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DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON

BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

ROSCOE JORDAN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frederick W. Fleming

No. 04-1-05986-2 & 04-1-06016-0

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**BRIEF OF RESPONDENT**

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

1. Did the trial court properly exercise its discretion when it denied defendant's motion to withdraw his guilty plea under cause number 04-1-05986-2 where defendant failed to establish that withdrawal was necessary to correct a manifest injustice?

B. STATEMENT OF THE CASE.

1. Procedure<sup>1</sup>

a. 04-1-05986-2

On December 29, 2004, the State filed an Information charging ROSCOE KENDRICK JORDAN (hereinafter "defendant") with one count of second degree child rape. 1CP<sup>2</sup> 1-2.

The parties appeared for trial before the Honorable Frederick Fleming on January 17, 2006. The State presented the testimony of two witnesses – the victim, T.P., and T.P.'s mother. RP 6-30. Midway through T.P.'s testimony, the defendant advised the court that he would like to plead guilty. RP 30-31. The court engaged in a lengthy colloquy

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<sup>1</sup> Cause numbers 01-1-05986-2 and 04-1-06016-0 have been consolidated in this appeal, but the defendant is not appealing 04-1-06016-0. The State is including a brief recitation of the procedural history for cause number 04-1-06016-0 in order to assist this court in understanding the procedural history of this case.

<sup>2</sup> The Clerk's Papers for cause number 04-1-05986-2 will be referred to as "1CP" throughout this brief. The Clerk's Papers for cause number 04-1-06016-0 will be referred to as "2CP."

with the defendant and ultimately accepted defendant's plea of guilt to one count of second degree child rape. RP 31-36. A sentencing hearing was set for March 17, 2006. RP 38.

On March 17, 2006, the parties appeared before Judge Fleming for sentencing. The State advised the court that the defendant entered his plea to second degree child rape with the mistaken belief that his offender score was three and that he was eligible for SSOSA. RP 61-63. The defendant's correct offender score was five, which made the defendant ineligible for SSOSA. RP 61-63. The State allowed the defendant to withdraw his plea under cause number 04-1-06016-0 and enter a new plea to the charge of communication with a minor for immoral purposes, a gross misdemeanor that would not affect his offender score on cause number 04-1-05986-0 and would not affect his eligibility for SSOSA. 1CP 23-25. Defendant did not request withdrawal of his plea under 04-1-05986-0 even though the standard range was higher than he thought when he entered the plea.<sup>3</sup> RP 66-67. Sentencing was set over to May 5, 2006 for defendant to pursue a SSOSA evaluation. RP 65.

On May 5, 2006, the parties appeared before the court for sentencing. Defendant filed a pro se motion for relief from judgment and appointment of counsel on cause number 04-1-05986-2. Defendant

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<sup>3</sup> When defendant entered his plea of guilt, he believed his standard range to be 102-136 months. When the offender score changed, defendant's standard range changed to 120-158 months.

claimed that he felt misled by his attorney when he entered the plea. RP 80-82. The court denied defendant's motion because it was his impression that the plea was knowing, intelligent, and voluntary. RP 82. The court proceeded with sentencing. The defense informed the court that they were unable to find a provider that would approve the defendant for the SSOSA program. RP 87. The court sentenced the defendant to 120 months, in addition to other conditions. 1CP 18-32; RP 91.

This timely appeal follows. 1CP 33-45.

b. 04-1-06016-0

On December 29, 2004, the State filed an Information charging the defendant with three counts of second degree child rape. 2CP 1-3.

The parties appeared for trial before the Honorable Frederick Fleming on January 19, 2006. RP 49. Pursuant to a plea agreement, the defendant entered a plea to an Amended Information charging him with one count of third degree assault. 2CP 4, 7-10; RP 53-55. A sentencing hearing was set for March 17, 2006. RP 56.

On March 17, 2006, the parties appeared before Judge Fleming for sentencing. The State explained that the defendant entered his plea to third degree assault with the mistaken belief that his offender score was lower than it really was. RP 61-63. The State agreed to let the defendant withdraw his plea to third degree assault and enter a new plea to communicating with a minor for immoral purposes, a gross misdemeanor

that would not affect his offender score. RP 61-63. The court accepted the defendant's withdrawal of plea and signed an order to that effect. 2CP 11-13. The defendant subsequently entered a plea of guilty to one count of communicating with a minor for immoral purposes. 2CP 14, 17-22; RP 69-71. Sentencing was set for May 5, 2006. RP 71.

On May 5, 2006, the parties appeared before the court for sentencing. The defendant filed a pro se motion to withdraw his plea under cause number 04-1-05986-2, but did not request to withdraw his plea under 04-1-06016-0. RP 78-82, 95. The court sentenced the defendant to 365 days in jail, concurrent to the sentence on cause number 04-1-05986-2. 2CP 41-46.

This timely appeal follows. 2CP 47-53.

## 2. Facts

The substantive facts of the offense are not relevant to the issues raised in this appeal.

## C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO WITHDRAW HIS PLEA BECAUSE DEFENDANT FAILED TO ESTABLISH THAT WITHDRAWAL WAS NECESSARY TO CORRECT A MANIFEST INJUSTICE.

The withdrawal of a guilty plea is governed by CrR 4.2(f), which provides:

The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

A "manifest injustice" is "an injustice that is obvious, directly observable, overt, not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974) (citing Webster's Third New International Dictionary (1966)). In Taylor, the Supreme Court discussed four indicia, any one of which would independently establish manifest injustice: (1) the denial of effective assistance of counsel, (2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea was not honored by the prosecution. Taylor, 83 Wn.2d at 597 (citation omitted). CrR 4.2(f) places a "demanding standard" on the defendant. Taylor, 83 Wn.2d at 597. See also State v. Watson, 63 Wn. App. 854, 856-57, 822 P.2d 327 (1992). An appellate court reviews a trial court's denial of a motion to withdraw guilty plea for an abuse of discretion. State v. Jamison, 105 Wn. App. 572, 589-90, 20 P.3d 1010, review denied, 144 Wn.2d 1018, 32 P.2d 283 (2001). A decision based on clearly untenable or manifestly unreasonable grounds constitutes an abuse of discretion. Jamison, 105 Wn. App. at 590.

Defendant claims that he was entitled to withdraw his plea because his counsel was ineffective throughout the plea proceedings. To establish ineffectiveness, the defendant must show that counsel's performance was deficient and prejudice resulted from the deficiency. Strickland v. Washington, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984);

State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance is established if counsel's conduct is shown to fall below an objective standard of reasonableness. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). In the context of a guilty plea, the defendant must show that counsel failed to assist him in deciding whether to plead guilty and that, but for counsel's failure, he would not have pleaded guilty. State v. McCollum, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997); State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901, review denied, 96 Wn.2d 1023 (1981)).

Defendant made several claims in support of his request for an evidentiary hearing on his motion to withdraw plea. Defendant first claimed that he received ineffective assistance of counsel because his attorney coerced him to plead guilty when he told defendant that there was nothing he could do for him. 2CP 38-40; RP 80. But advising a client to plead guilty and offering a pessimistic prognosis may constitute reasonable competence where called for by the facts. United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2045-46 n.19, 80 L. Ed. 2d 657 (1984); United States v. Rogers, 769 F.2d 1418, 1424 (9th Cir. 1985). Those facts exist here. Trial had already begun in this case when the defendant determined to plead guilty. Prior to entering his plea, the victim's mother testified that her 13-year-old daughter became pregnant in the summer of 2004 and gave birth to a baby girl in March of 2005. RP 8-

9, 15-16. The victim testified that she was 13-years-old when she met the 18-year-old defendant and that they engaged in romantic relations. RP 24-25. Before the victim could testify further, the defendant indicated that he wanted to plead guilty. RP 30. The State advised the court that, had the trial continued, the State would have introduced evidence that the victim gave birth to a baby girl and that DNA evidence established the defendant's paternity. RP 85. The evidence against the defendant was overwhelming. Thus, counsel was not deficient for advising the defendant as he did. Defendant's claim did not provide the justification for an evidentiary hearing.

In addition, there is no evidence that defense counsel improperly persuaded the defendant plead guilty. Due process requires that a guilty plea be made knowingly, intelligently, and voluntarily. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969). "[A guilty plea] cannot be the product of or induced by coercive threat, fear, persuasion, promise, or deception." Woods v. Rhay, 68 Wn.2d 601, 605, 414 P.2d 601, cert. denied, 385 U.S. 905, 87 S. Ct. 215, 17 L. Ed. 2d 136 (1966). When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness. In re Keene, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); State v. Ridgley, 28 Wn. App. 351, 623 P.2d 717 (1981). When the judge goes on to orally inquire of the

defendant and satisfies himself on the record of the existence of various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable. State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982), reversed on other grounds, 87 Wn. App. 293, 941 P.2d 704 (1997); State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983). Here, the judge asked the defendant whether he made a free and voluntary decision to waive his right to trial and to plead guilty, whether he had read the plea agreement and carefully reviewed it with his lawyer, whether he understood it, whether he knew that the sentencing judge need not follow the State's sentencing recommendation, and whether defendant understood that he was giving up enumerated rights by pleading guilty. RP 32-36. To all of these questions, the defendant answered affirmatively. RP 32-36. The trial court properly denied an evidentiary hearing because defendant's claim that he was coerced into pleading guilty was not supported by the record. See State v. Holley, 75 Wn. App. 191, 197, 876 P.2d 973 (1994) (to support an involuntariness claim, the defendant must present some evidence beyond his self-serving allegations).

Defendant also asserted as a basis for an evidentiary hearing that he felt he would have received a better deal if he had a different attorney. 1CP 64-65. But this speculative allegation was insufficient to warrant a hearing on defendant's motion to withdraw plea and insufficient to carry his burden of establishing ineffective assistance of counsel.

Moreover, even though defendant claimed that he would not have pleaded guilty but for counsel's actions, the record shows otherwise. The defendant made the decision to plead guilty midway through the victim's testimony. According to the prosecutor, the victim was crying and tearful on the stand when defendant opted to enter a guilty plea. RP 85. In his guilty plea, defendant admitted having sex with the 13-year-old victim and apologized for this "mistaken act." 1CP 18-32. At the motion to withdraw guilty plea, the trial court noted that it was his impression at the time of the plea that the defendant was taking responsibility for his actions and that he knew exactly what he was doing when he pleaded guilty. RP 82. These circumstances suggest that the defendant pleaded guilty on his own accord and not as a result of anything his counsel did or did not do. Defendant did not provide a sufficient basis to warrant a hearing on his motion to withdraw plea. The trial court acted within its discretion when it denied a hearing.

On appeal, defendant claims that he was completely denied counsel at the hearing on his motion to withdraw plea. But this claim is wholly without merit because the court determined that the facts did not justify a hearing and, therefore, did not require the court to appoint new counsel. Defendant relies principally on State v. Harell, 80 Wn. App. 802, 911 P.2d 1034 (1996). In Harell, before sentencing, the defendant moved to withdraw his plea of guilty, alleging ineffective assistance. The trial court granted an evidentiary hearing. During the hearing, defense counsel

testified as a witness for the State and the defendant was otherwise unrepresented. The trial court denied the motion. On appeal, the issue was whether the defendant was entitled to counsel at the plea withdrawal hearing. Applying the rule that a defendant has a constitutional right to appointed counsel at all critical stages of a criminal prosecution, the court reversed. Harell, 80 Wn. App. at 804. Defendant argues that Harell requires reversal because the trial court did not appoint new counsel when he alleged ineffective assistance. Defendant overlooks the crucial difference between the facts in Harell and the proceedings below. In Harell, the trial court concluded that the defendant had alleged sufficient facts to require an evidentiary hearing. Harell, 80 Wn. App. 802 at 804 (“Implicit in the trial court’s decision to hold a hearing is a finding that sufficient facts were alleged to warrant a hearing.”). The court erred because it failed to appoint new counsel for the hearing that followed that determination. Unlike Harell, the trial court here determined that an evidentiary hearing was not necessary. 1CP 66-67. As set forth above, the court’s determination that the facts did not warrant a hearing was proper.

Defendant also claims on appeal that the court should have made further inquiry into defendant’s claim of ineffective assistance of counsel. See Brief of Appellant, at 10. When a defendant raises a factual claim of ineffectiveness or a conflict with his counsel the trial court must conduct a thorough examination of the circumstances to determine whether new

counsel must be appointed. State v. Dougherty, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982); State v. Rosborough, 62 Wn. App., 341, 347, 814 P.2d 679 (1991). Defendant provided no factual basis regarding his claim of ineffective assistance other than his claim that he felt “misled” by his attorney’s suggestion to plead guilty. But, as stated above, an attorney’s advice to plead guilty is not deficient performance if the facts warrant the advice. In addition, the trial court presided over the taking of the guilty plea and engaged in an extensive colloquy with the defendant and had the opportunity to ascertain whether defendant had been properly advised about his case and the law. It was the court’s impression that the defendant knew exactly what he was doing when he entered his plea and that his plea was knowing, intelligent and voluntary. RP 81-82. Based on these circumstances, the court was not required to make a more sufficient inquiry. The trial court did not abuse its discretion by denying the defendant an evidentiary hearing.

The record shows that the trial court conducted a very thorough colloquy at the time of defendant’s guilty plea and demonstrates that defendant entered his plea knowingly, voluntarily, and intelligently and with the full benefit of consultation with competent counsel. RP 32-36. Defendant’s conclusory statements in support of his motion to withdraw did not allege sufficient facts to require the court to hold an evidentiary hearing or appoint substitute counsel. In addition, the record fails to show deficient performance on the part of defense counsel or any prejudice

resulting from his representation. Defendant's claim of ineffective assistance of counsel thus fails.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm the defendant's convictions.

DATED: JANUARY 16, 2007.

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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.

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