

No. 36237-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID T. GANNON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE GUILTY PLEA WAS INVOLUNTARY BECAUSE MR. GANNON WAS NOT INFORMED OF CRITICAL ELEMENTS OF THE CRIMES

a. The trial court must ensure a defendant pleading guilty to felony murder is aware of the *mens rea* element(s) of the underlying felony. The State contends the trial court need not ensure that a defendant pleading guilty to felony murder understands that the State would need to prove the *mens rea* element(s) of the underlying felony to a jury beyond a reasonable doubt if the case went to trial. This argument is clearly contrary to well-established Washington Supreme Court case law.

The State relies on the proposition that the elements of the underlying felony are not "essential elements" of the crime of felony murder that must be set forth in the information. SRB at 12-13. The State is correct that the Court of Appeals has held an information charging felony murder need not contain all of the elements of the underlying felony. See State v. Medlock, 86 Wn. App. 89, 101-02, 935 P.2d 693 (1997); State v. Bryant, 65 Wn. App. 428, 438, 828 P.2d 1121 (1992).

Regardless of what the information must contain, however, it is well established that in a prosecution for felony murder the State

bears the burden to prove the elements of the underlying felony to a jury beyond a reasonable doubt. AOB at 17 (citing State v. Gamble, 154 Wn.2d 457, 465-66, 114 P.3d 646 (2005); State v. Wanrow, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978)). Thus, those elements fit squarely within the usual definition of an "element" of an offense. See generally Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Moreover, it is also well established that the *mens rea* element of the underlying felony is a "critical element" of the crime of felony murder in the context of a guilty plea. AOB at 18; State v. Osborne, 102 Wn.2d 87, 94, 684 P.2d 683 (1984). In other words, in order for a guilty plea to the crime of felony murder be knowing, intelligent and voluntary, the defendant must understand the State would be required to prove the specific *mens rea* element of the underlying felony to a jury beyond a reasonable doubt if the case went to trial. Id.

In Osborne, the Washington Supreme Court held an information alleging 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," was sufficient to apprise the defendants that

"knowing" assault was a critical element of the crime. AOB at 24; Osborne, 102 Wn.2d at 94. That was because "[t]he word 'assault' is not commonly understood as referring to an unknowing or accidental act." Id. That analysis is consistent with other cases holding that the word "assault" in an information sufficiently conveys the element of intent in a prosecution for assault. AOB at 24; State v. Davis, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992).

But where the name of the underlying felony does not sufficiently convey the *mens rea* element of the felony, the defendant must be specifically informed of that element. In Ivy v. Caspari, 173 F.3d 1136, 1139 (8th Cir. 1999), Ivy pled guilty in Missouri state court to second degree felony murder. The information charged felony murder in the second degree as a result of the perpetration of the felony of unlawful use of a weapon. Id. at 1142. Under Missouri law, as in Washington, the State was not required to prove intent to kill, but was required to prove intent to commit the underlying felony. Id. at 1142. The *mens rea* of the underlying felony was to "knowingly . . . exhibit . . . any weapon readily capable of lethal use in an angry or threatening manner." Id. at 1143. This *mens rea* was not apparent from the name of the felony, "unlawful use of a weapon." Id.

At the guilty plea hearing, the court made sure to apprise the defendant the State would not be required to prove intent to kill if the case went to trial. Id. at 1142. The court also questioned defense counsel who stated he discussed the concept of felony murder with Ivy and believed he understood "that the question of his intent is in no way involved in this case." Id. But the court did not advise Ivy the State would have to prove he intended to commit the underlying felony. Id. at 1143. Thus, the federal court concluded the plea was involuntary, as the trial court's failure to inform Ivy of the State's burden to prove intent "was more than a quibble." Id. As the court explained, "intent is not to be presumed, and had the case gone to trial the State would have been put to its proof on this element of the offense." Id.

Here, as in Ivy and as explained in the opening brief, the *mens rea* elements of the underlying felonies are not conveyed by the names of the felonies set forth in the information. No one unfamiliar with the law would understand the allegation of "first degree burglary" contains the critical element of intent to assault. AOB at 25. A lay person also would not understand that in order to be convicted of "robbery" the State must prove he had an intent to steal. AOB at 26. Because these critical elements were not

sufficiently conveyed by the language in the information that the trial court read aloud to Mr. Gannon at the guilty plea hearing, the court was required to inform Mr. Gannon of these elements specifically. The court did not do so.

b. The court did not ascertain Mr. Gannon understood the critical elements of the crimes, rendering the plea involuntary. The State acknowledges the only evidence in the record that Mr. Gannon was informed of the nature of the crimes is the language in the information. SRB at 13-14. But the State argues that because counts three through five of the information contain the required elements, that was sufficient to apprise Mr. Gannon of those elements. SRB at 14-15.

This argument must be rejected. Mr. Gannon did not plead guilty to counts three through five. The court did not inform Mr. Gannon of the elements contained in those counts at the guilty plea hearing, and they are not contained anywhere on the guilty plea statement. 3/05/07RP 4-6; CP 79-80. Moreover, there is no authority for the State's argument that elements set forth in one count of an information, to which a defendant does not plead guilty, may be plucked from that count and inserted into another count of

the information, to which the defendant does plead guilty, in order to show the defendant was made aware of the nature of the crime.

Criminal Court Rule 4.2(d) places a burden on the trial court to establish affirmatively, at the guilty plea hearing, that the plea is made intelligently and with an understanding of the nature of the charge:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d); In re Pers. Restraint of Montoya, 109 Wn.2d 270, 278, 744 P.2d 340 (1987). Under the rule, "the trial judge must make direct inquiries of the defendant as to whether he understands the nature of the charge and the full consequences of a guilty plea." Wood v. Morris, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976).

As a corollary of this duty of the trial judge to make direct inquiries of the defendant at the plea hearing is the requirement that "the record of the plea hearing must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea." Wood, 87 Wn.2d at 503. The Washington Supreme Court has emphatically insisted, "[t]here is no adequate substitute for demonstrating *in the*

record at the time the plea is entered the defendant's understanding of the nature of the charge against him." Id. at 511 (quoting McCarthy v. United States, 394 U.S. 459, 470, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) (emphasis in McCarthy)). Failure to comply fully with CrR 4.2 requires that the defendant's guilty plea be set aside and his case remanded so that he may plead anew. Wood, 87 Wn.2d at 511.

The upshot of these requirements is that the record must show the trial court adequately inquired *at the guilty plea hearing* about the defendant's understanding of the critical elements of the crime. In this case, the trial judge did not ascertain, *at the guilty plea hearing*, whether Mr. Gannon was ever informed of the elements contained in counts three through five of the information. It is therefore immaterial whether the record shows Mr. Gannon was read the information in its entirety at his preliminary appearance or at formal arraignment. See SRB at 15. That is because the record does not show that the trial judge, *at the guilty plea hearing*, was aware of what occurred at those earlier hearings.

Moreover, there is no authority for the State's contention that Mr. Gannon must be presumed to be aware of the elements missing from counts one and two of the information, simply

because those elements were contained in counts three through five. In State v. Clowes, this Court held that where an essential element is missing from one count of an information, the defendant cannot be presumed to have received adequate notice of the charge, even if the missing element is contained in another count of the information. 104 Wn. App. 935, 942, 18 P.3d 596 (2001). The Court reached that conclusion even applying a liberal standard of review. Id. at 940. The Court explained:

[a]s we have previously ruled, we will not fill voids in a defective count with facts located elsewhere in the information. Here, as in Gill, there is no basis for the State's assertion that elements can be plucked out of one count in a charging document and dropped into another.

Id. at 942 (citing State v. Gill, 103 Wn. App. 435, 442, 13 P.3d 646 (2000)). Similarly, here, the record does not show Mr. Gannon received adequate notice of the charge simply because elements missing from the counts to which he pled guilty are contained in other counts of the information, to which he did not plead guilty.

The Constitution requires a person pleading guilty be informed of the elements the State would be required to prove at trial, in order that he may intelligently weigh the risks and benefits of going to trial versus pleading guilty. See, e.g., North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (guilty

plea must represent voluntary and intelligent choice among various options available to defendant). To safeguard that right, court rule and case law require the trial court to ascertain affirmatively at the time of the plea that the defendant fully understands the critical elements of the crime. Because the record does not demonstrate in this case that the trial court complied with that requirement, Mr. Gannon's guilty plea must be set aside and he must be permitted to plead anew. Wood, 87 Wn.2d at 511.

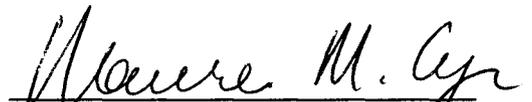
2. THE GUILTY PLEA WAS INVOLUNTARY BECAUSE IT WAS THE RESULT OF COERCIVE FEAR AND PERSUASION

Mr. Gannon relies on the arguments set forth in the opening brief in regard to this issue.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Gannon's guilty plea must be vacated and the case remanded to permit him to plead anew.

Respectfully submitted this 6th day of March 2008.


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DIVISION TWO**

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

AMENDED DECLARATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 6TH DAY OF MARCH, 2008, I CAUSED A TRUE AND CORRECT COPY OF THIS REPLY BRIEF OF APPELLANT TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF MARCH, 2008.

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