

No. 48656-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KINGSA NIGEL MCKNIGHT,

Appellant.

On Appeal from the Pierce County Superior Court
Cause Nos. 14-1-02449-7
The Honorable G. Helen Whitner, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it accepted Kingsa McKnight's guilty plea to first degree assault without adequately determining whether he understood the nature of the charge to which he was pleading.
2. Any future request by the State for appellate costs should be denied.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the crime of first degree assault as charged in this case requires proof that the defendant assaulted the victim using "force or means likely to produce great bodily harm or death," and where the plea statement did not recite this requirement and the court failed to determine if McKnight understood this requirement, did the trial court err when it found that McKnight understood the nature of the charge and when it accepted McKnight's guilty plea to first degree assault? (Assignment of Error 1)
2. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs because Kingsa McKnight does not have the ability to pay costs, he has previously been found indigent,

and there is no evidence of a change in his financial circumstances? (Assignment of Error 2)

III. STATEMENT OF THE CASE

The State charged Kingsa Nigel McKnight with one count of homicide by abuse (RCW 9A.32.055) and one count of second degree murder (RCW 9A.32.050(1)(b)). (CP 1-2) The State alleged that both crimes were domestic violence offenses and that both crimes were aggravated because McKnight used his or her position of trust to commit the offense and because the minor victim was particularly vulnerable. (CP 1-2)

According to pleadings filed by the State, McKnight committed multiple assaults against his three-year old son T.G. over the course of approximately six months. (CP 3-4, 9-17) One assault caused T.G. to suffer a skull fracture and brain damage. (CP 3-4, 9-17) On the day of T.G.'s death, according to the State, McKnight searched the internet for ways to revive a person who was unconscious, and subsequently brought a lifeless T.G. to the hospital. (CP 3-4, 9-17)

McKnight agreed to plead guilty to an amended information charging one count of second degree murder (RCW 9A.32.050(1)(b)) and one count of first degree assault (RCW 9A.36.011(1)(a)). (CP 20-21) McKnight agreed that the two charges

were not the same criminal conduct, and that both were serious offenses mandating consecutive sentences. (CP 23, 26, 31; 12/07/15 RP 5-6, 8-9)¹

Following a colloquy with McKnight, the trial court found that McKnight's plea was made knowingly, intelligently and voluntarily, and the court accepted the guilty plea. (12/07/15 RP 6-13) McKnight subsequently filed a motion to withdraw his guilty plea, asserting that his plea was involuntary because his trial counsel did not adequately prepare and pressured him to take the plea. (CP 86-88, 89-90; 02/19/16 RP 5-8, 25-26) The trial court denied McKnight's motion. (02/19/16 RP 8-9)

The trial court imposed standard range consecutive sentences totaling 343 months, and imposed only mandatory legal financial obligations. (02/19/16 RP 29; CP 77-79) This appeal timely follows. (CP 92)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT ERRED WHEN IT ACCEPTED MCKNIGHT'S GUILTY PLEA TO FIRST DEGREE ASSAULT WITHOUT ADEQUATELY DETERMINING WHETHER HE UNDERSTOOD THE NATURE OF THE CHARGE TO WHICH HE WAS PLEADING.

Washington's court rules set forth the requirements for the

¹ The transcripts will be referred to by the date of the proceeding.

acceptance of a guilty plea:

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) (emphasis added). A guilty plea is invalid if it is made without “an understanding of the nature of the charge.” CrR 4.2(d). And a guilty plea is not truly voluntary “unless the defendant possesses an understanding of the law in relation to the facts.” In re PRP of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)). “At a minimum, ‘the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime.’” State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (quoting Keene, 95 Wn.2d at 207).

Due process also requires that a guilty plea be knowing, intelligent and voluntary. In re PRP of Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). “Due process requires that a defendant be apprised of the nature of the offense in order for a guilty plea to be accepted as knowing, intelligent, and voluntary.

Real notice of the nature of the charge is ‘the first and most universally recognized requirement of due process.’” Osborne, 102 Wn.2d at 92-93 (quoting Henderson, 426 U.S. at 645).

For example, in Hews, the defendant was charged with and pled guilty to second degree murder. 108 Wn.2d at 580-81. Because intent is a “critical element” of that crime, the plea could not be considered voluntary unless Hews was advised of that element. 108 Wn.2d at 593.

In this case, the record does not establish that McKnight understood the nature of the crime of first degree assault or the facts the State would have to prove for a jury to find him guilty. The State charged McKnight with first degree assault under RCW 9A.36.011 (1)(a), which states that a person commits first degree assault if he or she “[a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death[.]” (CP 20) Thus, the State would have to produce sufficient evidence for a jury to conclude that “the force used was *likely* to inflict great bodily harm” or death. See State v. Pierre, 108 Wn. App. 378, 384, 31 P.3d 1207 (2001) (emphasis added); RCW 9A.36.011 (1)(a).

There is nothing in the record to show that McKnight understood this requirement. When asked in his Statement of

Defendant on Plea of Guilty to list what he did to make him guilty of the crime, McKnight simply writes:

[On] June 21, 2014 I did cause the death of T.G. while attempting to commit assault 1^o (inflicts great bodily harm with requisite intent)[.]

(CP 31)

At the plea hearing, the trial court did not inquire into whether McKnight understood that there must be specific evidence of the use of force likely to produce great bodily harm or death. The only discussion about the elements of the crimes occurred when trial counsel stated that he has “explained to him the elements of the charges he is pleading guilty to ... [and McKnight] has made a factual statement of what he’s done that makes him guilty of these offenses.” (12/07/15 RP 5) Then the trial court read McKnight’s plea statement set forth above and asked if he “adopt[s] that statement as your own as to what you did that makes you guilty of both offenses?” (12/07/15 RP 12) McKnight answered with a simple “Yes.” (12/07/15 RP 12)

Neither the defense attorney, nor the prosecutor nor the judge recited any additional facts or explained the requirement or meaning of the essential element of force likely to produce great bodily harm or death.

Simply reciting the elements of the crime and asking if

McKnight understood the charges, and McKnight's one word response, does not show that McKnight truly understood the nature of the allegation, and the elements the State was required to establish before he could be convicted of first degree assault. See State v. S.M., 100 Wn. App. 401, 415, 996 P.2d 1111 (2000) (the defendant's "simple 'yes' response to the court's oral question about the meaning of sexual intercourse" is not adequate).

Accordingly, "the record does not affirmatively show" that McKnight "understood the law in relation to the facts or entered the plea intelligently and voluntarily," and the trial court erred when it accepted McKnight's guilty plea. S.M., 100 Wn. App. at 415. And the State cannot meet its burden on appeal of proving the plea's validity. See State v. Knotek, 136 Wn. App. 412, 423, 149 P.3d 676 (2006).

An involuntary guilty plea produces a manifest injustice and due process requires that the defendant be permitted to withdraw the plea. In re PRP of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). When a defendant pleads guilty pursuant to a plea agreement, the agreement is indivisible if the charges were made at the same time, described in one document, and accepted in a single proceeding. State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). When a

defendant shows manifest injustice as to one charge in an indivisible plea agreement, he may move to withdraw the entire agreement. Turley, 149 Wn.2d at 400. Here, the plea agreement is indivisible because the charges were made at the same time, described in one document, and accepted in a single proceeding. (CP 20-21, 23-32; 12/07/15 RP 5-13) Thus, McKnight must be allowed to withdraw his guilty plea to both charges.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.²

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal.

RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest

² Recently, in State v. Sinclair, Division 1 concluded “that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief.” 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). McKnight is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1’s interpretation of RAP 14.2.

Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in McKnight’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, McKnight owns no property or assets, has no savings, and has no job and no income. (CP 107-08) McKnight will also be incarcerated for the next 28 years. (CP 78-79) And, finding that McKnight did not have the ability to pay LFOs now or in the future, the trial court declined to order any non-discretionary LFOs at sentencing in this case. (12/07/15 RP 29; CP

77) Thus, there was no evidence below, and no evidence on appeal, that McKnight has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that McKnight is indigent and entitled to appellate review at public expense. (CP 111-12) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore

presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that McKnight's financial situation has improved or is likely to improve. McKnight is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

"[F]ailure 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 v. Morris, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976). The trial court here failed to comply with CrR 4.2 or with due process standards because it did not ensure that McKnight understood the full nature of the charge of first degree assault or the facts necessary to prove that charge. McKnight's convictions should be vacated and his case remanded to the trial court for a new plea hearing. This court should also decline any future request to impose appellate costs.

DATED: June 29, 2016



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CERTIFICATE OF MAILING

I certify that on 06/29/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Kingsa N. McKnight, DOC# 389119, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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