

NO. 42495-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JASON LEE MARTIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 11-1-00655-9

BRIEF OF RESPONDENT

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

1. Did the defendant knowingly, voluntarily, and intelligently enter his plea of guilty where his counsel substantially assisted him in the plea negotiations, and the trial court ensured that defendant understood the rights he was waiving and the direct consequences of such a plea?

2. Did the trial court err where it imposed a condition of no contact with minors as the condition qualifies as a crime-related prohibition of defendant's sentence?

B. STATEMENT OF THE CASE.

1. Procedure

The declaration for determination of probable cause alleges that on two occasions¹ Jason Lee Martin (defendant) raped his daughter, T.M.² CP 3. T.M. was respectively six and seven years old when the crimes occurred. CP 3. On September 21, 2010, defendant's children —T.M. and E.M.—were removed into protective custody to live with their maternal grandmother. CP 3.

¹ March 7, 2009 and September 21, 2010. CP 3.

² Because T.M. is a minor, the State will refer to the victim as "T.M." for purposes of anonymity. Defendant also has another minor child who will be referred to as "E.M."

Once in protective custody, the grandmother reported to child services that the children had disclosed ongoing abuse and neglect by their parents. CP 3. T.M. told her grandmother that defendant had climbed into her bed with her while only in his underwear. CP 3. Although T.M. did not report any other misconduct at that time, she said that there was blood in her urine after the event. CP 3. T.M. and E.M. said that defendant had slapped and hit them, as well as locked them in their room when defendant left the house. CP 3. E.M. disclosed that defendant had purposely burned E.M. with a cigarette two times. CP 3.

T.M. later told a social worker that when defendant had climbed into bed with her, he touched her bottom with his hand. CP 3. She tried telling defendant to get out, but he refused. CP 3. She also showed the social worker bruises on her legs where defendant had abused her. CP 3. E.M. showed the social worker the two burn marks from defendant's cigarettes. CP 3.

During a forensic interview on December 22, 2010, T.M. stated that defendant had climbed on top of her and penetrated her with his penis. CP 3. She said that even though her mother was in the room while this occurred, her mother just laughed. CP 3. T.M. also told the interviewer that she did not know adults had pubic hair until she peeked under the covers and saw defendant's body. CP 3.

When police officers arrested defendant, he waived his *Miranda* rights and denied the allegations above. CP 3–4.

On February 9, 2011, the Pierce County Prosecuting Attorney's Office (State) charged defendant with two counts of rape of a child in the first degree and one count of child molestation in the first degree. CP 1–2. Pursuant to defendant's entering a guilty plea, the State amended the charges to two counts of abandonment of a dependent person in the first degree. CP 7–8.

Defendant pleaded guilty on July 22, 2011, entering an *Alford/In re Barr*³ plea to the abandonment charges. CP 11–19. The Honorable Edmund Murphy conducted defendant's plea proceeding, and engaged defendant in a colloquy to ensure his plea was made knowingly, voluntarily, and intelligently. RP 7–15. After the colloquy, the court accepted defendant's plea of guilty. RP 15.

The court sentenced defendant to 164 days of custody, which was credit for time served, and 24 months of community custody. RP 16, 24; CP 28 (paragraph 4.5). It also ordered defendant to undergo a psychosexual evaluation, and instituted a no contact order with his children and a sentencing condition of no contact with other minors. RP 16; CP 27 (paragraph 4.4). This appeal timely follows. CP 39–51.

³ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970); *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984).

C. ARGUMENT.

1. DEFENDANT'S PLEA OF GUILTY IS CONSTITUTIONALLY VALID BECAUSE THE RECORD SHOWS DEFENDANT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED HIS PLEA.

Where a defendant alleges he entered his guilty plea involuntarily, the State bears the burden of proving the validity of the plea. See *State v. Knotek*, 136 Wn. App. 412, 423, 149 P.3d 676 (2006). The record from the plea hearing must show that the defendant entered the plea voluntarily and intelligently. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). A plea is presumptively voluntary where the defendant completes a plea statement and admits to reading, understanding, and signing it. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998) (“[A] defendant’s signature on a plea statement is strong evidence of a plea’s voluntariness, . . .”). If the court questions the defendant regarding the voluntariness of his plea, the presumption that he entered it voluntarily becomes “well nigh irrefutable.” *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

For a plea to be constitutional, a criminal defendant must be aware that he is waiving his right (1) to remain silent, (2) to confront his accusers, and (3) to jury trial. *In re Hilyard*, 39 Wn. App. 723, 727, 695 P.2d 596 (1985). The defendant must also be aware of the elements of his charged offense and the direct consequences of pleading guilty. *Id.*

In this case, the record supports the validity of defendant's plea because he admitted to reading, understanding, and signing his plea statement. At defendant's plea hearing, the court asked defendant if he had read his plea form. RP 7. Defendant answered in the affirmative. RP 7. When the court asked defendant if he understood the terms of his plea, defendant replied that he did. RP 7–8. Defendant also told the court that the signature on the plea form was his, and that he was making a “voluntar[y] and informed” choice. RP 13–15.

Defendant signed the plea form, stipulating that his lawyer had explained the plea form to him, and that he understood the agreement in its entirety. CP 19 (paragraph 12). By signing the statement, defendant confirmed that he entered the plea freely and voluntarily, and that nobody had threatened him to sign the plea. CP 18 (paragraphs 8–9). Defendant's lawyer also signed the plea statement, stating that he had read and discussed the form with defendant, and that he believed defendant was “competent and fully underst[ood]” the plea form. CP 19 (paragraph 12).

Defendant's attorney vouched for the validity of the plea, telling the court:

I have talked to [defendant] about trial. I have talked to him about in general other cases and the evidence that I have had in those cases, what the jury has done. *I talked to him about the constitutional rights that he would be giving up.* I have talked to him about the psychosexual evaluation and follow-up treatment, as well as the alcohol and drug evaluation and treatment the State is requiring or recommending. *I have talked to him about all of the*

information that is in the plea statement. I have talked to him about his appellate rights and his one year time limit on collateral attack. I believe I answered all of his questions. I believe he's making this plea knowingly, intelligently and voluntarily. I think it is an appropriate resolution, and I would ask the Court to accept this statement.

RP 6–7 (emphasis added).

It is nigh irrefutable that defendant entered his plea voluntarily because the trial court thoroughly questioned defendant about the circumstances surrounding the plea. When the court asked defendant whether anybody had made promises to him to plead guilty, other than the prosecutor's recommendation, defendant told the court "no." RP 15. Defendant told the court that nobody had threatened, coerced, or otherwise made him plead guilty. RP 15. The court then accepted his plea. RP 15. The constitutional requirements for a valid plea are satisfied in this case. The court ensured that defendant understood his right to remain silent, to confront his accusers, and to have a jury trial. RP 8. Defendant acknowledged to the court that he understood each of the rights contained on page two of his plea statement. RP 8; CP 12 (paragraph 5). The court asked defendant whether he understood that he was waiving those rights by pleading guilty, and defendant acknowledged that he did. RP 8.

Finally, the court properly confirmed that defendant understood the elements of his charged offenses and any direct consequences of pleading guilty. RP 8–12.

Defendant's plea is constitutionally valid because the record shows that defendant read, understood, and signed his plea agreement. Furthermore, the trial court properly conducted a colloquy to ensure defendant understood the constitutional rights he waived by pleading guilty. Never did defendant claim he was entering the plea involuntarily, nor did he object to terms of his plea. This court should affirm defendant's convictions and uphold the validity of his plea.

- b. Defendant fails to show a manifest injustice such that this court should permit him to withdraw his plea of guilty.

Once a plea is accepted, “[t]he 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). The defense must demonstrate that withdrawal of the plea is necessary to correct a manifest injustice. *Branch*, 129 Wn.2d at 641. Withdrawal of guilty plea is a demanding standard that requires an injustice that is “obvious, directly observable, overt, [and] not obscure.” *Id.* (citation omitted). Manifest injustice does not exist unless the defendant can prove (1) the denial of effective assistance of counsel, (2) defendant’s failure to ratify the plea, (3) the plea was involuntary, or (4) the prosecution’s

breach of the plea agreement.⁴ *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006).

In order to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (1984). The defendant carries the burden to show deficient performance and prejudice based only on the record of the proceedings below. *State v. McFarland*, 127 Wn.2d 322, 335–38, 899 P.2d 1251 (1995). The reviewing court will not consider matters outside the trial record. *Id.* at 335.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 668. In the context of plea bargaining, counsel must "actually and substantially [assist] his client in deciding whether to plead guilty." *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981).

To show prejudice in the plea bargaining context, the defendant must show his counsel's deficient performance affected the outcome his plea. *State v. Garcia*, 57 Wn. App. 927, 932–33, 791 P.2d 244 (1990). The

⁴ Defendant does not allege that he failed to ratify the plea or that the prosecutor breached the plea agreement. Because the State addresses the voluntariness of the plea in the section above, only the claim of ineffective assistance of counsel is addressed here.

defendant is required to show that but for his counsel's performance, he would not have pleaded guilty and gone to trial. *Id.* at 933.

In *State v. Zhao*, 157 Wn.2d 188, 137 P.3d 835 (2006), the Washington Supreme Court dismissed the argument that defendant's plea was rendered involuntary by ineffective assistance of counsel where the prosecutor precluded defense counsel from interviewing witnesses before plea negotiations. *Id.* at 203. The defendant alleged that the prosecutor, based on an office policy, unconstitutionally prevented defense counsel from interviewing victims of child sex crimes, thus denying him effective assistance of counsel. *See id.* at 203 n.9. But the court dismissed this argument, reasoning that the record did not reveal sufficient facts for the defendant to prove that the policy had "actual or practical consequences" on the defendant's plea. *Id.* The court held:

The claimed error in failing to interview witnesses is grounded in a claim that the policy of the Pierce County Prosecutor's Office prevented full investigation of the charges and thus, Zhao's plea could not have been knowingly and intelligently entered. We have only very limited information about the Pierce County prosecutor's policy and *the record does not contain a copy of the policy*. Significantly, "[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, *no actual prejudice is shown and the error is not manifest.*"

Id. at n.10 (quoting *McFarland*, 127 Wn.2d at 333). Thus, the defendant cannot show prejudice where the policy in question is not even in the record. *Id.*

Here, defense counsel actually and substantially assisted defendant during plea negotiations by discussing the available evidence, the implications of a jury trial, defendant's constitutional rights, and answering all of defendant's questions. RP 6–7. Defense counsel adequately reviewed defendant's available options and agreed that the plea bargain was an “appropriate resolution.” RP 7.

Defense counsel successfully negotiated two counts of rape of a child in the first degree and one count of child molestation in the first degree, down to two counts of abandonment of a dependent person. CP 1–2 (information), 7–8 (amended information). After accepting the plea agreement and sentencing defendant, even the trial court recognized how adequately defense counsel had performed, stating, “Your attorney did a lot for you. You should be thankful for the work he’s done in this case.” RP 27.

Defendant argues that the prosecutor's condition of not allowing defendant to interview the victims before deciding to go to trial prejudiced his defense by rendering his counsel's performance ineffective. Brief of Appellant at 7. But the defendant fails to identify any actual details of this alleged condition, or policy, in the record. Similar to the defendant in *Zhao*, defendant cannot show what extent the prosecutor's actions—if any—had on defendant's decision to plead guilty.

Although defense counsel briefly alluded to the prosecutor's condition at defendant's plea hearing,⁵ he neither objected to the prosecutor's actions, nor claimed that defendant was unable to make a voluntary and intelligent plea because of it. On the contrary, counsel informed the court that defendant was knowingly, voluntarily, and intelligently entering his plea. *See* RP 6–7. There is no clear evidence on the record that the prosecutor actually prevented the interviews or that such a policy existed.

Defendant's reasoning demands a per se finding of both deficiency and prejudice where a prosecutor prohibits a defendant from interviewing witnesses prior to plea bargaining. But consider the principles underlying the prosecutor's alleged conduct in this case: the State has an interest in shielding child victims of sex abuse and other witnesses from harassment, intimidation, or other humiliation or degradation until a defendant chooses to exercise his right to a jury trial. Where a defendant finally determines he wants to exercise his right to trial, then the State must remove that shield and permit the defense to interview the witnesses. On the other hand, if a defendant were permitted to interview child victims of sex crimes before plea bargaining, he could intimidate or discourage these

⁵ *See* RP 3 (“We have not yet done an interview of either the two children or of [defendant]’s mother-in-law. That was part of the negotiations.”); *see also* RP 6 (“I have not conducted the interview of the children or of [defendant]’s mother-in-law, as I indicated earlier, due to the way the negotiations have gone.”).

witnesses—in some cases his victims—in hopes of avoiding a trial. This is a possible scenario when considering a minor child’s vulnerability to such intimidation.

Defense counsel recognized the importance of the prosecutor’s conduct, stating, “Having done many [interviews with children victims], though, as gentle as I try to be, it is very tough on especially minor children. *In order to negotiate a settlement that takes into account the potential trauma that the kids have . . . we’ve reached the settlement agreement.*” RP 3–4 (emphasis added).

Defendant further argues that the prosecutor’s condition “prevented [him] from knowing the nature and quality of evidence against him.” Brief of Appellant at 10. But this court should consider that a criminal defendant does not have a constitutional right to plea bargain. *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981). A prosecutor has the discretion to extend or withdraw a plea offer at any time before defendant enters into it. *See id.* at 803–05. If the court accepted defendant’s argument, then prosecutors would simply refrain from making any plea offers where the defendant insisted on interviewing the State’s witnesses prior to plea negotiations.

Defendant had two viable options: to go to trial and interview the State’s witnesses in preparation for trial, or plead guilty to substantially reduced charges. The record is clear that defense counsel thoroughly

reviewed both options with defendant before defendant pleaded guilty, telling the court:

The defense believes that the basis for the allegations leading to this charge were the result of fabrication so that [defendant]'s mother-in-law could get formal custody of the children. Presumably she thought that was in the best interest of the kids . . . I do believe that the evidence would lead to that conclusion, but that again is the defense's interpretation of the evidence.

RP 3. Despite the defense's theory, and the evidence that purportedly supported that theory, defense counsel stated: "Given all of the evidentiary issues, given [defendant]'s vigorous denial of these allegations, and what is in my impression a very suspect statement from [defendant]'s mother-in-law, the *In re Barr* plea is appropriate. The *Alford* plea is appropriate. I think these amended charges are appropriate." RP 4. Both defendant and defense counsel were aware of and had evaluated the evidence. Defendant never indicated that evidence had been withheld or that he could not make a full evaluation of his case without the evidence provided. On the contrary, both the prosecutor and defense made records of their evaluation of the evidence and the appropriateness of the resolution. RP 2, 4–5. After fully evaluating the merits of going to trial or pleading with his counsel, defendant knowingly, voluntarily, and intelligently entered a plea of guilty.

Defendant fails to cite any authority that directly supports his argument. For example, *State v. Burri*, 87 Wn.2d 175, 550 P.2d 507

(1976), differs from defendant's case because (1) it involved a prosecutor who had interfered with the *defendant's* alibi witnesses, not the state's witnesses, by subpoenaing and interviewing them without defense counsel present; and (2) the defendant had pleaded not guilty and was preparing for trial. *Id.* at 178.

Defendant also relies on *State v. Ulestad*, 127 Wn. App. 209, 111 P.3d 276 (2005). In that case, the court prevented defendant from communicating directly with his counsel while counsel interviewed the victim of defendant's molestation charges at trial. *Id.* at 212–13. The court held that any interference with continuous communication between defendant and counsel constituted reversible error. *Id.* at 214–15. The court's interference with defendant and counsel's continuous communication at trial is not at issue here.

Both the procedural context and the facts of defendant's cited authority are dissimilar to defendant's case. The prosecutor in this case did not infringe on defendant's right to trial or confrontation. Defendant cannot show that a manifest injustice occurred. Defense counsel properly provided effective assistance and substantially assisted defendant in the plea-bargaining process. This court should affirm his convictions.

2. THE TRIAL COURT PROPERLY IMPOSED A SENTENCING CONDITION PROHIBITING CONTACT WITH MINORS BECAUSE IT WAS A CRIME-RELATED PROHIBITION.

The trial court's imposition of a crime-related prohibition is reviewed for an abuse of discretion. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). An abuse of discretion occurs where the court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Hays* 55 Wn. App. 13, 16, 776 P.2d 718 (1989) (quoting *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)).

The sentencing court "may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." RCW 9.94A.505(8) A "crime-related prohibition" is defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct." RCW 9.94A.030(10).

Defendant was convicted of two charges of abandonment of a dependent person in the first degree. CP 24-34. A person is guilty of abandonment of a dependent person in the first degree where:

- (a) The person is the parent of a child, a person entrusted with the physical custody of a child or other dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or other dependent person any of the basic necessities of life;
- (b) The person recklessly abandons the child or other dependent person; and
- (c) As a result of being abandoned, the child or other dependent person suffers great bodily harm.

RCW 9A.42.060. In his plea of guilty, defendant conceded to each of the elements of these crimes. CP 11–12 (paragraph 4(b)).

In addition to prohibiting defendant from contacting the victims of his crimes,⁶ the court properly imposed a condition of no contact with minors. Defendant was convicted of two crimes that resulted in two minors being harmed. Upon issuing the no contact order, the court reasoned:

You are not to have any contact with either of the children. No contact with minors. If you get this [psychosexual] evaluation and there is a determination made that it safe for you to have contact with minors, we can address that issue. Until then, I'm going to be on the side of caution and I am going to impose that condition. You need to comply with that. I know that you are going to want to have contact with grandchildren, grandchildren who want to have contact with you.

⁶ Defendant's conditions of no contact with his children are not challenged on appeal.

RP 26. The court had a legitimate reason to worry that defendant posed a risk to minors because his reckless abandonment directly resulted in two children suffering great bodily harm.

Moreover, the trial court's condition of no contact was open for reconsideration upon defendant successfully undergoing a psychosexual evaluation. RP 25 ("I'm also going to order the psychosexual evaluation and follow-up with any recommended treatment. I don't know if there is anything there. They'll find out. If they do the evaluation and you don't have any issues, then you are fine."). There is no evidence that the condition perpetually extended beyond the statutory maximum for defendant's crimes—which the State agrees is the extent the court could have extended its jurisdiction. *See State v. Armendariz*, 160 Wn.2d 106, 118–19, 156 P.3d 201 (2007). The trial court thus did not err because the no contact condition was proper in light of the crimes defendant pleaded guilty to, as well as limited to defendant's successful completion of a psychosexual evaluation or the maximum statutory sentence for his crimes.

Where the reviewing court determines that the trial court did abuse its discretion by imposing an improper condition on a sentence, the proper remedy is to remand for resentencing with instructions to strike only the unauthorized condition. *See State v. Jones*, 118 Wn. App. 199, 212, 76 P.3d 258 (2003). If the court determines that the no contact condition at issue here does not qualify as a crime-related prohibition, then the State

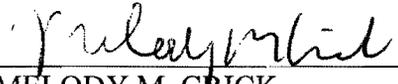
respectfully requests the matter be remanded only with instructions to strike the unauthorized condition.

D. CONCLUSION.

Defendant entered his plea knowingly, voluntarily, and intelligently. Defendant's counsel provided effective assistance in helping defendant make a knowing decision to plead guilty. The trial court properly imposed the no contact condition as a as part of defendant's sentence because it qualifies as a crime-related prohibition. For the reasons argued above, this court should affirm defendant's convictions and sentence.

DATED: April 3, 2012

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Certificate of Service:

The undersigned certifies that on this day she delivered by ^{Leile} 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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