

NO. 34419-0-II

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

STATE OF WASHINGTON,
Respondent,
v.
OSCAR A. SERRANO,
Appellant.

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APPELLATE DIVISION
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APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 03-1-01091-3

HONORABLE GARY R. TABOR, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUE

1. Whether the trial court erred in finding that the defendant had failed to prove that defendant's attorney rendered ineffective assistance.

2. Whether the trial court erred in finding that the defendant had failed to prove his guilty pleas were involuntary or without knowledge of a direct consequence.

3. Whether the trial court erred in finding that the defendant had not been misinformed regarding the consequences of his guilty pleas.

B. STATEMENT OF THE CASE

On June 5, 2003, defendant Oscar Serrano was arrested in Thurston County for child molestation. 2/6-7/06 Hearing RP 116. Serrano was an immigrant from El Salvador. He had previously attended two years of high school in Los Angeles, and had later attended a community college in Oregon. 2/6-7/06 Hearing RP 113; Ex. 15. He later claimed to the Department of Corrections that he had obtained a G.E.D. at that college. Ex. 15.

In May, 1995, Serrano had married Rebecca Klingman. They remained together until August 2001. Klingman did not speak Spanish. Throughout

their marriage, they communicated only in English. There were also children in the household and Serrano only communicated in English with them. Rebecca had no difficulty communicating with the defendant and throughout their marriage found him to be proficient in the English language. She never observed him request assistance from another person when using English to engage in business transactions or social encounters. 2/6-7/06 Hearing RP 72-74.

On June 10, 2003, an Information was filed in Thurston County Superior Court Cause No. 03-1-01091-3 charging Serrano with three counts of child molestation in the third degree and four counts of rape of a child in the first degree. CP 5-6. Shortly thereafter, Richard Woodrow was retained to represent the defendant in this matter. 2/6-7/06 Hearing RP 10-11. Woodrow continued to represent the defendant through the change of plea hearing which took place on January 9, 2004. Serrano remained in custody at the Thurston County Jail throughout that time. 2/6-

7/06 Hearing RP 133-134.

Woodrow hired an investigator named John Wilson to assist in preparing for trial. Wilson began working on this case in July, 2003, and continued until December, 2003. 2/6-7/06 Hearing RP 39. Wilson spent 18 hours working on this case locating and interviewing witnesses, viewing the alleged crime scene, obtaining school records of the victim and work records of the defendant, and participating in three meetings with Woodrow and Serrano, and two meetings just with Serrano. 2/6-7/06 Hearing RP 40-41, 175.

Either Wilson or Woodrow or both interviewed all of the State's potential witnesses except one child whose parents fought to prevent the interview. 2/6-7/06 Hearing RP 138. Either Wilson or Woodrow also interviewed all of the prospective defense witnesses, including anyone Serrano asked them to contact on his behalf. 2/6-7/06 Hearing RP 41, 140. The trial was continued a number of times so that the defense could contact all potential witnesses. 2/6-7/06 Hearing

RP 138. However, all of the prospective defense witnesses contacted either stated something different from what Serrano had indicated or refused to be cooperative with an effort to defend Serrano in this case. 2/6-7/06 Hearing RP 140, 147.

Woodrow met with Serrano approximately 7 times, usually for about an hour each time. He familiarized Serrano with all of the discovery provided by the State, discussed with him the defense investigation in response, and discussed all negotiations with the State in this case. 2/6-7/06 Hearing RP 140-146. As noted previously, Wilson attended three of these meetings. 2/6-7/06 Hearing RP 40-41.

From the beginning of Woodrow's representation in this case through the change of plea hearing on 1-9-04, Serrano never requested that an interpreter assist him in his meetings with his attorney, in his meetings with Wilson, or at court hearings. Neither Wilson nor Woodrow observed any need for an interpreter in their

contacts with Serrano. Neither had any problem communicating with Serrano in English, and Serrano was found to speak the English language fluently. 2/6-7/06 Hearing RP 42-43, 142.

On November 10, 2003, the State filed a First Amended Information, which charged the defendant with one count of child molestation in the first degree, five counts of rape of a child in the first degree, and one count of attempted child molestation in the first degree. CP 10-11. If convicted of any four of the charges in the First Amended Information, the defendant would face a sentence range of 240 to 318 months in prison. 2/6-7/06 Hearing RP 149.

Then, on December 4, 2003, the State provided a written plea offer. The State offered to amend the charges to four counts of assault in the second degree with sexual motivation in return for the defendant's guilty pleas. The offer noted that the defendant's sentence range would then be 63 to 84 months in prison. The State offered to recommend the special sex offender sentencing

alternative (SSOSA), including a suspended sentence of 84 months and 6 months in jail with credit for time served, if there was a positive recommendation for that from a state-certified sex offender therapist after full disclosure by the defendant. Otherwise, the State would recommend an 84-month prison sentence. 2/6-7/06 Hearing RP 81, 150-151; Ex. 4.

When the defendant was shown this written plea offer, he took it with him back to his cell and kept it in his personal property. 2/6-7/06 Hearing RP 124. The defendant made the decision to accept the SSOSA option. Since he had already served 6 months in custody, such a sentence would result in release due to credit for time served. 2/6-7/06 Hearing RP 17-18, 55. However, it was learned that the defendant had an immigration hold and would probably be deported if convicted, and so the SSOSA option was no longer viable. 2/6-7/06 Hearing RP 44, 151. The defendant was informed of this, including the fact that he was facing the potential for deportation, and became

quite upset as a result. 2/6-7/06 Hearing RP 17, 44-45, 151, 160; Ex. 15 at p. 12.

With the SSOSA option no longer available, the defendant was faced with a State's offer to plead guilty to four counts of second-degree assault with sexual motivation, resulting in a prison sentence from 63 to 84 months. Ex. 4. The State had originally offered to recommend a sentence of 84 months, but Woodrow persuaded the State to instead recommend 72 months on each count to run concurrently. 2/6-7/06 Hearing RP 151-152.

In December, 2003, Serrano decided to accept the State's offer. A change of plea hearing was scheduled. Woodrow reviewed with the defendant the complete Statement of Defendant on Plea of Guilty. To some extent he read the form to the defendant, and in other sections had the defendant read the form. In the course of doing this, Woodrow discussed with the defendant the fact that these charges would result in both a minimum penalty from the sentence range and a maximum penalty of life in prison. 2/6-7/06 Hearing RP

156-158. However, it became apparent to Woodrow that the defendant was unsure about his decision and there was a need to further discuss the consequences of pleading guilty, and so the change of plea hearing was stricken. 2/6-7/06 Hearing RP 156-157; Ex. 15 at p. 8.

In January, 2004, a change of plea hearing was again scheduled. Prior to that hearing, Woodrow again went through the Statement of Defendant on Plea of Guilty with Serrano. 2/6-7/06 Hearing RP 159-160. Woodrow discussed with the defendant the difference between the prison penalty that could result from his guilty pleas and what he could be facing if convicted at trial, including the fact that he could earn good time by behaving while in prison. Ex. 15 at pp. 11-12. Woodrow also explained to Serrano what an Alford plea is, but may not have used that name for such a plea. 2/6-7/06 Hearing RP 163, 194; 1-9-04 Hearing RP 10. Before going to the change of plea hearing on January 9, 2004, Woodrow made sure the defendant did not have any unanswered questions

about the consequences of his pleading guilty.
2/6-7/06 Hearing RP 164.

A change of plea hearing was held on January 9th before the Honorable Judge Gary Tabor. Consistent with the plea offer, a Second Amended Information was filed that same day charging the defendant with four counts of assault in the second degree with sexual motivation. CP 12-13. He now faced a maximum penalty of life in prison and a minimum penalty within the range of 63 -84 months on each count. CP 14-21. Again consistent with the plea offer, the State recommended a minimum term on each count of 72 months in prison to run concurrently. 1-9-04 Hearing RP 6.

The defendant's Statement of Defendant on Plea of Guilty affirmed that he understood the rights he was giving up by pleading guilty, and that he understood the charges to which he was pleading guilty. CP 14-21. The Statement further acknowledged that Serrano was making his guilty pleas freely and voluntarily, that no one had made any promises to him to get him to plead guilty

other than what was set forth in the Statement, and that he had discussed the Statement with his attorney and understood all of the sections of that Statement. CP 20-21.

At the change of plea hearing, when the court informed the defendant that the maximum sentence for these charges was life in prison and/or a \$50,000 fine, the defendant responded by stating, "I was told I'm going to do three and a half years." 1-9-04 Hearing RP 6. After clarifying that the defendant understood what the maximum penalties were, the court addressed the defendant's understanding of what penalties he faced in pleading guilty.

THE COURT: Okay. Now, the prosecuting attorney in this case has stated that they would recommend 72 months in prison, that you be on lifetime community custody, the usual sexual offender conditions, and have no contact with the alleged victim for life, and that there be a Pre-Sentence Investigation report which is required by law. Is that what you understand the State is going to recommend?

THE DEFENDANT: Yes.

MR. POWERS: Your honor, can I interrupt a second? I think that really needs to be clarified here for Mr. Serrano's benefit.

This is - these are offenses which come under the terms of RCW 9.94A.712, which requires that upon a conviction Mr. Serrano be given the maximum term, which is life, and then the question becomes what the minimum term would be and that's what the sentence - that's what the range becomes pertinent to.

So on the forms there you'll note that it refers to a maximum term with a minimum term of, and then relates to the standard range. And so what Mr. Serrano refers to, I guess, is the minimum term minus good time, which certainly could be the sentence, but the thing I want to be very clear about so Mr. Serrano understands, that under 712, the statute I'm referring to, he would be sentenced to the maximum term for life, a minimum term of whatever the Court felt appropriate under the sentence range, which the Court has already described, and then it would be up to the Indeterminate Sentencing Review Board after the minimum term has been completed minus any good time, whether in fact release takes place then or whether it takes place at a later time, up to the board.

And so, of course, that's a little different from being able to say he would automatically be released at the end of the minimum term plus good time. I just want to make sure that Mr. Serrano understands that distinction.

MR. WOODROW: Your Honor, I think I explained to Mr. Serrano that he has to cooperate with the Department of Corrections. If they send him to do sexual offender treatment he has to do that. He can't engage in any disciplinary problems while in the Department of Corrections and actually earn any potential good time, and if he does that stuff there is a potential that he will be granted good time while he's in the Department of Corrections and get out sooner than the sentence that Your Honor is going to

impose.

THE COURT: Mr. Woodrow, what I want to delve further into is if you have discussed with Mr. Serrano that under the new sentencing statute that was referred to by Mr. Powers, a court must impose a maximum sentence and a minimum sentence.

MR. WOODROW: Right.

THE COURT: Is he aware of that?

MR. WOODROW: Yes, sir.

THE COURT: Mr. Serrano, you do understand, then, that the Court will impose a maximum sentence of up to life and a minimum sentence within the standard range?

MR. WOODROW: Could your honor tell him what the standard range is?

THE COURT: Standard range is 63 to 84 months. Do you understand that, Mr. Serrano?

THE DEFENDANT: Yes.

. . . THE COURT: Now, as to the State's recommendation which has now been clarified on the record, are you aware that that is only a recommendation by the State and a sentencing court is free to impose whatever sentence that court thinks is appropriate, does not have to follow a recommendation by the State, by your attorney or by anyone else?

THE DEFENDANT: Yes, Your Honor.

1-9-04 Hearing RP 6-10.

The defendant entered Alford pleas of guilt

to the four charges. 1-9-04 Hearing RP 10. The defense stipulated that the information contained in the prosecution's certification of probable cause and the affidavit for search warrant in this case established a factual basis for the charges. 1-9-04 Hearing RP 11. The prosecution then supplemented those documents with a further recitation of what could have been shown by evidence at trial, and the defense agreed that this was an accurate summary of the State's evidence. 1-9-04 Hearing RP 11-13. The court therefore found a factual basis for the defendant's guilty pleas. 1-9-04 Hearing RP 13-14.

The Court then addressed the defendant.

. . . Having so found, then, Mr. Serrano, I need to ask you if you're making your Alford plea to each of the four counts that you're now charged with freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: And you have gone over this course of action with your attorney, Mr. Woodrow? You've talked with him about this?

THE DEFENDANT: Yeah.

1-9-04 Hearing RP 14. The trial court then accepted the defendant's guilty pleas and ordered a pre-sentence investigation. 1-9-04 Hearing RP 14.

For purposes of the pre-sentence report, the Department of Corrections asked the defendant to fill out a form called an Intake Presentence Report. The defendant completed that form in English, and added an additional seven pages in which he wrote his version of events in English. Ex. 15; 1-9-04 Hearing RP 66-67. In those additional pages, Serrano provided a detailed description of contacts between himself and Woodrow leading up to his change of pleas. While in this recitation the defendant was critical of the pressure he claimed Woodrow put upon him to plead guilty, he never claimed in this document that Woodrow promised he could be immediately released if he pled guilty or that the charges would be dismissed. Rather, he described how Woodrow told him he would do prison time if he pled guilty, but less than if he went to trial.

Ex. 15 at pp. 11-12.

Sentencing was scheduled for February, 2004. However, Serrano told Woodrow he was upset with Woodrow's representation, that his guilty pleas had not been knowingly or voluntarily made, and that he wished to withdraw those guilty pleas. Therefore, on February 20, 2004, Woodrow moved to withdraw as the defendant's attorney in this case. CP 44. Attorney Samuel Meyer was appointed to replace Woodrow as the defendant's counsel, and sentencing was continued so that the defendant could present his motion to withdraw his guilty pleas. 3-4-04 Hearing RP 5-6.

On March 14, 2005, the defendant filed, under his own signature, a motion to represent himself in this case. CP 45. In that document, the defendant stated as follows:

. . . This defendant is competent and able to read and understand the English language, is educated and understands the basic rules of Washington State Court rules.

CP 45. At the hearing pursuant to this motion, the defendant addressed the court to explain his motion, and why he had filed it, without the

assistance of an interpreter. The defendant discussed the issues with the court in English without any difficulty. The defendant told the court he had completed two years of high school and a part of a third year, and that he read English, although not perfectly. 3-25-05 Hearing RP 5-6. At no time during this hearing did the defendant request the assistance of an interpreter. 3-25-05 Hearing RP 2-14.

On April 12, 2005, a formal motion to withdraw the defendant's guilty pleas was filed. CP 46-54. The motion essentially alleged ineffective assistance of counsel and that the pleas had not been knowing and voluntary. CP 47-48. In a handwritten statement attached to this motion, the defendant now alleged that Woodrow had promised Serrano if he pled guilty he would be released at sentencing and the charges would be dismissed, and that the defendant had pled guilty because of those assurances. CP 49-54.

This matter proceeded to a hearing on the defendant's motion on February 6-7, 2006. At the

conclusion of this hearing, the court determined that the defendant had not satisfied his burden to show that withdrawal of his guilty pleas was necessary to correct a manifest injustice. The court concluded that Woodrow had effectively assisted the defendant both in preparing for trial and in advising the defendant on whether to accept the State's plea offer and enter guilty pleas. The court also concluded that the defendant's guilty pleas were entered voluntarily, with full knowledge of the direct consequences of his pleas. The court's written findings of fact and conclusions of law were entered on February 17, 2006. CP 181-187.

In reaching these conclusions, the trial court addressed the defendant's reference to "three and a half years" at the change of plea hearing. The court noted that both the prosecutor and defense counsel had understood the defendant to be referring to his expectation of what his sentence would be if he received all of his good time, and that both counsel addressed the fact

that good time is discretionary with the Department of Corrections. 2/6-7/06 Hearing RP 269-271.

The court found support for this interpretation of what the defendant had been referring to in numbers written on the State's plea offer. 2/6-7/06 Hearing RP 269-271, 273; Ex. 4. Those numbers were consistent with an attempt to calculate actual prison time minus good time and credit for time served for a sentence imposed within the defendant's standard range. Woodrow had testified that he had not written those numbers on the offer, nor had the numbers been there when he discussed the offer with Serrano. 2/6-7/06 Hearing RP 207-208. The defendant had testified that when he met with Woodrow and discussed the State's offer, he snatched it from the table and put it under his shirt. He then took it back with him to his cell, and kept a copy in his personal property. 2/6-7/06 Hearing RP 124. While the State's offer with the numbers written on it was submitted at the hearing as

Exhibit 4, the document was originally presented to the court as an attachment to the defense memorandum on the motion to withdraw guilty plea. CP 147.

A sentencing hearing was also held on February 17th. On Counts II through IV, the defendant was sentenced to a maximum term of life in prison and a minimum term of 72 months. On Count I, which did not come under the sentencing requirements of RCW 9.94A.712, a standard range sentence of 72 months was imposed. CP 167-180.

C. ARGUMENT

1. At the hearing on his motion to withdraw his guilty pleas, the defendant failed to show that his attorney had rendered ineffective assistance of counsel, and therefore the court properly refused to allow withdrawal of the pleas on this basis.

Under CrR 4.2(f), a defendant will be allowed to withdraw a guilty plea if it appears that withdrawal is necessary to correct a manifest injustice. State v. Turley, 149 Wn.2d 395, 398, 69 P.3d 338 (2003). A manifest injustice is one that is obvious, directly observable, overt, and not obscure. State v. Taylor, 83 Wn.2d 594, 596,

521 P.2d 699 (1974). A defendant has a demanding burden to prove the existence of a manifest injustice. State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996). The Washington Supreme Court has identified four nonexclusive examples of a manifest injustice which can justify the withdrawal of a guilty plea: (1) the denial of effective counsel; (2) a guilty plea not ratified by the defendant or one authorized by him to do so; (3) a guilty plea which was involuntary; and (4) a failure of the prosecution to fulfill the terms of a plea agreement. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

One of the bases cited by Serrano for withdrawal of his guilty pleas was that attorney Richard Woodrow had failed to provide him with effective assistance of counsel. To demonstrate ineffective assistance of counsel, a defendant must show: (1) that defense counsel's performance was deficient, in that it fell below an objective standard of reasonableness based on a consideration of all the circumstances; and (2)

that defense counsel's performance prejudiced the defendant because there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In the context of guilty pleas entered pursuant to a plea agreement, the defendant must prove there is a reasonable probability that, but for some error committed by his attorney, the defendant would not have entered his guilty pleas. State v. Jamison, 105 Wn. App. 572, 590, 20 P.3d 1010 (2001).

When considering a claim of ineffective assistance, the court must engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. The defendant bears the burden of proving ineffective assistance by a preponderance of the evidence. State v. Robinson, 138 Wn.2d 753, 770, 982 P.2d 590 (1999).

In this case, the trial court found that the defendant had failed to satisfy his burden of

proof with regard to the allegation of ineffective assistance of counsel. CP 186-187. In support of that conclusion, the court entered findings of fact.

An unchallenged finding of fact is a verity on appeal. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Those findings which are challenged must be upheld if they are supported by substantial evidence, which is evidence sufficient to persuade a rational, fair-minded person as to the truth of the finding. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). If the findings of fact are supported by substantial evidence, then the trial court's legal conclusions will be upheld if those conclusions are supported by the findings of fact. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

On appeal, Serrano contends the trial court erred in finding he had failed to prove ineffective assistance by attorney Richard Woodrow. He makes three arguments in this regard. First, he contends that Woodrow was ineffective by

not arranging to have an interpreter assist the defendant. However, the court made the following findings of fact in this regard:

4. The defendant could read and understand the English language. He was able to express himself orally and in writing on legal matters, and did so on a number of occasions.

5. On one occasion after he entered his guilty pleas in this case, specifically on March 14, 2005, the defendant filed with the court a motion to proceed as his own attorney in this case. He stated in that motion that he was competent and able to read and understand the English language. At a hearing on March 25, 2005, the defendant orally addressed the court in support of this motion, and therefore was aware of the nature and contents of this motion.

6. Prior to April 15, 2005, the defendant never made a request for the assistance of an interpreter in this case. On April 15, 2005, the court directed that the defendant have the assistance of an interpreter at certain depositions ordered by the court in this case.

CP 182.

The above-quoted Findings of the court are supported by substantial evidence. The defendant's former wife testified that the defendant was proficient in the English language, that as a married couple they communicated only in English, and that she had never experienced any

difficulty communicating with Serrano in English. In six years of marriage prior to their separation in 2001, she had never seen the defendant ask for anyone's assistance to communicate in English for business or social purposes. 2/6-7/06 Hearing RP 72-74.

Investigator John Wilson met with the defendant on five occasions to discuss this case. He found that the defendant was very fluent in the English language and he had no difficulty communicating with Serrano in English. Serrano never requested the assistance of an interpreter in his contacts with Wilson. 2/6-7/06 Hearing RP 40-43.

Attorney Woodrow met with Serrano approximately 7 times, each meeting lasting about an hour. Serrano also wrote him letters in English. 2/6-7/06 Hearing RP 141-146. During Woodrow's representation in this case, the defendant never requested the assistance of an interpreter for meetings with Woodrow or for court hearings. The defendant never displayed any

difficulty communicating in English with Woodrow.
2/6-7/06 Hearing RP 141-146.

Even long after the change of plea hearing, Serrano made no effort to seek the assistance of an interpreter. Just the opposite is true. In March, 2005, Serrano filed a motion to represent himself, and asserted he was competent to read and understand the English language, and was familiar with Washington court rules. CP 45.

All of this evidence is sufficient to persuade a rational, fair-minded person of the truth of the court's findings quoted above. The only fact raised by the defendant in support of his claim that he proved Woodrow was ineffective in not providing him an interpreter is that he was provided an interpreter in later hearings. However, he was provided an interpreter at that time because he requested one at that time, whereas he had never requested one before.

Serrano's first request for an interpreter came on April 15, 2005, only a month after he had communicated at length with the court in English

at a hearing on March 25, 2006, asking he be allowed to represent himself. 4-15-05 Hearing RP 11; 3-25-05 Hearing RP 2-5. As of April, 2005, Serrano was attempting to claim that his attorney had deceived him into believing he would be released and the charges dismissed if he pled guilty. CP 46-54. This was contrary to what he had claimed in early 2004 concerning the actions of his attorney. Ex. 15, pp. 11-12. Thus, he now had a motive to portray himself as limited in his English, and therefore vulnerable to such deception, contrary to what he had acknowledged before. Therefore, the court could reasonably find that the defendant was, in fact, sufficiently fluent in English so that he was not prejudiced by the lack of an interpreter at prior hearings.

The defendant also argues he proved ineffective assistance by showing that his attorney failed to review with him the Statement of Defendant on Plea of Guilty prior to the entry of his guilty pleas. However, the trial court found just the opposite in Findings of Fact 11 and

12.

11. The defendant's attorney discussed with the defendant the consequences of pleading guilty and the possible consequences if the defendant was convicted at trial. The attorney recommended to the defendant that he accept the State's offer of reduced charges and a prison term, and explained why he was making that recommendation.

12. The defendant came to court twice to plead guilty, one time in December, 2003, and then on January 9, 2004. Both times, the defendant's attorney reviewed with the defendant the form for a Statement of Defendant on Plea of Guilty. Each paragraph of that document was either read to the defendant by the attorney or read by the defendant.

CP 183-184. These findings were also supported by substantial evidence.

Attorney Woodrow testified that Serrano was initially going to plead guilty in December, but then became hesitant. Woodrow stated he reviewed with the defendant the Statement of Defendant on Plea of Guilty twice, once in December, 2003 when the defendant was going to plead guilty, and then again before January 9, 2004. He stated he went over the entire form, at times reading sections to Serrano, and at other times having Serrano read the form. Woodrow addressed the potential

penalties Serrano would face, and made sure Serrano did not have any unanswered questions before going to the change of plea hearing in January 9, 2004. 2/6-7/06 Hearing RP 156-164.

This testimony was corroborated by the Statement of Defendant on Plea of Guilty, which acknowledged above the defendant's signature that he and his attorney had discussed all of the paragraphs of the Statement, and that the attorney had explained them to him, and that Serrano understood them. CP 21. Further, the defendant's credibility in claiming the contrary in February, 2006, was suspect. For example, he claimed that he had not decided to plead guilty in December, 2003, contradicting Woodrow's claim that Serrano and Woodrow had gone over the Statement of Defendant at that time. 2/6-7/06 Hearing RP 81-82, 96-97. However, in an earlier statement, the defendant had admitted he had decided to plead guilty that December, but then changed his mind when he got to court. Ex. 15, pp. 8-9. Thus, there was substantial evidence to support the

trial court's findings that Woodrow carefully went over the plea form with Serrano before the defendant pled guilty.

The last basis for ineffective assistance claimed by the defendant on appeal is that he expressed a belief at the change of plea hearing that his sentence would be three-and-a-half years, and that no one clarified the actual extent of punishment he faced. That claim is refuted by the record of the plea hearing, as quoted above in the Statement of the Case.

First, the trial court clarified that the defendant understood there was a maximum possible sentence up to life in prison for the offenses to which he was pleading guilty. 1-9-04 Hearing RP 6. Next, the defendant acknowledged he understood that the State would recommend a sentence of 72 months in prison if he pled guilty. 1-9-04 Hearing RP 6.

Next, the prosecutor discussed at length the penalties the defendant would face if he pled guilty, in order to clarify those potential

penalties for the defendant. 1-9-04 Hearing RP 6-8. The defendant's attorney joined the prosecutor in explaining to the defendant that good time was at the discretion of the Department of Corrections, and a defendant could not simply assume that he would be given all of the good time he could potentially earn. 1-9-04 Hearing RP 8.

The court then asked Serrano if he now understood that if he pled guilty, the court would impose a maximum sentence of life in prison and a minimum sentence from 63 to 84 months in prison. Serrano responded that he did understand this. 1-9-04 Hearing RP 8-9. Nevertheless, the defendant maintained his desire to plead guilty, and affirmed to the court that he was doing so freely and voluntarily, after having discussed the matter with his attorney. 1-9-04 Hearing RP 14.

In Finding of Fact No. 21, the court found as follows:

21. At the time the defendant entered his guilty pleas, the defendant understood that he would not be released afterwards and knew that charges would not be dismissed. Rather, the defendant understood that he would receive a minimum prison term within the

standard range, minus credit for the time he had served and minus the good time credit he hoped to receive.

CP 185. The record of the 1-9-04 Hearing and the defendant's Statement of Defendant on Plea of Guilty provide substantial evidence to support this finding. 1-9-04 Hearing RP 1-16; CP 14-21.

In summary, the factual findings of the court were supported by substantial evidence. Those findings show that the defendant failed to prove that his attorney had rendered ineffective assistance of counsel.

2. At the hearing on the defendant's motion to withdraw his guilty pleas, the defendant failed to prove that his pleas were involuntary or that he lacked knowledge of a direct consequence, and therefore the court properly refused to allow withdrawal of the pleas on that basis.

The second basis upon which the defendant sought to withdraw his guilty pleas in this case was the claim that his guilty pleas were not entered voluntarily and intelligently. For a plea of guilty to be intelligently made, the defendant must be aware of the rights he is giving up and the direct consequences of his

pleas. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The defendant's signature on the written plea statement is strong evidence that the pleas were voluntarily and intelligently made. Branch, 129 Wn.2d at 642.

The trial court concluded that the defendant had failed to meet his burden of proof in regard to this claim. See Conclusions of Law 1 and 2, CP 186. On appeal, the defendant contends that the trial court erred in reaching this conclusion. This contention is based upon allegations also relied upon by the defendant to claim ineffective assistance of counsel: (1) that the lack of an interpreter prevented the defendant from entering a knowing plea; (2) that the defendant entered his guilty pleas believing that he would only receive a sentence of three-and-a-half years.

The court found that the defendant could read and understand the English language, that he was able to express himself in English on legal matter both orally and in writing, that the

defendant himself confirmed this in a motion to the court, that the defendant never requested the assistance of an interpreter in this case prior to April 2005, that during the change of plea hearing the defendant answered appropriately questions put to him, and that he appeared to be aware of what was taking place. The court further found that the defendant pled guilty not because of any lack of information, but rather to take advantage of the State's plea offer. Findings of Fact Nos. 4, 5, 6, 17. The reasons why these findings are supported by substantial evidence were discussed in the prior section of this Brief, and that discussion is incorporated herein by reference. These findings support the court's legal conclusion that the defendant failed to prove the absence of an interpreter at the change of plea hearing prejudiced his ability to enter voluntary and intelligent guilty pleas.

The defendant next contends that he proved he entered guilty pleas believing his penalty would only be three-and-a-half years, and so these

guilty pleas were not knowingly made. However, it should be noted that at the hearing on his motion to withdraw the pleas, Serrano never claimed that such a misunderstanding was what prevented him from making intelligent pleas of guilt. Rather, at that hearing, Serrano claimed that his counsel had deceived him by convincing him he would be freed if he pled guilty to the amended charges. 2/6-7/06 Hearing RP 100.

At the change of plea hearing, it was the understanding of both the prosecutor and defense counsel that the defendant's reference to three-and-a-half years reflected the defendant's expectation of what the defendant would actually serve after receiving good time credit and credit for time served. 2/6-7/06 Hearing RP 7-8. This interpretation was not contradicted by the defendant. Moreover, this interpretation was consistent with the fact that the defendant also acknowledged understanding that the State would recommend 72 months in prison. The court, the prosecutor, and the defendant's attorney all then

proceeded to clarify to the defendant what the full scope of his potential penalties actually was, including the fact that good time was discretionary with the Department of Corrections, and that the sentence imposed would be a minimum term only, with a maximum term of life in prison. 1-9-04 Hearing RP 6-9.

The defendant repeatedly demonstrated in this hearing that he was fully capable of demanding clarification when he felt it was necessary. However, after this detailed explanation of the penalties involved, the defendant simply acknowledged his understanding and affirmed his desire to plead guilty. 1-9-04 Hearing RP 9-14. See Finding of Fact Nos. 18 and 19, CP 186.

At the February 2004 hearing on defendant's motion to withdraw his pleas, the court found that at the point the defendant entered his guilty pleas on January 9, 2004, he understood he would receive a minimum sentence within the standard range. For the reasons discussed above,

there was substantial evidence to support that finding. Finding of Fact No. 21, CP 186.

The court also found that the defendant made the choice to plead guilty in order to take advantage of the State's plea offer. Finding of Fact No. 16, CP 185. Attorney Woodrow testified that this was the defendant's purpose in pleading guilty. 2/6-7/06 Hearing RP 162. At the change of plea hearing, the defendant acknowledged he had discussed with his attorney the purpose of an Alford plea, that being to take advantage of a plea offer while maintaining innocence. 1-9-04 Hearing RP 10. Having had the benefit of such a discussion with his attorney, Serrano affirmed to the court that he wished to enter Alford pleas to these charges. 1-9-04 Hearing RP 14. Thus, there was substantial evidence to support this finding of fact as well.

Finally, the court found that the defendant's attorney had reviewed the guilty plea form with the defendant, and explained its contents, on two separate occasions before the

defendant's change of plea hearing. Finding of Fact No. 12, CP 185. The reasons why there is substantial evidence for this finding have been discussed in the previous section of this Brief, and that discussion is incorporated here by reference.

These findings fully support the court's conclusion that the defendant failed to prove his guilty pleas were involuntary or without knowledge of the direct consequences.

3. At the hearing on the defendant's motion to withdraw his guilty pleas, the defendant failed to prove that he was misinformed concerning the direct consequences of pleading guilty.

When a defendant is misinformed regarding the direct consequences of pleading guilty, his guilty plea is involuntary, and a defendant must be allowed to withdraw his plea. In re Personal Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). On appeal, the defendant cites cases affirming this principal of law, and argues that he was misinformed regarding the consequences of his guilty pleas.

Significantly, on appeal the defendant does not argue the theory of misinformation that he claimed in the trial court. There, he claimed that his attorney had erroneously assured him he would be released from custody immediately if he pled guilty. 2/6-7/06 Hearing RP 100. The trial court did not find this claim to be credible. Instead, the trial court found that Serrano's attorney had fully and accurately informed Serrano concerning the consequences of pleading guilty. Finding of Fact Nos. 10-12, 15. As argued above, these findings are supported by substantial evidence.

On appeal, the defendant is silent concerning this claim of deceit by his attorney. Instead, he argues that at the time he plead guilty, he erroneously believed he would receive a penalty of three-and-a-half years in prison, which contradicts the claim he made at the hearing on his motion to withdraw his guilty pleas. He then argues that the trial court's alleged failure to correct this mistaken belief

amounted to misinformation that made his plea involuntary.

However, the claim by the defendant that the court did not respond to his reference to a penalty of three-and-a-half years is simply incorrect, as has been discussed above. There was a lengthy clarification on this point, engaged in by not only the court, but also the prosecutor and the defendant's attorney. In the course of that clarification, the defendant was accurately informed concerning the direct consequences of his guilty pleas. 1-9-04 Hearing RP 6-9. Thus, it is not accurate to characterize as misinformation the court's response to the defendant's reference to three-and-a-half years.

At the February 2006 hearing on the defendant's motion to withdraw his guilty pleas, the court found that the defendant understood the potential consequences when he entered his guilty pleas. Finding of Fact No. 21, CP 185. The Statement of Defendant on Plea of Guilty and the record of proceedings for the 1-9-04 change of

plea hearing provide substantial evidence to support that finding. Therefore, the court validly concluded that the defendant pled guilty with knowledge of the direct consequences of his guilty pleas.

D. CONCLUSION

Based on the above, the State respectfully requests that this court affirm the ruling of the trial court denying this defendant's motion to withdraw his pleas of guilt, and affirm the defendant's convictions for four counts of assault in the second degree with sexual motivation.

DATED this 5th day of December, 2006.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
OSCAR A. SERRANO,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

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James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 5th day of December, 2006, I caused to be mailed to appellant's attorney, PATRICIA A. PETHICK, a copy of the Respondent's Brief, addressing said envelope as follows:

Patricia A. Pethick,
Attorney at Law
P.O. Box 7269
Tacoma, WA 98406-0269

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 5th day of December, 2006 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney