEPTED DEFENDANT'S PLEA WITH A SUFFICIENT FACTUAL BASIS AS HIS STATEMENT ON PLEA OF GUILTY AND THE STATE'S PROBABLE CAUSE STATEMENT ESTABLISH THAT HE PROVIDED THE PRINCIPAL WITH A RIFLE WITH KNOWLEDGE THAT IT WOULD BE USED TO KILL SOMEONE.

"The court shall not enter judgment upon a plea of guilty unless it is satisfied that there is a sufficient factual basis for the plea." CrR 4.2(d). "The

factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that the defendant is in fact guilty.” *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976). “There must only be sufficient evidence, from many reliable source, for a jury to find guilt.” *State v. Zhao*, 157 Wn.2d 188, 198, 137 P.3d 835 (2006).

A person is guilty of murder in the second degree when they intentionally cause the death of another person. RCW 9A.32.050(1)(a). To hold a defendant liable as an accomplice, the State must prove that the person who aids in the commission of the offense necessarily had knowledge of it. *State v. Trujillo*, 112 Wn. App. 390, 404, 49 P.3d 935 (2002). However, “an accomplice need not have knowledge of each element of the principal’s crime in order to be convicted under RCW 9A.08.020. General knowledge of ‘the crime’ is sufficient.” *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). In other words, a defendant charged as an accomplice need only have knowledge of the type of crime they are facilitating in order to be convicted. *State v. McChristian*, 158 Wn. App. 392, 401, 241 P.3d 468 (2010) (quoting *In re Pers. Restraint of Sarausad*, 109 Wn. App. 824, 836, 39 P.3d 308 (2001)). An accused who knows that his conduct will aid in the commission of a crime is liable as an accomplice to that crime whether or not they know of the facts that would determine the degree to be charged. *Id.*

Under Washington's accomplice liability statute, Defendant does not need to be aware of the elements of the principal's crime to be convicted if he had knowledge he was facilitating a murder by providing the rifle. Thus, to accept Defendant's plea, there must be a sufficient factual basis for a jury to conclude that Defendant provided the rifle with knowledge that by doing so, he was helping the principal intentionally cause the death of another person. A factual basis for Defendant's plea can be found in Paragraph 11 of Defendant's Statement on Plea of Guilty where he admits that he knew the gun he gave to the principal was going to be used to shoot someone. CP 39.

Defendant furnished a rifle, an accurate and lethal type of firearm, to the principal with knowledge it would be used to shoot someone. A jury is entitled to find the principal acted with the intent to kill from the fact that he shot the rifle into a crowded yard. *Hoffman*, 116 Wn.2d at 84-85. A jury would also be entitled to find that Defendant shared this intent as he provided the weapon used to kill the victim with knowledge of the principal's intentions. Defendant did not object to the principal taking the rifle and firing it at the victim. Instead, he was fully compliant with the entire scope of the principal's conduct, including the intentional act of firing the rifle into the crowded yard, which resulted in the victim's death.

The trial court also could have relied on other facts included in Defendant's Statement on Plea of Guilty to find a factual basis for the assertion that Defendant knew he was aiding the principal in committing a

murder. First, in paragraph 11 of his Statement on Plea of Guilty, Defendant admits to following the principal to the location of the shooting and watching as he shot the victim. CP 39. Defendant first aided the principal carry out the murder by providing the weapon used to kill the victim. However, Defendant's aid to the principal persisted beyond providing the weapon when he accompanied the principal to the scene of the shooting and watched as he fired into a crowded yard. This act demonstrates that Defendant was not only complicit in the murder during its preparation phase, but also as it was actually occurring.

The trial court also could have found a sufficient factual basis to accept Defendant's guilty plea from the incorporated Declaration for Determination of Probable Cause. CP 3-4. Defendant indicated that the trial court could look to the incorporated Declaration for Determination of Probable Cause to establish a factual basis for his plea by checking the box in paragraph 11 of his written plea statement. CP 39.

The incorporated Declaration for Determination of Probable Cause supplements the factual basis for Defendant's guilty plea found in his Statement on Plea of Guilty. The incorporated declaration corroborates Defendant's admissions in paragraph 11 of his Statement on Plea of Guilty. The declaration illustrates Defendant's role in providing the rifle and accompanying the principal as he shot the victim. CP 3. The declaration provides additional evidence of Defendant's guilt by showing that his role in the murder continued after the shooting. According to the incorporated

declaration, Defendant retrieved the rifle he had given the principal after it was used to kill the victim. CP 4.

At the time he retrieved the rifle from the principal, Defendant had witnessed the principal use it to shoot another person. Defendant did not attempt to distance himself from the principal's actions, and instead elected to retain possession of the murder weapon. Defendant's assistance to the principal continued even after he witnessed the full extent of the principal's crime. The record contains ample evidence establishing that Defendant was fully aware of the principal's intent before the shooting when he provided the rifle. This evidence is corroborated by his actions both during and after the shooting.

Defendant's actions demonstrate that he was fully aware that by providing the rifle, he was facilitating the commission of a murder. His Statement on Plea of Guilty and the incorporated Declaration for Determination of Probable Cause demonstrate his willingness to aid the principal in all phases of the crime. Defendant helped plan the murder out of retaliation for the earlier fight, assisted the principal by accompanying him during the actual shooting, and exhibited his dedication to the crime by retaining possession of the murder weapon after it had been used to shoot the victim. The trial court did not err as it accepted Defendant's guilty plea with a sufficient factual basis.

3. DEFENDANT NEVER RAISED A LEGITIMATE QUESTION REGARDING HIS COMPETENCY BECAUSE HE FAILED TO PROVIDE SUBSTANTIAL EVIDENCE OF INCOMPETENCY AS THE LAW REQUIRES AND HIS COUNSEL DECLINED TO REQUEST A COMPETENCY EVALUATION AT HIS OMNIBUS HEARING.

“A formal competency hearing under RCW 10.77.060 is required ‘whenever a legitimate question of competency arises.’” *State v. DeClue*, 157 Wn. App. 787, 792, 239 P.3d 377 (2010) (quoting *State v. Marshall*, 144 Wn.2d 266, 279, 27 P.3d 192 (2001)). A legitimate question of competency is raised when a defendant presents substantial evidence of incompetency. *Id.* The substantial evidence standard refers to a burden of production and relates to the quantity of evidence produced rather than its probative value. *State v. Paul*, 64 Wn. App. 801, 806, 828 P.2d 594 (1992). The determination of whether a competency examination should be ordered rests within the discretion of the trial court. *State v. Heddrick*, 166 Wn.2d 898, 903, 215 P.3d 201 (2009) (citing *State v. Thomas*, 75 Wn.2d 516, 517-18, 452 P.2d 256 (1969)).

Defendant failed to raise a legitimate question regarding his competency because he did not meet his burden of providing substantial evidence of incompetency. The record does not contain any psychological or medical evaluations suggesting that Defendant was incompetent.

Furthermore, the pro se filings Defendant alleges suggest incompetency on appeal were not before the trial court until after it had already accepted his plea and entered judgment. CP 45-47.

The only evidence that competency may have been an issue was the checked box on the omnibus order indicating Defendant's request for a competency hearing. However, the request for a competency hearing was not supported by any evidence indicating incompetency at the time of the omnibus hearing. Defendant is required to present substantial evidence of incompetency before the trial court is compelled to hold a competency hearing. In this case, Defendant failed to produce *any* evidence of incompetency, and therefore did not raise a legitimate question regarding his competency. The trial court was under no obligation to hold a competency hearing.

The request for a competency hearing was later determined to have been a matter of administrative convenience rather than a definitive request from Defendant:

[DEFENSE COUNSEL]: Your honor, in the omnibus order that's been prepared by Mr. Ryan, it indicates that there may be a competency examination, and I don't know what he means by that.

[TRIAL COURT]: Well, that's kind of an unusual situation to have floating around. I would think. Do you have any knowledge about this, Mr. Greer?

[PROSECUTOR]: No, sir.

[TRIAL COURT]: Okay. I am going to assume that Mr. Ryan is just covering his bases. At the moment, you have no indication that there's a request for a competency evaluation at this point?

[DEFENSE COUNSEL]: No, I do not.

1/5/09 RP 6. This discussion establishes that the trial court did in fact address the competency issue at the omnibus hearing, but Defendant failed to produce any evidence suggesting that he was incompetent. Additionally, when the trial court inquired into whether competency was going to be an issue, defense counsel expressly withdrew the request for a hearing.

Finally, the trial court's reasoning for not *sua sponte* holding a competency before sentencing is apparent in the record. At sentencing, the trial court addressed the defendant before entering judgment:

[TRIAL COURT]: Well, I had the benefit of listening to your testimony, and of all those who testified, yours stands out in my mind. I can remember your testimony, I can remember your mannerisms, I can remember that you were – in my mind anyway – very credible and forthright in the information you provided to the jury and you were critical to the conviction in that case. And all of that is very important and goes into my decision to adopt this joint recommendation that is much lower than what the State was originally asking for. . .

3/12/10 RP 8. This exchange shows that the trial court was never presented with a legitimate question regarding Defendant's competency in two ways. First, it shows that the defendant's was found competent to testify during the trial of his codefendants. The trial court obviously observed the

defendant's testimony during that trial and found him to be a competent witness. The trial court had the opportunity to observe the defendant testify in a high-stress trial and did not find any reason to question the defendant's competency at that time. The trial court's decision not to hold a competency hearing before imposing Defendant's sentence was a proper exercise of its discretion as it was soundly based on evidence of his competence.

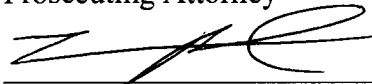
D. CONCLUSION

Defendant's plea contract with the State, his Statement on Plea of Guilty, and his colloquy with the trial court demonstrate that he made the decision to plead guilty voluntarily, knowingly, and intelligently. Defendant's Statement on Plea of Guilty and the State's Declaration for Determination of Probable Cause establish a sufficient factual basis to find that Defendant acted as an accomplice by facilitating an intentional murder. Finally, Defendant did not raise a legitimate question regarding his competency because he failed to produce substantial evidence of incompetency and declined to request a hearing when given the opportunity to do so. Thus, the trial court did not abuse its discretion by declining to

hold a competency hearing. For these reasons, the defendant's conviction and sentence should be affirmed.

DATED: December 30, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Spencer Babbitt
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/31/15 Shenkar
Date Signature

PIERCE COUNTY PROSECUTOR

December 31, 2015 - 1:41 PM

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