

No. 36237-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID T. GANNON,

Appellant.

COURT OF APPEALS
STATE OF WASHINGTON
2007 OCT 18 PM 4:04

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon L. Godfrey

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. <u>SUMMARY OF APPEAL</u>	1
B. <u>ASSIGNMENTS OF ERROR</u>	1
C. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	3
D. <u>STATEMENT OF THE CASE</u>	4
E. <u>ARGUMENT</u>	12
1. MR. GANNON'S GUILTY PLEA WAS INVOLUNTARY AND UNKNOWING IN VIOLATION OF DUE PROCESS BECAUSE HE WAS NOT INFORMED OF EVERY CRITICAL ELEMENT OF THE CRIME.....	12
a. A guilty plea cannot be fully voluntary and knowing unless the defendant is apprised of all critical elements of the crime	13
b. Intent to assault and intent to steal are critical elements of the crime of first degree felony murder as charged in this case	16
c. Mr. Gannon's guilty pleas was not fully knowing and intelligent, as the record does not show he was informed the State was required to prove he intended to steal from the Bishops or intentionally assaulted them	22
d. Mr. Gannon must be permitted to withdraw the plea	27
2. MR. GANNON'S GUILTY PLEA WAS INVOLUNTARY BECAUSE IT WAS THE RESULT OF COERCIVE FEAR AND PERSUASION.....	28
a. Courts should liberally allow a defendant to withdraw a plea of guilty before sentencing if there is a fair and just reason for doing so.....	29

b. The trial court should have permitted Mr. Gannon to withdraw his plea, as it was the product of coercive fear, promise and persuasion 32

i. The guilty plea was the product of coercive pressure and promises by the State 33

ii. The guilty plea was the product of coercive fear of a figurative “lynching” in the press 35

F. CONCLUSION 37

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. Const. amend. 14.....	13
----------------------------	----

Washington Supreme Court Cases

<u>In re Pers. Restraint of Hews</u> , 108 Wn.2d 579, 741 P.2d 982 (1987).....	13, 14, 15, 22
<u>In re Pers. Restraint of Isadore</u> , 151 Wn.2d 294, 88 P.3d 390 (2004).....	28
<u>In re Pers. Restraint of Keene</u> , 95 Wn.2d 203, 622 P.2d 360 (1980).....	14, 15, 18, 22
<u>State v. Barton</u> , 93 Wn.2d 301, 609 P.2d 1353 (1980).....	13
<u>State v. Bergeron</u> , 105 Wn.2d 1, 711 P.2d 1000 (1985).....	20
<u>State v. Chervenell</u> , 99 Wn.2d 309, 662 P.2d 836 (1983).....	15, 18, 21, 22, 27
<u>State v. Davis</u> , 119 Wn.2d 657, 835 P.2d 1039 (1992)	24
<u>State v. Dennison</u> , 115 Wn.2d 609, 801 P.2d 193 (1990)	17
<u>State v. Frederick</u> , 100 Wn.2d 550, 674 P.2d 136 (1983), <u>overruled on other grounds by Thompson v. Department of Licensing</u> , 138 Wn.2d 783, 982 P.2d 601 (1999).....	32, 33, 35, 36
<u>State v. Gamble</u> , 154 Wn.2d 457, 114 P.3d 646 (2005).....	17
<u>State v. Hicks</u> , 102 Wn.2d 182, 683 P.2d 186 (1984).....	26
<u>State v. Holsworth</u> , 93 Wn.2d 148, 607 P.2d 845 (1980)	14, 18
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	19, 25
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 552 (1989).....	23

<u>State v. Lee</u> , 132 Wn.2d 498, 939 P.2d 1223 (1997)	33, 34
<u>State v. Osborne</u> , 102 Wn.2d 87, 684 P.2d 683 (1984).....	15, 18, 21, 22, 24
<u>State v. Saas</u> , 118 Wn.2d 37, 820 P.2d 505 (1991)	32
<u>State v. Taylor</u> , 83 Wn.2d 594, 521 P.2d 699 (1974)	28
<u>State v. Wanrow</u> , 91 Wn.2d 301, 588 P.2d 1320 (1978)	17
<u>Woods v. Rhay</u> , 68 Wn.2d 601, 414 P.2d 601 (1966)	32

Washington Court of Appeals Cases

<u>State v. Decker</u> , 127 Wn. App. 427, 111 P.3d 286 (2005).....	19
<u>State v. Hummell</u> , 68 Wn. App. 538, 843 P.2d 1125 (1993).....	20
<u>State v. Hurt</u> , 107 Wn. App. 816, 27 P.3d 1276 (2001)	32
<u>State v. Thomas</u> , 98 Wn. App. 422, 989 P.2d 612 (1999)	20

United States Supreme Court Cases

<u>Boykin v. Alabama</u> , 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).....	13, 16, 22
<u>Brady v. United States</u> , 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).....	32
<u>Henderson v. Morgan</u> , 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).....	13, 14, 15, 18
<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).....	6

Statutes

RCW 9.94A.421	33, 34
RCW 9A.32.030(1)(c).....	5, 17, 21, 23
RCW 9A.32.050(1)(b).....	21
RCW 9A.36.041(1)	20
RCW 9A.52.020	20, 21
RCW 9A.56.190	19
RCW 9A.56.200	19
RCW 9A.56.210	19

Rules

CrR 4.2(d).....	13
-----------------	----

Other Authorities

American Bar Association, <u>Standards for Criminal Justice: Pleas of Guilty</u> , Plea withdrawal and specific performance, 14-2.1(a) (3rd ed. 1999).....	31
<u>Commonwealth v. Forbes</u> , 299 A.2d 268 (1973).....	29
<u>Commonwealth v. Randolph</u> , 718 A.2d 1242 (Pa. 1998)	30
<u>Commonwealth v. Santos</u> , 301 A.2d 829 (Pa. 1973).....	29
<u>Commonwealth v. Whitford</u> , 452 N.E.2d 262 (Mass. App. 1983) ..	30
<u>Little v. Commonwealth</u> , 142 Ky. 92, 133 S.W. 1149 (1911)	36
<u>Nickels v. State</u> , 86 Fla. 208, 98 So. 497 (1923)	36
<u>Parris v. Commonwealth</u> , 52 S.E.2d 872 (Va. 1949)	30

People v. Hollman, 162 N.W.2d 817 (Mich.App. 1968) 30

Soto v. State, 780 So.2d 168 (Fla. App. 2001) 29

State v. Christian, 967 P.2d 239 (Haw. 2004) 29

State v. Jenkins, 710 N.W.2d 502 (Wisc. 2006) 30

State v. Williams, 775 A.2d 727 (N.J.Super. 2001) 30

State v. Carswell, 2006 Ohio 5210 (Ohio App. 2006) 30

State v. Poglianich, 43 Idaho 409, 252 P. 177 (1927) 35

United States v. Cammisano, 599 F.2d 851 (8th Cir. 1979) 33, 34

United States v. Slayton, 408 F.2d 559 (3d Cir. 1969) 30, 31

A. SUMMARY OF APPEAL

David Gannon's guilty plea to two counts of first degree felony murder was involuntary in violation of due process, because he was never informed of the "critical" mens rea elements of the crime. In addition, the guilty plea was involuntary because Mr. Gannon was unduly pressured by the State's promise he could get married while in jail, and by his fear that he would be excoriated by the press and the jury pool thereby tainted if he did not go forward with the plea.

B. ASSIGNMENTS OF ERROR

1. The guilty plea was not knowing, intelligent and voluntary, in violation of constitutional due process, because Mr. Gannon was not informed of all the "critical" elements of the crime.

2. The guilty plea was not knowing, intelligent and voluntary, in violation of constitutional due process, because Mr. Gannon was coerced into entering the plea.

3. In the absence of substantial evidence in the record, the trial court erred in finding:

The testimony of David Hatch was credible.
The testimony of the defendant and his wife, Barbara Gannon, was not credible.

CP 115.

4. In the absence of substantial evidence in the record, the trial court erred in finding:

The defendant voluntarily entered his plea of guilty on March 5, 2007 after being fully advised and understanding his rights, the charges to which he was pleading guilty and the consequences of his plea of guilty.

CP 115.

5. In the absence of substantial evidence in the record, the trial court erred in finding:

The defendant was not coerced, threatened or improperly promised anything to secure his plea of guilty other than the promises contained in the plea agreement.

CP 115.

6. In the absence of substantial evidence in the record, the trial court erred in finding:

The defendant has not established the existence of a manifest injustice that would support the withdrawal of his plea of guilty entered on March 5, 2007 in this case.

CP 115.

7. The trial court erred in denying the motion to withdraw the guilty plea.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In order for a guilty plea to be knowing, intelligent and voluntary in satisfaction of due process, the defendant must be informed of all “critical elements” of the crime. At a minimum, the record must show the defendant was informed of the acts and the requisite state of mind in which they must be performed to constitute a crime. Is Mr. Gannon’s guilty plea involuntary where he was never informed of the state of mind the State would be required to prove if he went to trial?

2. A guilty plea is involuntary if it is the product of coercive fear, promise and persuasion. Family coercion may render the plea involuntary. Is Mr. Gannon’s plea involuntary where the State used his desire to maintain a physical relationship with his family members to pressure him into pleading guilty?

3. A plea may be involuntary and the product of undue coercion if the defendant pleads guilty out of fear of a figurative “lynching.” Is Mr. Gannon’s guilty plea involuntary where he entered the plea out of fear he would be vilified in the press and the jury pool tainted if he did not so plead?

D. STATEMENT OF THE CASE

On May 27, 2006, Charles Wilcox discovered the body of his step-father, Vernon Bishop, lying dead on the living room floor of Mr. Bishop's home in Hoquiam. Sub #2, at 2.¹ A subsequent autopsy confirmed Mr. Bishop died of blunt force trauma to the head and neck. Id. Mr. Wilcox also found his mother Maxine Bishop lying on the floor in the hallway, alive but severely beaten. Id. Ms. Bishop died four days later as a result of her injuries. Id.

Police arrested David Gannon and April Hensley for the crimes. Sub #2, at 5. Ms. Hensley subsequently pled guilty to two counts of first degree manslaughter and one count of residential burglary and agreed to testify against Mr. Gannon. 4/04/07RP 51, 108; Statement of Defendant [April Hensley] on Plea of Guilty to Non-Sex Offense, at 1.² Ms. Hensley admitted she entered and remained unlawfully in the Bishops' home in order to commit the crime of theft. Statement of Defendant [April Hensley] on Plea of Guilty to Non-Sex Offense, at 7. She claimed Mr. Gannon had caused the death of the Bishops. Id.

¹ A supplemental designation of clerk's papers has been filed for this document.

² A supplemental designation of clerk's papers has been filed for this document.

When he was arrested, Mr. Gannon admitted going to the Bishop residence in order to "make a deal" on a ring, but claimed no one was hurt when he left. Sub #2, at 5. Mr. Bishop was a trader in gems, gold and jewelry. Sub #2, at 2.

Mr. Gannon was charged with two counts of first degree felony murder pursuant to RCW 9A.32.030(1)(c), based on the underlying felonies of "Robbery in the First or Second Degree and/or the crime of Burglary in the First Degree." CP 1-2.³ Mr. Gannon was also charged with one count of first degree burglary and two counts of first degree robbery. CP 3.

³ Specifically, count one alleged:

That the said defendant, David Thomas Gannon, in Grays Harbor County, Washington, on or between May 21-23, 2006, did commit or attempt to commit the crimes of Robbery in the First or Second Degree and/or the crime of Burglary in the First Degree and in the course of and in furtherance of such crimes or in the immediate flight therefrom, the defendant or another participant, caused the death of Vernon Bishop, not a participant in the crime of Robbery in the First or Second Degree or Burglary in the First Degree.

CP 1. Count two alleged:

That the said defendant, David Thomas Gannon, in Grays Harbor County, Washington, on or between May 21-23, 2006, did commit or attempt to commit the crimes of Robbery in the First or Second Degree and/or the crime of Burglary in the First Degree and in the course of and in furtherance of such crimes or in the immediate flight therefrom, the defendant or another participant, caused the death of Maxine Bishop, not a participant in the crime of Robbery in the First or Second Degree or Burglary in the First Degree.

CP 2.

The case was well covered by the media in Grays Harbor County. Defense counsel filed a motion for change of venue, attaching several newspaper articles that showed "there has been a tremendous amount of pre-trial publicity in this case, some of which is highly inflammatory." CP 14-45. The trial court denied the motion but ruled if it could not draw an unbiased jury from Grays Harbor County, it would grant a motion for change of venue at that point. 1/10/07RP 6.

Three days before the scheduled trial date of March 6, 2007, Mr. Gannon's attorneys presented him with a plea offer from the State. 4/04/07RP 47. Mr. Gannon understood the State would allow him to have physical-contact visits with his mother and to marry his fiancé while he was in jail, and would dismiss counts three, four, and five,⁴ in exchange for Mr. Gannon's guilty plea to counts one and two, first degree felony murder. 4/04/07RP 47-48; CP 67-68. Mr. Gannon also understood he would not be able to enter an Alford⁵ plea. 4/04/07RP 50. Finally, the State promised to recommend a standard-range sentence. CP 69.

⁴ The State also agreed to dismiss two charges of violation of the Uniform Controlled Substances Act and one charge of unlawful possession of a firearm from a separate cause number. CP 67.

⁵ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Even though the State offered to dismiss three of the charges, this was not a significant component of the plea agreement from Mr. Gannon's perspective. 4/04/07RP 130-32. A standard range sentence for two convictions for first degree felony murder was 72 years confinement, in effect a life sentence for Mr. Gannon. Id.; CP 121. Thus, even if Mr. Gannon were convicted of three additional crimes, this would make little difference in the amount of time he would have to serve. 4/04/07RP 130-32. The real incentive to plead guilty for Mr. Gannon was the prospect of physical-contact visits with his family. 4/04/07RP 131.

Mr. Gannon later explained he had not had a face-to-face visit with his mother in about a year. 4/04/07RP 47. Mr. Gannon's father was passing away, and he believed his mother would probably need to have physical contact with him. 4/04/07RP 52. Defense counsel explained, and Mr. Gannon understood, he would have to be "classified" by the Department of Corrections before he could have physical-contact visits with his mother. 4/04/07RP 73, 109-12. In addition, the written plea agreement contains no promises regarding family visitation. See CP 67-68. Nonetheless, Mr. Gannon believed he would be able to have physical-contact visits with his mother if he pled guilty. 4/04/07RP 47.

The prospect of physical-contact visits with his fiancé was also a significant element of the guilty plea agreement for Mr. Gannon. 4/04/07RP 131-32. Mr. Gannon and his fiancé Barbara⁶ had planned to marry for a number of months. 4/04/07RP 67, 107. In the plea agreement, the State promised to "allow defendant to marry while in custody at GHC jail." CP 68. Defense counsel explained to Mr. Gannon that if he got married in jail, he would be eligible for extended visits with his wife, but if he married while in prison, he would not qualify for such visits. 4/04/07RP 132. Thus, Mr. Gannon understood that if he pled guilty, the State would make sure he could have physical-contact visits with his fiancé. 4/04/07RP 53.

Finally, Mr. Gannon's attorneys explained to him that if he went to trial he was not likely to prevail. 4/04/07RP 51, 108. Mr. Gannon's co-defendant, April Hensley, had already pled guilty and agreed to testify against Mr. Gannon. 4/04/07RP 51, 108.

On March 5, 2007, a guilty plea hearing was held. In addition to informing Mr. Gannon of the constitutional rights he would be waiving by pleading guilty, the court read the charges to

⁶ Mr. Gannon and Barbara married several days after Mr. Gannon entered his guilty plea, at which time she changed her name to Barbara Gannon. She will be referred to in this brief by her married name.

him as set forth in the information. 3/05/07RP 4-6; compare CP 1-2 (Information). At the conclusion of the colloquy, the judge stated he would accept Mr. Gannon's plea of guilty. 3/05/07RP 7.

Immediately, however, Mr. Gannon asked the court if he could change his plea. 3/05/07RP 7-8. Barbara Gannon's cell phone had rung in the courtroom, catching Mr. Gannon's attention. 3/05/07RP 7; 4/04/07RP 85. When Mr. Gannon looked at her, she gestured to him in an effort to persuade him not to plead guilty. 4/04/07RP 85-86. She was crying, as she did not want him to plead guilty to something he did not do. 4/04/07RP 82, 85. Mr. Gannon later explained he also had second thoughts at that moment, as his "gut" told him he was not doing the right thing. 4/04/07RP 54. Noting Mr. Gannon was "very emotional," the court granted a short recess to allow Mr. Gannon to confer with his attorney. 3/05/07RP 8.

During the recess, defense counsel spirited Ms. Gannon away to talk with her privately outside the courtroom. 4/04/07RP 54. Counsel directed Ms. Gannon to tell Mr. Gannon that since the media was present in the courtroom, he could not now withdraw his plea and proceed to trial. 4/04/07RP 54-56, 83-84. Counsel later explained he was "very concerned" about the media presence,

because the newspapers would report that Mr. Gannon had changed his plea, which would taint the pool of potential jurors. 4/04/07RP 122-23. Ms. Gannon conveyed this information to Mr. Gannon, convincing him he must proceed with his guilty plea. 4/04/07RP 56.

After the recess, Mr. Gannon entered pleas of guilty to two counts of murder in the first degree "as charged in the information." 3/05/07RP 10; CP 72, 77, 79-80. He also signed a guilty plea statement, which set forth the same elements of the crime as provided in the information. CP 79-80;⁷ compare CP 1-2.

⁷ Specifically, the guilty plea statement provided the elements of the crime as follows:

COUNT 1.

That the said defendant, David Thomas Gannon, on or about or between May 21-23, 2006, in Hoquiam, Grays Harbor County, Washington, did commit or attempt to commit the crimes of Robbery in the First or Second Degree and/or the crime of Burglary in the First Degree and in the course of or in the furtherance of such crimes or in the immediate flight therefrom, the defendant caused the death of Vernon Bishop, who was not a participant in the crime of Robbery in the First or Second Degree or Burglary in the First Degree.

COUNT 2.

That the said defendant, David Thomas Gannon, on or about or between May 21-23, 2006, in Hoquiam, Grays Harbor County, Washington, did commit or attempt to commit the crimes of Robbery in the First or Second Degree and/or the crime of Burglary in the First Degree and in the course of or in the furtherance of such crimes or in the immediate flight therefrom the defendant caused the death of Maxine Bishop, who was not a participant in the crime of Robbery in the First or Second Degree or Burglary in the First Degree.

CP 79.

As Mr. Gannon was leaving the courtroom, however, he again changed his mind, and told the jailer he wished to speak to the judge so that he could withdraw his plea. 4/04/07RP 56, 59. He was informed it was too late, that if he wanted to communicate with the judge he must write a letter. 4/04/07RP 56, 59-60. Both Mr. Gannon and Ms. Gannon wrote letters to the judge asking to allow Mr. Gannon to withdraw his plea. CP 82-86, 98-103.

On April 4, 2007, before sentencing, the court held a hearing on the motion to withdraw the guilty plea. A new attorney was appointed to represent Mr. Gannon for purposes of the motion. 4/04/07RP 43. Mr. Gannon, Ms. Gannon, and original trial counsel explained the circumstances surrounding Mr. Gannon's guilty plea and his reasons for wanting to withdraw the plea. 4/04/07RP 47-74, 82-88, 106-32. Mr. Gannon testified he had not been truthful when he admitted the allegations in his guilty plea. 4/04/07RP 63. He testified he felt pressured into pleading guilty so that he could have physical contact with his fiancé and his mother, who needed him. 4/04/07RP 52-53. He also felt pressured by the presence of the media at the guilty plea hearing. 4/04/07RP 56.

The trial court denied the motion. 4/04/07RP 140, 144-45; CP 115. The court found Mr. Gannon "voluntarily entered his plea

of guilty on March 5, 2007 after being fully advised and understanding his rights, the charges to which he was pleading guilty and the consequences of his plea of guilty." CP 115.

At a later hearing, the court imposed a standard-range sentence of 72 years confinement. CP 121. This appeal follows.

E. ARGUMENT

1. MR. GANNON'S PLEA WAS INVOLUNTARY AND UNKNOWING IN VIOLATION OF DUE PROCESS BECAUSE HE WAS NOT INFORMED OF EVERY CRITICAL ELEMENT OF THE CRIME

Mr. Gannon pled guilty to the crime of first degree felony murder, with the understanding that the predicate felonies he was accused of committing were first and second degree robbery, and first degree burglary. CP 1-2, 79. Yet Mr. Gannon was never informed that, if he went to trial, the State would have to prove he intentionally assaulted the Bishops in order to prove he committed first degree burglary. He was also never informed the State would have to prove he intended to steal from the Bishops in order to prove the predicate felony of robbery. Because these were critical elements of the crime as charged, Mr. Gannon's guilty plea was not sufficiently voluntary or knowing to satisfy due process.

a. A guilty plea cannot be fully voluntary and knowing unless the defendant is apprised of all critical elements of the crime. It is a fundamental principle of constitutional due process⁸ that a guilty plea must be knowing, intelligent, and voluntary. Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); In re Pers. Restraint of Hews, 108 Wn.2d 579, 590, 741 P.2d 982 (1987).

A trial court may not accept a guilty plea unless there is an affirmative showing in the record that the plea was made intelligently and voluntarily. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); CrR 4.2(d). Not only must the record disclose the defendant understood the rights he was giving up, but it must also show the defendant possessed an understanding of the law in relation to the facts. Boykin, 395 U.S. at 244. A defendant who does not understand how the law applies to the behavior he admits committing, cannot be said to be entering the plea voluntarily. Id.

"A guilty plea cannot be voluntary in the sense that it constitutes an intelligent admission unless the defendant is

⁸ The Fourteenth Amendment provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

apprised of the nature of the charge, 'the first and most universally recognized requirement of due process.'" In re Pers. Restraint of Keene, 95 Wn.2d 203, 207, 622 P.2d 360 (1980) (quoting Henderson, 426 U.S. at 645)). To be made sufficiently aware of the nature of the offense, the defendant must be advised of the crime's essential elements; he must be given "notice of what he is being asked to admit." State v. Holsworth, 93 Wn.2d 148, 153, 607 P.2d 845 (1980) (citing Henderson, 426 U.S. at 647). Apprising the defendant of the nature of the offense need not "always require a description of every element of the offense." Henderson, 426 U.S. at 647 n.18. At a minimum, however, the defendant must be informed of "the acts and the requisite state of mind in which they must be performed to constitute a crime." Holsworth, 93 Wn.2d at 153 n.3.

This requirement of due process is satisfied only if the record demonstrates the defendant has been notified of all the "critical elements" of the crime to which he pleads guilty. In Hews, the defendant was charged with and pled guilty to second degree murder. 108 Wn.2d at 580-81. Relying on the United States Supreme Court's decision in Henderson, the Hews court held a defendant who chooses to plead guilty must be informed of every

"critical element" of the offense. 108 Wn.2d at 593. Because intent is a "critical element" of second degree murder, the court held the record must show Hews was advised of that element before his guilty plea could be considered voluntary. Id. at 593 (citing Henderson, 426 U.S. at 647 n.18 (holding intent is "critical element" of crime of second-degree murder)). The court rejected the State's contention that so long as Hews received the "benefit of his bargain," a full understanding as to the nature of the charge was not required. Id. at 590.

As in Hews, Washington courts have consistently held a defendant pleading guilty must be apprised of any element that encompasses the mens rea of the charged offense. See, e.g., Keene, 95 Wn.2d at 208 ("intent to injure or defraud" is "critical element" of crime of forgery); State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (defendant pleading guilty to second degree felony murder based on underlying felony of assault must be informed that "knowledge" is essential element of crime).

In addition, Washington courts hold an element is "critical" in the Henderson sense if it is the only element that differentiates the charged offense from some other offense. In State v. Chervenell, 99 Wn.2d 309, 311, 662 P.2d 836 (1983), for instance, defendant

pled guilty to felony possession of marijuana, which required the State to prove he possessed over 40 grams of marijuana. Yet there was no evidence in the record to show Chervenell was informed that the amount of marijuana in his possession was one of the facts the State would be required to prove at trial. Id. at 318-19. The court explained, "[s]ince the amount of marijuana possessed is the only factor which distinguishes felony possession of marijuana from misdemeanor possession, it is a critical element of the former offense." Id. at 317-18. Because Chervenell did not receive "real notice of the true nature of the charge against him," as required by Boykin, his plea was involuntary. Id.

These decisions make clear that the record must show a defendant pleading guilty was informed of the mens rea elements of the offense the State would be required to prove at trial. In addition, if an element is the only fact that distinguishes the charged offense from a lesser offense, it is also a "critical element" of which the defendant must be informed.

b. Intent to assault and intent to steal are critical elements of the crime of first degree felony murder as charged in this case. Mr. Gannon pled guilty to the crime of first degree felony murder, with first degree burglary and first and second degree

robbery as the predicate felonies. CP 1-2, 79. The first degree felony murder statute provides a person is guilty of murder in the first degree when

He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants

RCW 9A.32.030(1)(c).

To prove the crime of first degree felony murder, the State must prove all essential elements of not only felony murder but also of the underlying felony. State v. Gamble, 154 Wn.2d 457, 465-66, 114 P.3d 646 (2005) (citing, inter alia, State v. Wanrow, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978) (elements of predicate felony are "necessary" elements of felony murder)).

In particular, the State must prove the mental state element of the underlying felony, as such mental state substitutes for the intent to kill the State is required to prove for other forms of murder. See State v. Dennison, 115 Wn.2d 609, 615, 801 P.2d 193 (1990) (state of mind required to prove felony murder is same as that required to prove predicate felony); Wanrow, 91 Wn.2d at 311

("The intent necessary to prove the felony-murder is the intent necessary to prove the underlying felony.").

In State v. Osborne, 102 Wn.2d 87, 94, 684 P.2d 683 (1984), the Supreme Court held the mens rea for the underlying felony is a critical element of which the defendant must be informed before pleading guilty to a charge of felony murder. In that case, defendants were charged with second degree felony murder based on the underlying felony of second degree assault. Id. at 94. The underlying felony required proof the defendants "knowingly" inflicted grievous bodily harm. Id. Relying on the well-established case law cited above, the court recognized that, at a minimum, a defendant pleading guilty to felony murder must "be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime." Id. at 92-93 (citing Henderson, 426 U.S. at 645; Keene, 95 Wn.2d at 207; Holsworth, 93 Wn.2d at 153 n.3; Chervenell, 99 Wn.2d at 318). Thus, because "[t]he state of mind necessary to prove a felony murder is the same state of mind necessary to prove the underlying felony," the record must show the defendants were informed the State was required to prove they "knowingly" inflicted grievous bodily harm. Id. at 94.

In this case, Mr. Gannon was charged with and pled guilty to first degree felony murder based on the underlying felonies of first and second degree robbery and first degree burglary. CP 1-2, 79. Intent to steal is an essential non-statutory element of both first-degree and second-degree robbery.⁹ State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); see also State v. Decker, 127 Wn. App. 427, 431, 111 P.3d 286 (2005) (intent required to prove robbery in the first degree is intent to deprive victim of property; intent to cause bodily injury is not element of robbery in the first degree).

⁹ A person is guilty of robbery in the second degree if he commits robbery. RCW 9A.56.210. Robbery is defined as:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. A person commits first degree robbery if,

- (a) In the commission or a robbery or of immediate flight therefrom, he or she:
 - (i) Is armed with a deadly weapon; or
 - (ii) Displays what appears to be a firearm or other deadly weapon; or
 - (iii) Inflicts bodily injury; or
- (b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

RCW 9A.56.200.

As for the crime of burglary, intent to commit any crime against a person or property inside the burglarized premises, although not the intent to commit a specific named crime, is an essential element. State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). In addition, a person is guilty of burglary in the first degree if,

with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020.

The State's theory in this case was that Mr. Gannon committed first degree burglary by assaulting the Bishops during the course of a burglary or in immediate flight therefrom. See Sub #2. Each of the elements of fourth degree assault is a necessary element of first degree burglary where the underpinning of the burglary charge is the allegation that defendant assaulted another. State v. Hummell, 68 Wn. App. 538, 541, 843 P.2d 1125 (1993). Intent is a non-statutory element of fourth degree assault. State v. Thomas, 98 Wn. App. 422, 424, 989 P.2d 612 (1999); RCW 9A.36.041(1).

Thus, intent to steal, intent to commit a crime within the burglarized premises, and intent to assault are all “critical elements” in this case, as they encompass the mens rea of the crime with which Mr. Gannon was charged. Osborne, 102 Wn.2d at 92-93 (and cases cited therein) (defendant must be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime). Further, intent to assault is a “critical element,” because it is the only factor that distinguishes first degree felony murder based on burglary from second degree felony murder. See Chervenell, 99 Wn.2d at 317-18 (where allegation is only factor that distinguishes crime charged from some lesser offense, it is “critical element”); RCW 9A.32.050(1)(b) (person commits second degree felony murder where he or she causes death of person in connection with any felony other than those enumerated in RCW 9A.32.030(1)(c)); RCW 9A.32.030(1)(c)(3) (first degree burglary is only form of burglary that can serve as predicate felony for first degree felony murder); RCW 9A.52.020(1)(b), .030 (assaulting any person in connection with burglary distinguishes crime of first degree burglary from second degree burglary).

c. Mr. Gannon's guilty plea was not fully knowing and intelligent, as the record does not show he was informed the State was required to prove he intended to steal from the Bishops or intentionally assaulted them. Due process requires more than a mere showing that the defendant was made aware of the factual assumptions on which the court and the State were proceeding. Osborne, 102 Wn.2d at 94; Chervenell, 99 Wn.2d at 318-19. The record must also show the defendant was informed of the relation between the State's factual allegations and the law. Id.; Boykin, 395 U.S. at 244. In other words, even if the defendant admits particular facts that establish a "critical element," the record must nonetheless show the defendant was informed the State would be required to prove that element if the case went to trial. Osborne, 102 Wn.2d at 94; Chervenell, 99 Wn.2d at 318-19.

If the critical element is contained in the information, the defendant pleads guilty as charged in the information, and the record shows the defendant was informed of the contents of the information, this creates a presumption that the plea was knowing, intelligent and voluntary. Hews, 108 Wn.2d at 596; Osborne, 102 Wn.2d at 94; Keene, 95 Wn.2d at 208-09. The presumption does

not apply in this case, however, as the critical elements are not contained in the information.

The information alleged Mr. Gannon “did commit or attempt to commit the crimes of Robbery in the First or Second Degree and/or the crime of Burglary in the First Degree and in the course of and in furtherance of such crimes or in the immediate flight therefrom,” he caused the death of Vernon and Maxine Bishop. CP 1-2. The information does not set forth any of the elements of the underlying felonies of robbery or first degree burglary.

The language of the information mirrors the language of the first degree felony murder statute, which also does not set forth the elements of the underlying felonies. See RCW 9A.32.030(1)(c). Yet charging in the language of the statute was insufficient in this case to apprise Mr. Gannon of the critical elements the State was required to prove. If an information charging a statutory offense merely recites the statutory language, this may be insufficient to apprise the accused of the nature of the accusation. State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989). An information should not merely list the elements or recite the name of the offense, but should also state the acts constituting the offense in ordinary and concise language. Id. at 689.

In determining whether an information sufficiently apprised a defendant pleading guilty of the “critical elements” the State would be required to prove, if the information does not set forth the elements explicitly, the question is whether the charge is a self-explanatory legal term or so simple in meaning that it can be expected or assumed a lay person would understand it. Osborne, 102 Wn.2d at 94.

In Osborne, the information alleged the defendants committed second degree felony murder by causing the death of their daughter “while committing or attempting to commit the crime of assault in the second degree.” 102 Wn.2d at 90. The court held this language was sufficient to apprise the defendants that “knowing” assault was a critical element of the crime. Id. at 94.

The court explained

It is clear from this language that some sort of knowing, purposeful conduct is contemplated. The word ‘assault’ is not commonly understood as referring to an unknowing or accidental act. Likewise, it is difficult to imagine anyone ‘attempting to commit’ an act unknowingly.

Id. Similarly, in State v. Davis, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992), the Supreme Court concluded the word “assault” in an information sufficiently conveys the non-statutory element of intent

in a prosecution for fourth degree assault, just as it conveys the "knowingly" element of second degree assault.

In this case, however, the information does not allege Mr. Gannon committed an "assault," it merely alleges he committed first degree burglary. CP 1-2. Intent to assault is a critical element of first degree burglary, but it cannot be assumed that a lay person would understand that without being explicitly informed of it. The mere allegation of "first degree burglary" is not self-explanatory or simple in meaning. It is not commonly understood that the State must prove an intentional assault in order to prove the crime.

Similarly, the information alleged Mr. Gannon committed or attempted to commit the crime of "Robbery in the First or Second Degree." CP 1-2. The information does not explicitly set forth the critical element of intent to steal.

In Kjorsvik, the information alleged defendant committed the crime of robbery in the first degree in that he

did unlawfully take personal property, to-wit: lawful United States currency from the person and in the presence of Chris V. Balls, against his will, by the use or threatened use of immediate force, violence and fear of injury to such person or his property and in the commission of an in immediate flight therefrom the defendants were armed with an displayed what appeared to be a deadly weapon, to-wit: a knife.

117 Wn.2d at 96. The question was whether the information sufficiently apprised the defendant of the essential element of “intent to steal.” The Supreme Court concluded it did, as

[i]t is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money.

Id. at 110.

In this case, by contrast, the information set forth no facts to support the allegation of robbery. A person cannot be guilty of robbery in forcibly taking property from another if he does so under the good faith belief that he is the owner or otherwise entitled to the possession of the property; this good faith belief negates the requisite intent to steal. State v. Hicks, 102 Wn.2d 182, 184, 683 P.2d 186 (1984). Yet it cannot be assumed that a lay person would understand that a good faith claim of title is a viable defense to robbery. In other words, the term “robbery,” by itself, is not self-explanatory or simple in meaning. It is not commonly understood the State must prove intent to steal in order to prove the crime.

Where the critical element is not set forth in the information, the reviewing court may look to other parts of the record to determine whether a defendant pleading guilty was nonetheless

apprised of the element. For instance, if the plea form sets forth the element, or if there is evidence in the record that the court or defense counsel otherwise advised the defendant of the State's burden to prove the element, this may be sufficient. E.g., Chervenell, 99 Wn.2d at 318-19.

Here, neither the plea agreement nor the defendant's statement on plea of guilty sets forth the critical elements of intent to assault or intent to steal. CP 67-71; 72-80. The plea statement merely recites the elements in the same language as the information. CP 79. Further, this is the same language that the court read aloud to Mr. Gannon at the guilty plea hearing. 3/05/07RP 4-6; CP 1-2. The record does not show that the court, the State, or defense counsel otherwise informed Mr. Gannon of the missing critical elements.

Thus, Mr. Gannon's guilty plea was not knowing, intelligent or voluntary, in that the record does not show he was apprised of all critical elements of the crime before pleading guilty.

d. Mr. Gannon must be permitted to withdraw the plea. An involuntary guilty plea produces a manifest injustice and due process requires the defendant be permitted to withdraw the plea. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d

390 (2004) (and cases cited therein); State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

Mr. Gannon's guilty plea was involuntary because the record does not show he was informed of all critical elements of the crime. A manifest injustice occurred and he must therefore be permitted to withdraw his plea.

2. MR. GANNON'S GUILTY PLEA WAS INVOLUNTARY BECAUSE IT WAS THE RESULT OF COERCIVE FEAR AND PERSUASION

When a defendant questions the waiver of his right to trial and moves to withdraw his guilty plea prior to sentencing, courts should liberally grant such motions. Here, the record shows Mr. Gannon was pressured into pleading guilty by the State's promise he could marry his fiancé in jail, and thus have physical-contact visits with her prison, and by his desire to have physical contact with his mother. He was also pressured by his fear that he would be vilified in the press if he did not go through with the guilty plea. Together, these pressures combined to compel Mr. Gannon to enter a plea that was not a product of his free and voluntary choice. Under these circumstances, the trial court should have permitted Mr. Gannon to withdraw his plea.

a. Courts should liberally allow a defendant to withdraw a plea of guilty before sentencing if there is a fair and just reason for doing so. A guilty plea involves the simultaneous waiver of several constitutional rights. When a defendant requests to withdraw the guilty plea before sentencing, it is an abuse of discretion to ignore the solicitude owed to a defendant who questions the waiver of his right to trial and as such, withdrawal should be liberally allowed. See Commonwealth v. Santos, 301 A.2d 829, 830-31 (Pa. 1973) (citing Commonwealth v. Forbes, 299 A.2d 268, 271 (1973)).

Should the accused move to withdraw his plea before sentencing, courts should liberally construe a request to withdraw a guilty plea in favor of the accused. Santos, 301 A.2d at 831 (citing numerous federal cases supporting liberal view of pre-sentence motions to withdraw guilty pleas); see also Soto v. State, 780 So.2d 168, 170 (Fla. App. 2001) (noting liberal standard for guilty pleas based on mistakes); State v. Christian, 967 P.2d 239, 255 (Haw. 2004) (explaining liberal pre-sentence standard for granting motions to withdraw plea); State v. Johnson, 816 P.2d 364, 367 (Idaho App. 1991) (“When a defendant seeks to withdraw a guilty plea before sentencing, the court is to exercise liberal discretion,

and the defendant need only present a just reason to withdraw his plea.”); Commonwealth v. Whitford, 452 N.E.2d 262, 263 (Mass. App. 1983) (liberal standard applies pursuant to court rule); People v. Hollman, 162 N.W.2d 817, 818-19 (Mich.App. 1968) (“Permission to withdraw a plea of guilty must be liberally granted”); State v. Williams, 775 A.2d 727, 730 (N.J.Super. 2001) (applying liberal standard pre-sentencing); State v. Carswell, 2006 Ohio 5210 (Ohio App. 2006) (“the trial court should have applied the more liberal standard applicable to pre-sentence motions to withdraw pleas”); Parris v. Commonwealth, 52 S.E.2d 872, 874 (Va. 1949) (liberal allowance to withdraw pleas before sentencing under case law); State v. Jenkins, 710 N.W.2d 502, 508 (Wisc. 2006) (liberal standard for plea withdrawal before sentence).

When there are “fair and just” reasons to withdraw a guilty plea and no sentence has yet been imposed, the court should liberally permit withdrawal. Commonwealth v. Randolph, 718 A.2d 1242, 1244 (Pa. 1998). On the other hand, a request to withdraw made after sentencing is more likely to reflect a dissatisfaction with the sentence imposed and need not be treated as leniently as a pre-sentence motion to withdraw. United States v. Slayton, 408 F.2d 559, 561 (3d Cir. 1969). This rationale reflects balancing both

for the fundamental constitutional rights accorded an accused person and the integrity of the judicial process.

This distinction rests upon practical considerations important to the proper administration of justice. Before sentencing, the inconvenience to the court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease *after* sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process.

Slayton, 408 F.2d at 561 (footnotes omitted).

The American Bar Association likewise holds that,

After entry of a plea of guilty or nolo contendere and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason.

American Bar Association, Standards for Criminal Justice: Pleas of Guilty, Plea withdrawal and specific performance, 14-2.1(a) (3rd ed. 1999) (emphasis added).¹⁰

In sum, while a defendant does not have an absolute right to withdraw a guilty plea, courts should liberally permit withdrawal before sentencing when there is a fair and just reason for doing so.

¹⁰ The ABA Standards are available at: http://www.abanet.org/crimjust/standards/guiltypleas_blk.html#2.1 (last accessed Oct. 11, 2007).

b. The trial court should have permitted Mr. Gannon to withdraw his plea, as it was the product of coercive fear, promise and persuasion. A guilty plea that is the product of, or is induced by coercive threat, fear, persuasion, promise, or deception is involuntary in violation of due process. Woods v. Rhay, 68 Wn.2d 601, 605, 414 P.2d 601 (1966). “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.” CrR 4.2(f) (emphasis added). “Manifest injustice is proved by showing that the plea is involuntary.” State v. Hurt, 107 Wn. App. 816, 829, 27 P.3d 1276 (2001) (citing State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)).

The voluntariness of a plea can be determined only by considering all of the relevant circumstances surrounding it. Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). A defendant’s denial of improper influence in open court does not preclude him from claiming coercion at a later time. State v. Frederick, 100 Wn.2d 550, 557, 674 P.2d 136 (1983), overruled on other grounds by Thompson v. Department of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999).

i. The guilty plea was the product of coercive pressure and promises by the State. Plea bargaining pressures may, in particular circumstances, render a plea involuntary. Frederick, 100 Wn.2d at 556. Agreements to forgo seeking an exceptional sentence, to decline prosecuting all offenses, to pay restitution on uncharged crimes, and to waive the right to appeal are all permissible components of valid plea agreements. State v. Lee, 132 Wn.2d 498, 506, 939 P.2d 1223 (1997); See RCW 9.94A.421 (setting forth particular promises prosecutor may make in exchange for defendant's agreement to plead guilty). Thus, for example, entry of a guilty plea in return for dismissal of other charges does not per se render a plea involuntary. Frederick, 100 Wn.2d at 555-56.

On the other hand, family coercion may render a plea involuntary. Frederick, 100 Wn.2d at 557 (citing United States v. Cammisano, 599 F.2d 851, 856-57 (8th Cir. 1979)). In Cammisano, defendant claimed he entered a guilty plea because his brother, the co-defendant, told him he was hurting him by not pleading guilty and defendant "didn't want to hurt his brother and he didn't want to start a war between their families." 599 F.2d at 853. This factor helped to establish defendant pled guilty under undue

coercion, creating “fair and just” reasons to allow him to withdraw his plea of guilty before sentencing. Id. at 856-57.

Here, the State used Mr. Gannon’s desire to have physical contact with his family members as a means of inducing him to plead guilty. The record demonstrates the State’s promise to allow Mr. Gannon to marry while in jail and the prospect of physical-contact visits, and not the State’s promise to drop three of the charges or recommend a standard-range sentence, was the significant element of the plea agreement from Mr. Gannon’s perspective. 4/04/07RP 47, 52-53, 131-32; CP 68. Mr. Gannon was facing, in effect, a life sentence for two counts of first degree murder. His attorney repeatedly informed him he was not likely to prevail if he went to trial, given his co-defendant’s promise to testify against him in exchange for her own plea bargain. 4/04/07RP 51, 108. Thus, Mr. Gannon was presented with little choice but to plead guilty, so that he could maintain some bit of normalcy in his family relationships.

A prosecutor’s promise to allow a defendant to marry while in jail is not a well-recognized element of plea agreements. See Lee, 132 Wn.2d at 506 (listing permissible components of valid plea agreements); RCW 9.94A.421 (same). As in Cammisano, such a

promise pressures a defendant into pleading guilty in order to maintain family relationships and thus borders on improper coercion. Combined with the other pressures exerted on Mr. Gannon in this case, this family pressure rendered the guilty plea invalid.

ii. The guilty plea was the product of coercive fear of a figurative “lynching” in the press. Coercion may render a guilty plea involuntary, irrespective of the State’s involvement. Frederick, 100 Wn.2d at 556-57. As the Frederick court explained:

While prevention of governmental misconduct is certainly a weighty concern, it is merely one means of advancing the most basic goal of our criminal justice system, protection of the innocent by assuring them a fair trial. To hold one in prison who, through no real choice of his or her own, has been denied a fair trial, indeed denied *any trial at all*, strikes us as the ultimate in injustice. The injustice lies not in the taint on our legal system, but in the more basic wrong of incarcerating one who because of illegitimate threats has been denied any opportunity to prove his or her innocence.

Id.

A plea may be involuntary if coerced by illegitimate threats from outside forces. In particular, a plea is involuntary if it is “the product of a wild lynch mob figuratively if not literally banging at the door.” Frederick, 100 Wn.2d at 557 (citing State v. Poglianich, 43 Idaho 409, 417, 424, 252 P. 177 (1927); Nickels v. State, 86 Fla.

208, 234-35, 98 So. 497 (1923) (per curiam on rehearing); Little v. Commonwealth, 142 Ky. 92, 94-95, 133 S.W. 1149 (1911)). In Poglianich, Nickels, and Little, the record showed the defendants believed that if they did not plead guilty, they were in danger of being lynched by a mob. Poglianich, 43 Idaho at 421; Nickels, 86 Fla. at 233; Little, 142 Ky. at 95. The courts in those cases concluded such fear rendered the guilty pleas involuntary and the defendants should have been permitted to withdraw their pleas. Poglianich, 43 Idaho at 424; Nickels, 86 Fla. at 235; Little, 142 Ky. at 95.

As the Frederick court observed, a “lynch mob” may figuratively if not literally bang at the door of a defendant accused of committing a brutal and notorious crime. Frederick, 100 Wn.2d at 557. In this day and age, an actual lynch mob is less common than a figurative lynch mob that takes the form of inflammatory and sensational news coverage. The record demonstrates the local press coverage of Mr. Gannon’s case was voluminous and sensationalist. See CP 14-45. The record also shows Mr. Gannon was pressured into pleading guilty by his attorney’s and his fiancé’s representations that he would be vilified in the press, and the jury pool consequently tainted, if he did not go through with his guilty

plea despite his second thoughts at the guilty plea hearing.

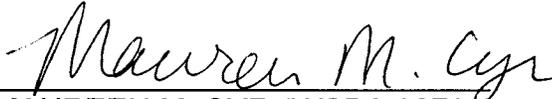
4/04/07RP 54-56, 83-84, 122-23. Under these circumstances, Mr. Gannon was unduly coerced by these outside pressures into entering his guilty plea.

Mr. Gannon asserted his innocence and presented fair and just reasons for questioning the prior waiver of his right to trial. The court should have permitted him to withdraw the plea.

F. CONCLUSION

Mr. Gannon's guilty plea was involuntary because he was not informed of every "critical element" of the crime, and because the plea was the product of coercive fear and persuasion. Thus, Mr. Gannon respectfully requests this Court permit him to withdraw his plea and proceed to trial.

Respectfully submitted this 18th day of October 2007.


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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 36237-6-II
)	
DAVID GANNON,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, ANN JOYCE, CERTIFY THAT ON THE 18TH DAY OF OCTOBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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GRAYS HARBOR CO. PROSECUTOR'S OFFICE	()	HAND DELIVERY
102 W. BROADWAY AVENUE, ROOM 102	()	_____
MONTESANO, WA 98563-3621		

[X] DAVID GANNON	(X)	U.S. MAIL
922022	()	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	()	_____
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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF OCTOBER, 2007.

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DIVISION II

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