

No. 69313-1-I  
King County Superior Court No. 07-1-10538-3 KNT

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

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STATE OF WASHINGTON,  
Plaintiff-Appellee,  
v.

ANDRE STEWART,  
Defendant-Appellant.

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

The Honorable Barbara Harris, Judge Pro Tem

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APPELLANT'S OPENING BRIEF

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COURT OF APPEALS  
STATE OF WASHINGTON  
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## **I. ASSIGNMENTS OF ERROR**

The trial court erred in failing to determine that Stewart's plea was voluntarily and competently made by asserting a factual basis for the plea.

## **II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERRORS**

Where the statement of the defendant on plea of guilty does not contain any admission of criminal negligence and where the plea judge does not engage in any colloquy with the defendant to ascertain whether or not he admits that element, must the plea be withdrawn?

## **III. STATEMENT OF THE CASE**

On September 21, 2007, Andre Stewart was charged with one count of third degree assault – Domestic Violence against Christina Evans under RCW 9A.36.031(1)(f). CP 1.

On February 29, 2008, Stewart completed a plea form. When asked to state in his own words what he did that made him guilty of the crime, Stewart stated:

That on 26 August 2007, in King County, I did cause bodily harm accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering to Christina Evans.

CP 14.

The plea judge engaged in a very brief colloquy with Stewart.

When it came to the elements of the crime, she said:

Your statement indicates that on the 26th of August 2007, in King County, Washington, you did cause bodily harm accompanied by substantial pain that it did extend for a period sufficient to cause considerable suffering to – is it Christina Evans.

2/29/08 RP 3.

When Mr. Stewart affirmed the truth of the statement, the court entered the plea. Judgment and sentence were entered. CP 26-33.<sup>1</sup>

#### IV. ARGUMENT

This Court does not review issues raised for the first time on appeal unless the issue involves a manifest error affecting a constitutional right. RAP 2.5(a)(3). The question of whether a factual basis exists to support Stewart's plea is a constitutional question. *In re Personal Restraint of Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987).

The constitutional requirements of a voluntary guilty plea are that the defendant be aware (1) that he is waiving the rights to remain silent, to confront his accusers, and to a jury trial; (2) of the essential elements of the offense charged; and (3) of the direct consequences of pleading guilty.

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<sup>1</sup> Stewart also has a PRP pending in this Court. *In Re Stewart*, No. 69483-9-I. Stewart has alleged that his trial counsel was ineffective for failing to ascertain that Ms. Evans had committed suicide a month before he entered in his plea in this matter. That PRP is stayed pending the outcome of this appeal.

*State v. Holsworth*, 93 Wn.2d 148, 153-57, 607 P.2d 845 (1980). The factual basis of a plea may be constitutionally significant where it relates to the defendant's understanding of his plea. *Hews*, 108 Wn.2d at 591-92. The lack of factual basis prevented Stewart from understanding how his conduct constituted third degree assault. Therefore, this Court can consider his argument for the first time on appeal.

In *McCarthy v. United States*, 394 U.S 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), the Supreme Court stated that a guilty plea "cannot be truly voluntary unless defendant possesses an understanding of the law in relations to the facts." While the Constitution does not expressly require that the record establish a factual basis for the plea, the absence of a factual basis leaves the plea open to challenge that it was involuntary and therefore violated due process. *State v. Rigsby*, 49 Wn. App. 912, 916, 747 P.2d 472 (1987) (citing *In re Hews*, 108 Wn.2d at 592).

Washington's Criminal Court Rules specifically require the court to find a factual basis for a guilty plea:

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. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d). One purpose of this rule is to fulfill the constitutional requirement that a guilty plea be made voluntarily. *In re Keene*, 95 Wn.2d 203, 206, 622 P.2d 360 (1980) (citing *McCarthy*; *Wood v. Morris*, 87 Wn.2d 501, 554 P.2d 1032 (1976)). The factual basis requirement protects the defendant who may understand the nature of the charge but may not realize that his conduct does not actually constitute the crime charged. *See Keene*, 95 Wn.2d at 206, 209, 213 (vacating plea to forgery as constitutionally invalid where conduct admitted by petitioner did not amount to forgery).

The court may consider any reliable source of information in determining whether a factual basis supports the guilty plea, but the factual basis must be developed on the record at the time the plea is taken. *State v. Osborne*, 102 Wn.2d 87, 95, 684 P.2d 683 (1984) (citing *Keene*, 95 Wn.2d at 210). A factual basis exists when there is sufficient evidence in the record from which a jury could find the defendant guilty. *Osborne*, 102 Wn.2d at 95. But simply having the defendant parrot the elements of the offense or charging language will not suffice. *State v. Zumwalt*, 79 Wn. App. 124, 130-31, 901 P.2d 319 (1995) (statements which are legal conclusions cannot provide factual basis), *overruled in part on other grounds*, *State v. Bisson*, 156 Wn.2d 507, 130 P.3d 820 (2006).

For example, in *State v. S.M.*, 100 Wn. App. 401, 996 P.2d 1111 (2000), the defendant was charged with three counts of first degree rape of a child. *Id.* at 403. A plea to first degree rape of a child requires that the defendant admit to penetrating the victim. RCW 9A.44.073(1); *S.M.*, 100 Wn. App. at 415. S.M. signed a statement of juvenile on plea of guilty, which stated: ““In Cowlitz County in the Spring of 1994, I had sexual contact with my Brother who is age 10 in 1994. It happened three times.”” *S.M.*, 100 Wn. App. at 403. At the hearing for entry of the guilty plea, the trial court asked S.M. if he knew what sexual intercourse meant, to which he replied that he did. *Id.* at 404. The court did not clarify S.M.’s plea any further. *Id.* The Court of Appeals concluded that the record did not show that S.M. understood the law in relation to the facts because the plea statement did not provide the necessary factual basis for the charge, and the trial court did not sufficiently clarify that S.M. admitted to conduct that would constitute the charge. *Id.* at 414-15.

Stewart was charged with a violation of RCW 9A.36.031(1)(f). That statute provides that a defendant is guilty of assault in the third degree if “with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.08.010 states that:

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

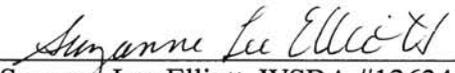
Here, Stewart's plea was not voluntary because he did not understand the conduct required to prove third degree assault. Specifically, nowhere in the plea colloquy was Stewart informed that not only did he have to inflict injury on Evans, he had to do so with criminal negligence. Because of this failure, Stewart's plea was not voluntary and the conviction must be reversed.

#### V. CONCLUSION

This Court must reverse.

DATED this 14<sup>th</sup> day of August, 2013.

Respectfully submitted,

  
Suzanne Lee Elliott, WSBA #12634  
Attorney for Andre Stewart

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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And to:

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Date

  
William Brenc