

No. 48143-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANNY ALLEN WING,


Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES iii

I. ISSUES.....1

II. STATEMENT OF THE CASE1

III. ARGUMENT6

 A. THE STATE DID NOT BREACH ITS PROFFER AGREEMENT WITH WING BY FILING A SUPPLEMENTAL TO AMENDED INFORMATION ADDING AGGRAVATING FACTORS6

 1. Standard Of Review.....7

 2. Plea Agreements Are Governed By Contract Principles7

 3. The State Did Not Breach The Proffer Agreement By Adding Aggravating Factors After Wing Failed His Two Polygraph Tests9

 B. WING’S OFFENSES ARE DOMESTIC VIOLENCE14

 1. Standard Of Review.....14

 2. Wing And JJH Were Family Or Household Members, Thereby Making Wing’s Crimes Domestic Violence14

 3. The Judgment And Sentence Is Properly Marked.....17

 C. WING’S OFFENDER SCORE IS CORRECT AND HIS PLEA WAS MADE INTELLIGENTELY, KNOWINGLY, AND VOLUNTARILY17

 1. Standard Of Review.....18

2.	Guilty Pleas Must Be Knowing, Intelligent, And Voluntary	18
3.	Wing's Offender Score For Count I: Manslaughter In The First Degree Was Correct.....	19
4.	The Incorrect Offender Score For Count II: Assault Of A Child In The Third Degree Does Not Render The Plea Unintelligent Or Unknowing As That Count Was To Run Concurrent With The Manslaughter Count	22
IV.	CONCLUSION.....	25

TABLE OF AUTHORITIES

Washington Cases

Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990) ..8, 12, 13

In re Postsentence Review of Combs, 176 Wn. App. 112, 308 P.3d 763 (2013).17

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010)19

State v. Armstrong, 109 Wn. App. 458, 35 P.3d 397 (2001)7

State v. Codiga, 162 Wn.2d 912, 175 P.3d 1082 (2008).....19, 23

State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012)7

State v. Harrison, 148 Wn.2d 550, 61 P.3d (2003)7, 9

State v. Munoz-Rivera, 190 Wn. App. 870, 361 P.3d 182 (2015)14, 15, 18

State v. Robinson, 172 Wn.2d 783, 263 P.3d 1233 (2011).....18

State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997).....7, 8

Stender v. Twin City Foods, Inc., 82 Wn.2d 250, 510 P.3d 221 (1973)8

Washington Statutes

RCW 10.99.020 14, 15, 16, 17

RCW 9.94A.03020

RCW 9.94A.51023

RCW 9.94A.51523

RCW 9.94A.52520, 21

RCW 9.94A.533	12
RCW 9.94A.535	12
RCW 9.94A.537	12
RCW 9A.32.060	19
RCW 9A.36.031	19, 21
RCW 9A.36.140	21, 23

Other Rules or Authorities

CrR 4.2	18, 19, 24
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I. ISSUES

- A. Did the State breach the Proffer Agreement with Wing when it filed an amended information adding aggravating factors?
- B. Did the trial court error when it designated Wing's offenses as domestic violence on the judgment and sentence?
- C. Was Wing's offender score miscalculated, thereby making his plea unknowing and unintelligently entered?

II. STATEMENT OF THE CASE

On November 7, 2014 the State charged Danny Allen Wing with Count I – Homicide By Abuse, or in the alternative, Count II – Manslaughter in the First Degree. CP 1-4. Included in the Information were two aggravating factors, (1) the defendant used his or her position of trust, or confidence, to facilitate the commission of the crime, and (2) the defendant should have known the victim was particularly vulnerable or incapable of resistance. *Id.* The information also included accomplice liability language. *Id.* The State submitted a probable cause affidavit based upon the police reports regarding the investigation into Wing's and his wife, Debra's,¹ actions that caused the death of JJH.² Supp. CP PC Aff.³

¹ The State will refer to Debra Wing by her first name to avoid any confusion, no disrespect intended.

² JJH is referred to as JJH-W in later charging documents. The State will refer to him as JJH in this briefing.

³ The State will be submitting a supplemental Clerk's papers designating the Affidavit of Probable Cause.

On October 5, 2014 Lewis County emergency dispatch received a phone call regarding an unresponsive three year old child. Supp. CP PC Aff. The child, later identified as JJH, was pronounced dead at Centralia Providence Hospital. *Id.*

During the investigation it was discovered that JJH's mother had become homeless and unable to care for JJH, so she asked the Wings', whom she met previously, to care for JJH. *Id.* JJH's mother had a note signed by herself, Wing, and Brenda, which made Wing and Brenda the guardians of JJH from "7/31/14 to 7/31/15..." *Id.*

The Wing household, according to the Wings, consisted of Wing, Brenda, Zackery Kidder (18), and the Wings' children. *Id.* Brenda told detectives that she and Wing had picked up JJH the night before from his mother in Woodland. *Id.* Brenda explained she and Wing often watched JJH because his mother was a drug user. *Id.* Brenda also told detectives she believed the child had been abused while in the mother's care. *Id.* Brenda detailed a number of injuries she had seen on JJH. *Id.*

Brenda told detectives on the morning of October 5, 2014 JJH woke her up by moaning that JJH was hungry. *Id.* JJH barely ate a little toast and some Gatorade. *Id.* According to Brenda, JJH

was not saying much, but did open his eyes. *Id.* Around 4:00 p.m. Brenda decided she should get JJH up. *Id.* When Brenda attempted to wake up JJH she lifted up his arm and it fell limply to the floor, JJH was not moving, but Brenda believed he was still breathing. *Id.*

Brenda told detectives that she gave the child a cold bath in an attempt to revive him, and when she did, noticed bruising that had not been visible previously all over his body. *Id.* JJH stopped breathing, Brenda had Wing call 911, and they began CPR. *Id.*

Wing also gave a statement to the detectives, but he told the detectives he and Brenda picked up JJH on Friday night, October 3, 2014, not Saturday, October 4. *Id.* Wing also told the detectives he had noticed the bruising on Saturday, not right before 911 had been called. *Id.*

Mr. Kidder told detectives JJH had been picked up two days before his death. *Id.* Mr. Kidder later admitted he had been instructed to tell law enforcement this by Wing, and that for the seven to 10 days Mr. Kidder had stayed with the Wings, JJH had been at the residence the entire time. *Id.* Mr. Kidder also described to detectives how JJH would simply fall over at times, stiffen, and writhe in pain. *Id.* These incidents would occur for up to 30 minutes and multiple times each day. *Id.*

The preliminary autopsy findings indicated that JJH had several abuse-related injuries. *Id.* These injuries were dated as weeks if not months old and were within the time JJH had been with the Wings. *Id.* The preliminary cause of death was Chronic Battered Child Syndrome. *Id.* The secondary cause of death was skin infections. *Id.*

Wing entered into a Proffer Agreement with the State. CP 54-56. In part 1 of the agreement, it spelled out the essence of the agreement:

(a) Danny A. Wing agrees to truthfully describe all that he remembers and truthfully answer all of the State's questions to the best of his ability.

(b) The State agrees to dismiss with prejudice the Homicide by abuse charge against Danny A. Wing, so long as Danny A. Wing fulfills part (1)(e).

(c) If Danny A. Wing tells the truth during interview(s) and if necessary, testifies truthfully with these statements at trial, the State shall offer Manslaughter 1st Degree-DV & Assault of a Child in the 3rd Degree-DV, both charges without enhancements. Each party would then be free to argue within the standard sentence range. (i.e. 146-194 months based upon the current offender score of 6 [4 priors plus 2 points for the current domestic violence offense])

(d) If Danny A. Wing is not truthful during the interview(s) or trial(s), then the State shall offer Manslaughter 1st Degree Domestic Violence & Assault in the 3rd Degree Domestic Violence, both charges with enhancements. Each party would then

be free to argue between low end of the standard range and maximum penalty (i.e. Life imprisonment).

(e) Danny Wing agrees to plead guilty pursuant to the terms of this agreement as summarized here and elaborated upon below.

CP 54. Wing pleaded guilty on March 19, 2015. RP (3/19/15); CP 9-18. As part of the plea, Wing admitted he recklessly caused the death of JJH, by failing to get him medical care for injuries sustained to JJH while JJH was a member of his household. RP (3/19/15) 10; CP 17.

The State filed a motion on September 21, 2015 to find Wing in violation of the Proffer Agreement. Supp. CP Mt to Find Violation. The State filed a memorandum that outlined the violations. Supp. CP Memorandum in Support. Wing's attorney responded. CP 49-161. The trial court entered an order finding a violation of the Proffer Agreement. CP 19. The order also states that the trial court accepts the stipulation to the filing of the supplemental amended information adding aggravating factors. CP 19. The State handed up the amended information adding back in the aggravating factors as they were originally filed pursuant to the Proffer Agreement. RP (9/25/15) 20; CP 20-22. Wing agreed that he committed those aggravating factors. RP (9/25/15) 20-21.

The State requested an exceptional sentence of 55 years. RP (9/25/15) 31. Wing's attorney asked the trial court for a 15 year sentence. RP (9/25/15) 39. The trial court sentenced Wing to an exceptional sentence of 416 months (34.5 years) in prison. RP (9/25/15) 58; CP 27. Findings of fact and conclusion of law were entered. CP 162-63. Wing timely appeals his sentence. CP 35-47.

The State will provide supplemental facts below in its argument below.

III. ARGUMENT

A. THE STATE DID NOT BREACH ITS PROFFER AGREEMENT WITH WING BY FILING A SUPPLEMENTAL TO AMENDED INFORMATION ADDING AGGRAVATING FACTORS.

Wing argues the State breached its Proffer Agreement with him when, after he failed his polygraphs and was found in violation of the agreement, it submitted an amended information adding aggravating factors. Brief of Appellant 17-20. The State did not violate the Proffer Agreement. The parties all understood the Proffer Agreement to mean that if Wing violated the terms of the agreement he was facing the addition of the originally charged

aggravating factors. This Court should uphold the agreement, the plea, and the sentence.⁴

1. Standard Of Review.

Constitutional issues and questions of law are reviewed de novo. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). In determining whether the State has breached its plea agreement, the reviewing court applies an objective standard. *State v. Sledge*, 133 Wn.2d 828, 843 n.7, 947 P.2d 1199 (1997).

2. Plea Agreements Are Governed By Contract Principles.

Plea agreements are analyzed using basic contract principles. *Sledge*, 133 Wn.2d at 838. This is because “[a] plea bargain is analogous to a contract right and its terms are read as a contract.” *State v. Armstrong*, 109 Wn. App. 458, 461, 35 P.3d 397 (2001) (internal quotations and citations omitted). The law imposes an implied promise upon the State to act in good faith. *State v. Harrison*, 148 Wn.2d 550, 556, 61 P.3d (2003).

A plea agreement is more than a simple contract. *Sledge*, 133 Wn.2d at 839. A plea agreement concerns the fundamental rights of the accused, and therefore, “constitutional due process

⁴ The State has reorganized the argument section, answering all Wing’s issues, but in a different order.

considerations come into play.” *Id.* Due process requires prosecutors to adhere to the terms of a plea agreement. *Id.* (internal citation omitted).

Interpretation of a contract is the process in which one ascertains the meaning of the expressions, symbols, or words of the parties used in the document. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). “The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties.” *Berg*, 115 Wn.2d at 663 (internal quotations and citations omitted).

In *Berg*, the Supreme Court decided it would adopt the “context rule” over the “plain meaning” rule of contract interpretation. *Id.* at 666-68. The “context rule” can be explained as follows:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Id. at 667, citing *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.3d 221 (1973). The Supreme Court held that, in order to ascertain the intent of parties, extrinsic evidence regarding the

entire circumstances under which the contract was made would be admissible. *Id.* at 667.

If there is a breach of the plea agreement by the State, the courts have recognized two possible remedies available to the defendant. *Harrison*, 148 Wn.2d at 557. “The defendant has the choice to either withdraw his plea and be tried anew on the original charges or receive specific performance of the agreement.” *Id.* The defendant is entitled to a remedy which restores him or her to the position he or she occupied before the State breached the plea agreement. *Id.* Further, in Washington, the courts generally follow the recommendation that the defendant be resentenced under a different judge when the defendant elects specific performance as his or her remedy for the State’s breach of the plea agreement. *Id.*

3. The State Did Not Breach The Proffer Agreement By Adding Aggravating Factors After Wing Failed His Two Polygraph Tests.

Wing argues the State breached its Proffer Agreement, after Wing failed to truthfully take two polygraphs, by submitting the Supplemental to Amended Information Adding Aggravating Factors. Brief of Appellant 17-20; See also RP (9/25/15) 20; CP 20-22. Wing argues, pursuant to the plain language found in the Proffer Agreement, the State could only have requested the trial court

consider sentencing enhancements, not aggravating factors. While Wing is correct that the Proffer Agreement uses the word “enhancement” and not “aggravator” or “aggravating factor(s)”, Wings’ argument nonetheless hinges on a faulty, and disingenuous, interpretation of the Proffer Agreement. The State abided by the terms its agreement with Wing, pursuant to the Proffer Agreement.

Wing’s attorney, Mr. Pascoe, drafted the initial Proffer Agreement, which was later reworked in conjunction with the State. RP (9/25/15) 9; CP 54-56. The agreement uses the word “enhancements” exclusively when discussing the charges as drafted against Wing, what Wing will plead to, and if enhancements will or will not be charged, and plead [pleaded] to by Wing. CP 54-56. The agreement discusses, in the overview section, if Wing were to be not truthful in his interviews that the State shall offer the charged and plead to offenses with enhancements. CP 54. The agreement states, “Each party would then be free to argue between the low end of the standard range and the maximum penalty (i.e. Life imprisonment). CP 54. Again, in section 8 of the agreement, which explains what will occur if Wing is not truthful, states “Significantly, this being a Class A felony the State could seek any amount of confinement time up to Life in prison.” CP 55.

The information as originally filed in this case charged Wing with Count I – Homicide By Abuse, or in the alternative, Count II – Manslaughter in the First Degree. CP 1-2. Both counts were charged with two aggravating factors, (1) abuse of position of trust, and (2) particularly vulnerable victim. *Id.* There were no sentencing “enhancements” charged. During the plea colloquy on March 19, 2015, Mr. Pascoe states,

That is correct, we are prepared at this time to enter a plea of guilty to the new amended information through which the state will be dismissing the homicide by abuse. They’ll also be dismissing the enhancements, subject to refile on the enhancements only, related to a proffer agreement that was signed by both sides this day.

RP (3/19/15) 3. The deputy prosecutor then states, “the state has the option under certain conditions to add the enhancements or aggravators back into this charge...” RP (3/19/15) 3-4.

At the sentencing hearing, after the judge found Wing had violated the Proffer Agreement, pursuant to Wing's decision to go forward with sentencing that day, Wing stipulated to the aggravating factors. RP (9/25/15) 16, 20-21. The State filed its amended information adding the aggravating factors and Wing admitted to both aggravating factors. RP (9/25/15) 20-21; CP 20-22.

This Court, when interpreting a plea agreement, in this case the Proffer Agreement, considers the intent of the parties when they drafted the agreement. *Berg*, 115 Wn.2d at 663. The Proffer Agreement cannot be looked at in a vacuum. The circumstances surrounding its drafting and extrinsic evidence of the parties clear intent are important in this case.

Yes, Wing is correct that the Proffer Agreement used the word “enhancement.” The State cannot deny that in legal terms, for sentencing purposes under the Sentencing Reform Act, there is a distinction between an aggravating factor and sentencing enhancement. See RCW 9.94A.533; RCW 9.94A.535; RCW 9.94A.537. But what Wing fails to acknowledge is that distinction was clearly lost on his trial counsel, who used the word enhancement interchangeably with the word aggravator or aggravating factor. See RP (3/19/15) 3-4; RP (9/25/15) 16; CP 54-55. The intent is also clear because a stipulation to an aggravating factor allows the sentencing judge to sentence a person up to the statutory maximum sentence. RCW 9.94A.535; RCW 9.94A.537. A sentencing enhancement has a determinate additional amount of time for a violation. RCW 9.94A.533. The Proffer Agreement clearly states that if Wing violated it, and the State added the

enhancements, the State was free to seek any amount of confinement up to Life in prison because Wing was being convicted of a Class A felony. CP 55.

The evidence from the time of the drafting and entering of the plea clearly show the intent of the parties was to allow the State to refile the aggravating factors that it had filed in the original information. This was the stick the State carried, the incentive for Wing to follow through with his end of the bargain. Allowing the State to refile and requiring Wing to stipulate to the aggravating factors upon a breach of the agreement on his part allowed the State to seek an exceptional sentence. That was clearly the intent of the parties. If, there is any doubt to that, this Court needs to look no further than the sentencing hearing, as subsequent acts and conduct of the parties is relevant to the determination of the intent of the parties. *Berg*, 115 Wn.2d at 667. Wing stipulated to the aggravating factors at sentencing. RP (9/25/15) 20-21.

This Court is to consider the reasonableness of the respective interpretations of the contract as advocated by the parties. *Berg*, 115 Wn.2d at 667. Wing's interpretation, that the State has breached its agreement with Wing because it added aggravating factors instead of enhancements is not reasonable.

Using the objective standard, this Court should not find the State in breach of the Proffer Agreement. This Court should reject Wing's argument and affirm his guilty plea and sentence.

B. WING'S OFFENSES ARE DOMESTIC VIOLENCE.

Wing argues his offenses are not domestic violence, as he and JJH were not family or household members. Brief of Appellant 8-12. Wing argues this improper designation must be stricken from his judgment and sentence. Brief of Appellant 12. Wing's offenses are domestic violence and are properly noted as such in his judgment and sentence. This Court should affirm the designation and the judgment and sentence.

1. Standard Of Review.

This Court reviews the purpose and meaning of statutes de novo. *State v. Munoz-Rivera*, 190 Wn. App. 870, 884, 361 P.3d 182 (2015).

2. Wing And JJH Were Family Or Household Members, Thereby Making Wing's Crimes Domestic Violence.

Domestic Violence is defined statutorily. RCW 10.99.020(5). The statute states that "Domestic violence' includes but is not limited to any of the following crimes when committed by one family or household member against another." RCW 10.99.020(5). This is

followed by a non-exclusive list of crimes. *Id.* Family or household member is also defined by statute. RCW 10.99.020(3).

"Family or household members" means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 10.99.020(3).

Wing argues that, like *Munoz-Rivero*, there was no legal parent-child relationship between himself and JJH, therefore, the relationship falls outside RCW 10.99.020(3) and is not domestic violence. Brief of Appellant 10-11; *Munoz-Rivero*, 190 Wn. App. 884-86. In *Munoz-Rivero* the defendant was the child's mother's boyfriend, who, while living in the home, there was no evidence of any legal parent-child relationship with the child. *Munoz-Rivero*, 190 Wn. App. at 885-86.

The facts of Wing's case are distinguishable. First, Wing stipulated that the crime was committed against a family or

household member. RP (9/25/15) 20. Second, Wing, along with Debra, signed an agreement with JJH's mother, to be JJH's "guardian" for a year. Supp. CP Aff. PC. "This note made [] Brenda and Danny the guardian of the child from '...7/31/14 to 7/31/15....'" *Id.* At Wing's sentencing hearing, JJH's mother spoke. RP (9/25/15) 50-54. JJH's mother stated, "Had I known that there was any abuse in the home, of course I would have never trusted them to his guardian." RP (9/25/15) 51.

A guardian, or custodian, of a child is sufficient to satisfy the legal parent-child relationship for purposes of the definition of family or household member in RCW 10.99.020(3). To find otherwise would mean that a person who has third-party custody of a child could never meet the definition of a family or household member. This would be an absurd reading, as any person who has been given custody of a child, even on a temporary basis, meets the definition of a legal parent-child relationship, as they are now charged with the day to day welfare of the child. Wing entered into a signed contract with JJH's mother to care for her child for a year while she got back on her feet. Further, Wing stipulated that JJH was a family or household member. Under these circumstances, JJH meets the definition of a family or household member and

Wing's offenses are domestic violence pursuant to RCW 10.99.020(5).

3. The Judgment And Sentence Is Properly Marked.

Wing argues the domestic violence notation on his judgment and sentence is a mischaracterization and should be stricken. Brief of Appellant 12. As argued above, Wing's offenses were properly characterized as domestic violence.

The Sentencing Reform Act prescribes the authority sentencing courts are awarded in Washington State when sentencing persons convicted of felony offenses. *In re Postsenteece Review of Combs*, 176 Wn. App. 112, 117, 308 P.3d 763 (2013). "The SRA limits the trial court's sentencing authority to that expressly found in the statutes." *Id.* Therefore, in this case, the trial court had the authority to mark the judgment and sentence in section 2.1 for the crimes charged in Counts I and II as domestic violence. CP 24. This Court should affirm the trial courts domestic violence designation and the judgment and sentence.

C. WING'S OFFENDER SCORE IS CORRECT AND HIS PLEA WAS MADE INTELLIGENTLY, KNOWINGLY, AND VOLUNTARILY.

Wing argues his offender score was miscalculated, which thereby invalidates the voluntariness of his guilty plea because it

was not an intelligent and knowing guilty plea. Brief of Appellant, 14-17. Wing's offender score was correctly calculated for the Manslaughter in the First Degree – Domestic Violence count. Wing suffers no prejudice from the incorrect offender score for the Assault of a Child in the Third Degree, a count which was to run concurrent with the Manslaughter count. Wing's plea was knowing, intelligent and voluntary. This Court should affirm the plea and remand for a correction of the offender score in Count II: Assault of a Child in the Third Degree.

1. Standard Of Review.

This Court reviews the purpose and meaning of statutes de novo. *State v. Munoz-Rivera*, 190 Wn. App. 870, 884, 361 P.3d 182 (2015).

2. Guilty Pleas Must Be Knowing, Intelligent, And Voluntary.

Guilty pleas may only be accepted by the trial court after a determination of the voluntariness of the plea is made. CrR 4.2(d). Due process requires that a defendant in a criminal matter must understand the nature of the charge or charges against him or her and may only enter a plea to the charge(s) voluntarily and knowingly. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011) (citations omitted).

The court rule requires a plea be “made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). Prior to acceptance of a guilty plea, “[a] defendant must be informed of all the direct consequences of his plea.” *State v. A.N.J.*, 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (citations and internal quotations omitted).

A defendant may be allowed to withdraw his or her guilty plea “whenever it appears that withdrawal is necessary to correct a manifest injustice.” *State v. Codiga*, 162 Wn.2d 912, 922-23, 175 P.3d 1082 (2008), *citing* CrR 4.2(f). “An involuntary plea can amount to manifest injustice.” *Codiga*, 162 Wn.2d at 923 (internal citation omitted). A miscalculation of an offender score, even one by mutual mistake that lowers the defendant’s standard range, renders the defendant’s plea involuntary and the plea may be withdrawn. *Id.* at 925.

3. Wing’s Offender Score For Count I: Manslaughter In The First Degree Was Correct.

Wing pleaded guilty to of Manslaughter in the First Degree, RCW 9A.32.060(1), and Assault of a Child in the Third Degree, RCW 9A.36.031(1)(f). CP 9-18, 20-22, 23-34. Both counts carried a domestic violence designation, which was plead [pleaded] and proven by stipulation. RP (3/19/15) 10-11; RP (9/25/15) 20; CP 9-

18, 20-22, 23-34. As such, pursuant to RCW 9.94A.525(21) when calculating Wing's offender score for the Manslaughter in the First Degree count:

If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead [pleaded] and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead [pleaded] and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;

RCW 9.94A.525(21)(a). Prior felony convictions count as one point.

RCW 9.94A.525(8).

Wing had four prior felony convictions. CP 7-8, 25, 54. These four prior offenses make up four points of Wing's offender score. The conviction for the other current offense, Assault of a Child in the Third Degree – Domestic Violence, counts as two

points. It is two points because the State plead [pleaded] and proved domestic violence, as required by the statute. RCW 9.94A.525(21). Assault of a Child in the Third Degree is one of the listed offenses, "a domestic violence Assault 3 offense." RCW 9.94A.525(21)(a). Assault of a Child in the Third Degree is defined as:

A person eighteen years of age or older is guilty of the crime of assault of a child in the third degree if the child is under the age of thirteen and the person commits the crime of assault in the third degree as defined in RCW 9A.36.031(1)(d) or (f) against the child.

RCW 9A.36.140(1). Therefore, Assault of Child in the Third Degree is an Assault 3 offense and satisfies the requirements of the statute for scoring purposes, and counts as two points when plead [pleaded] and proven. RCW 9.94A.525(21)(a); RCW 9A.36.031; RCW 9A.36.140.

Wing had a total of six points, four for his prior felony convictions and two for his current domestic violence conviction. Wing's offender score for the Manslaughter count was accurate, his plea was knowingly and intelligently made.

4. The Incorrect Offender Score For Count II: Assault Of A Child In The Third Degree Does Not Render The Plea Unintelligent Or Unknowing As That Count Was To Run Concurrent With The Manslaughter Count.

The State concedes that Wing's offender score for Assault of a Child in the Third Degree, Count II, was incorrectly calculated at six (6). The State agrees that the correct offender score should be five (5). The State does not agree that this error creates a manifest injustice that requires this Court to allow Wing the option of withdrawing his guilty plea. The incorrect score had no bearing or consequence on the plea as a whole, and this Court should look at the plea in total, not each count separately when determining if the incorrect offender score for Count II actually rendered Wing's plea involuntary.

Wing in his Proffer Agreement agreed to plead to two counts, Manslaughter in the First Degree, which had a standard range of 146 to 194 months (with an offender score of six points) and Assault of a Child in the Third Degree. CP 9-10, 54-55. The Assault of a Child in the Third Degree had an improperly calculated offender score of six, which put the standard range incorrectly at 22 to 29 months. *Id.* The correct standard range, with an offender

score of five, would have been 17 to 22 months. RCW 9.94A.510; RCW 9.94A.515; RCW 9A.36.140.

The State acknowledges that generally a miscalculation of an offender score, including mutual mistake, renders a plea involuntary, even if it lowers the offender score. *Codiga*, 162 Wn.2d at 925. That is because there is no meeting of the minds. But that is not so in this case. The two counts were to run concurrent with each other. CP 12. If Wing kept up his end of the Proffer Agreement he was looking at a minimum sentence of 146 months, regardless of the standard range for the Assault of the Child in the Third Degree count. CP 7-10, 12, 54-55.

There is no conceivable way that an improper calculation for the lesser count, which was to run concurrent with the greater charge, could render Wing's plea unintelligent or unknowing. Wing understood he was looking at a minimum sentence of 146 months. Wing understood his two counts were going to run concurrent. Wing understood if he did not follow through with the agreement the State could ask for anything up to the statutory maximum sentence, and for the greater charge, which was Manslaughter in the First Degree, that meant life in prison.

The purpose of allowing a defendant to withdraw their guilty plea, pursuant to CrR 4.2 and the case law that has spawned from it, is to protect a defendant and to ensure that guilty pleas are only accepted after a defendant has made a competent and voluntary decision to plea. This decision must be made after a defendant is fully informed of all the consequences of the plea, both direct and indirect. Withdrawal of the plea is allowed to correct a manifest injustice when something goes wrong in this procedure that renders the plea unknowing or unintelligent and thereby involuntary. This did not happen in Wing's case. Wing understood the sentence he was facing, the faulty offender score on Count II had no consequence to the actual sentence Wing would serve. There is no manifest injustice to correct. This Court should affirm the guilty plea and remand this case to correct the offender score for Count II: Assault of a Child in the Third Degree.

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IV. CONCLUSION

The State did not breach its Proffer Agreement with Wing. The agreement of the parties allowed the State to file the aggravating factors if Wing breached the agreement, which he did. Wing's offenses are correctly noted as domestic violence in the judgment and sentence, as both offenses are domestic violence. Wing's offender score for the Manslaughter in the First Degree count is correct. Finally, while Wing's offender score for the Assault of a Child in the Third Degree count is incorrect, this error did not render his plea unknowing, unintelligent, or involuntary, and therefore, Wing should not be able to withdraw his plea. Therefore, the State respectfully requests this Court affirm the guilty plea and remand the case to correct the offender score on Count II: Assault of a Child in the Third Degree.

RESPECTFULLY submitted this 29th day of July, 2016.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

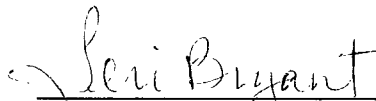
by: 
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Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. DANNY ALLEN WING, Appellant.	No. 48143-0-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 29, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lisa E. Tabbut, attorney for appellant, at the following email address: ltabbutlaw@gmail.com.

DATED this 29th day of July, 2016, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

July 29, 2016 - 10:57 AM

Transmittal Letter

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