

**NO. 49290-3**

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

STATE OF WASHINGTON, RESPONDENT

v.

TERRY RAY MOSER, JR, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Gretchen Leanderson

No. 15-1-03711-2

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**BRIEF OF RESPONDENT**

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

1. Did the trial court properly accept defendant's knowing, intelligent, and voluntary guilty plea, where defendant was adequately advised of the nature of the offenses, and defendant's unobjected-to statement and the supporting record provided a sufficient factual basis for his plea?
2. Whether this Court should decide the issue of appellate costs before the State submits a cost bill or the provisions of RAP 14.2 have been applied?

B. STATEMENT OF THE CASE.

1. Procedure and Facts Relevant to Appeal

On September 16, 2015, the Pierce County Prosecutor's Office charged TERRY MOSER, JR., hereinafter "defendant," with three counts of robbery in the first degree (all firearm enhanced), one count of assault in the first degree (firearm enhanced), and one count of unlawful possession of a firearm in the first degree. CP 1-3.<sup>1</sup> According to the Declaration for Determination of Probable Cause, on September 9, 2015, defendant entered the Autozone store located in the 17300 block of Pacific Ave. in Pierce County. CP 4-6. Defendant pointed a firearm at the store clerk and demanded money. *Id.* Defendant was given money out of the

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<sup>1</sup> Clerk's Papers are referred to as "CP."

cash register. *Id.* Defendant also pointed the firearm at customers inside the store and demanded money from them. *Id.* The customers gave defendant money. *Id.* Defendant fired multiple shots both inside and outside of the store, including at a store employee. *Id.* Bullets fired by defendant struck vehicles in the store parking lot. *Id.* There were 9mm shell casings later recovered at the scene. *Id.*

Defendant fled the scene in a vehicle. *Id.* Law enforcement later found the vehicle abandoned. *Id.* There were small bills observed on the vehicle floorboard. *Id.* The vehicle was registered to defendant. *Id.* Police searched the vehicle pursuant to a search warrant and located a cellular phone, 9mm handgun, 9mm ammunition, and a brown wig. *Id.* Information on the cellular phone linked defendant to the phone. *Id.* Defendant was also identified through a photo montage. *Id.* Defendant was previously convicted of a serious offense. CP 1-3, 6.

On July 6, 2016, the case was called for trial before the Honorable Gretchen Leanderson. 7/6/16 RP 1-3.<sup>2</sup> On July 11, 2016, the parties conducted voir dire and addressed preliminary motions. 7/11/16 RP 2-33, 48. The parties specifically addressed the motions in limine contained in defendant's trial brief, defendant's stipulation that he had been previously convicted of a serious offense, and several 911 calls and a cellphone

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<sup>2</sup> The verbatim reports of proceedings (RP) will be referred to by date of proceeding.

recording that the State intended to use at trial. CP 47-59; Exhibits 1, 2, 3; 7/11/16 RP 2-12, 14-27, 29-32.

On July 12, 2016, defendant pleaded guilty to the Amended Information, which retained all of the original charges but eliminated three of the four firearm enhancements. CP 62-64, 65-74; 7/12/16 RP 50-61. In his plea statement, defendant wrote,

On September 9th, 2015, in Pierce County Washington, I robbed three people at gun point and shot at another with a firearm with intent to cause great bodily harm after having been previously convicted of a serious offense.

CP 73. Defendant initialed this statement and orally confirmed the statement on the record. CP 73; 7/12/16 RP 58-59.

The plea was accepted by Judge Leanderson, who engaged in a colloquy with defendant. 7/12/16 RP 51-61. The court found defendant's plea to be knowingly, intelligently, and voluntarily made. CP 74; 7/12/16 RP 61. The court also found a factual basis for defendant's plea. CP 74.

Sentencing was held the same day. 7/12/16 RP 61-67. The court sentenced defendant to 300 months total confinement in the Department of Corrections. CP 78-92; 7/12/16 RP 62, 66. Defendant filed a timely notice of appeal. CP 97-99.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ACCEPTED DEFENDANT'S KNOWING, INTELLIGENT, AND VOLUNTARY GUILTY PLEA TO ROBBERY, ASSAULT, AND UNLAWFUL FIREARM POSSESSION, BECAUSE DEFENDANT WAS ADEQUATELY ADVISED OF THE NATURE OF THE OFFENSES, DEFENDANT FAILED TO OBJECT TO THE FACTUAL SUFFICIENCY OF HIS PLEA, AND EACH OFFENSE'S ELEMENTS WERE WELL SUPPORTED BY THE RECORD.

Due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Robinson*, 172 Wn.2d 783, 794, 263 P.3d 1233 (2011); *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). The criminal rules reflect this principle by requiring that the trial court not accept a guilty plea without first determining that the plea was made “voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). The trial court must also be satisfied that “there is a factual basis for the plea.” *Id.* This rule provides sufficient safeguards to protect a defendant against an involuntary plea. *Robinson*, 172 Wn.2d at 792.

Once a plea is entered, the defendant bears the burden to show an involuntary plea.<sup>3</sup> *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). Given the procedural safeguards inherent in plea proceedings, the defendant’s burden of proof requires more evidence than a “mere allegation by the defendant.” *Id.* at 97. A strong public interest supports enforcement of voluntary and intelligently made pleas. *State v. Chambers*, 176 Wn.2d 573, 586-87, 293 P.3d 1185 (2013).

a. Defendant was adequately advised of the nature of the offenses.

Whether a plea is knowing, intelligent, and voluntary is determined from a totality of the circumstances. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (citing *Wood v. Morris*, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976)). A criminal defendant must be aware of the nature of the offense in order for his guilty plea to be knowing, intelligent, and voluntary.<sup>4</sup> *State v. Holsworth*, 93 Wn.2d 148, 153, 607 P.2d 845 (1980) (citing *Boykin*, 395 U.S. at 243-44). “To be made sufficiently aware of

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<sup>3</sup> Courts will only permit a guilty plea to be withdrawn to correct manifest injustice. *Codiga*, 162 Wn.2d at 922 (citing CrR 4.2(f)). “An involuntary plea can amount to manifest injustice.” *Id.* The injustice must be obvious and not obscure. *State v. Pugh*, 153 Wn. App. 569, 577, 222 P.3d 821 (2009).

<sup>4</sup> The constitutional requirements of a voluntary guilty plea are that the defendant be aware: 1) that he is waiving the rights to remain silent, to confront his accusers, and to a jury trial; 2) of the essential elements of the charged offense(s); and 3) of the direct consequences of pleading guilty. *State v. Holsworth*, 93 Wn.2d 148, 153-57, 607 P.2d 845 (1980). Here, defendant is alleging that he was not aware of the essential elements of the charged offenses. Brief of Appellant at 5-7.

the nature of the offense, the defendant must be advised of the essential elements of the offense.” *Holsworth*, 93 Wn.2d at 153. An information detailing the acts and state of mind necessary to constitute the charged crime adequately informs the defendant of the nature of the offense. *In re Personal Restraint of Montoya*, 109 Wn.2d 270, 278-79, 744 P.2d 340 (1987).

When a defendant completes a written plea statement and admits to reading, understanding, and signing the statement, a strong presumption arises that the plea was voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); *see also Branch*, 129 Wn.2d at 642 (“a defendant’s signature on a plea statement is strong evidence of a plea’s voluntariness”). An information that notifies the defendant of the nature of the crimes to which he is pleading creates a presumption that the plea was knowing, intelligent, and voluntary. *In re Personal Restraint of Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993). When a judge orally inquires of the defendant and becomes satisfied of voluntariness on the record, the presumption of voluntariness is “well nigh irrefutable.” *State v. Perez*, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982). After a defendant has orally confirmed statements in this written plea form, that defendant “will not now be heard to deny these facts.” *In re Personal Restraint of Keene*, 95 Wn.2d 203, 207, 622 P.2d 360 (1980).

Here, defendant alleges that his plea was not knowing, intelligent, and voluntary, because the record “does not show that [he] truly understood the nature of the allegations, and the elements the State was required to establish before he could be convicted of the charged offenses.” Brief of Appellant at 7. *See also*, Brief of Appellant at 5. Defendant specifically challenges his plea to the charges of first degree robbery and first degree unlawful possession of a firearm.<sup>5</sup> *See* Brief of Appellant at 1-2, 4-6. Defendant’s claim is without merit. The amended information not only sufficiently apprised defendant of the nature of the charges against him, but a review of the record also shows that defendant’s plea was knowingly, intelligently, and voluntarily made.

The totality of the circumstances demonstrates that defendant understood the elements of the charged crimes when he pled guilty. First, defendant’s amended information outlined the essential elements of robbery in the first degree, assault in the first degree, and unlawful

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<sup>5</sup> Defendant does not challenge his plea to first degree assault or to the firearm sentencing enhancement. The State therefore will not address that charge or enhancement in its response.

possession of a firearm in the first degree.<sup>6 7</sup> CP 62-64. Second, defendant acknowledged that he was prepared to plead guilty to the amended information, which alleged robbery in the first degree, assault in the first degree, and unlawful possession of a firearm in the first degree. CP 65, 73. Third, defendant agreed that he reviewed the elements of these offenses with his attorney. CP 65. The following exchange occurred during the court's colloquy with defendant:

[Court:] And you've had the opportunity to read and go over the statement of defendant on plea of guilty on... [the] amended information[]?

[Defendant:] Yes, Your Honor.

[Court:] All right. And was your attorney able to answer all the questions that you had regarding your statement of defendant on plea of guilty?

[Defendant:] Yes.

[Court:] And any other questions that you might have?

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<sup>6</sup> Contrary to defendant's assertions, the amended information specifically alleged that as to the multiple counts of first degree robbery, defendant took personal property from the person or presence of another "by use or threatened use of immediate force, violence or fear of injury to that person... said force or fear being used to obtain or retain possession of the property." CP 62-64. See Brief of Appellant at 6. As to the count of first degree unlawful possession of a firearm, the amended information specifically alleged that defendant "did unlawfully, feloniously, and knowingly own, have in his possession, or under his control a firearm, having been previously convicted... of a serious offense, as defined in RCW 9.41.010." *Id.* "[H]aving been previously convicted... of a serious offense" is an essential element of first degree unlawful possession of a firearm. See WPIC 133.02. Defendant does not challenge the sufficiency of the charging document.

<sup>7</sup> See Washington Practice, Washington Pattern Jury Instructions: Criminal (WPIC) 35.02, 37.02 and 133.02.

[Defendant:] Yes.

[Court:] All right. *Did your attorney explain to you the elements of each of the offenses on the amended information to your satisfaction?*

[Defendant:] *Yes, Your Honor.*

[Court:] Okay. *And do you understand what the State would have to prove if these cases were to continue to go to trial?*

[Defendant:] *Yes.*

7/12/16 RP 52-53 (emphasis added).

Fourth, the court detailed the rights defendant was giving up by pleading guilty, and defendant acknowledged that he understood that he was giving up those rights. 7/12/16 RP 53. *See also*, CP 65-66. Defense counsel also represented to the court that he went over the statement on plea of guilty with defendant in “great detail,” including the rights defendant was giving up by pleading guilty. 7/12/16 RP 51. Fifth, defendant signed a stipulation on prior record and offender score as part of his guilty plea, which outlined his previous criminal convictions (including his convictions for “serious offenses” as defined in RCW 9.41.010). CP 75-77. Sixth, defendant acknowledged that no one had threatened or forced him to plead guilty against his will and that it was his decision to plead guilty. CP 73; 7/12/16 RP 59. Finally, the court read to defendant his statement about what he did that made him guilty of the

offenses, which defendant initialed and signed in the statement on plea of guilty and orally agreed to. CP 73; 7/12/16 RP 58-59. The record demonstrates that defendant was aware of the nature of the offenses to which he knowingly, intelligently, and voluntarily pled guilty.

Defendant's reliance on *State v. S.M.*, 100 Wn. App. 401, 996 P.2d 1111 (2000), is misplaced. See Brief of Appellant at 7. In *S.M.*, the defendant pled guilty as charged to three counts of first degree rape of a child. *Id.* at 403. The defendant had not discussed the substance of the plea with his attorney, and the court's colloquy with the defendant only asked if he knew what the word "sexual intercourse" meant, whether he knew the victim, and how he pled. *Id.* at 403-04. Further, S.M.'s plea statement did not properly lay out all the elements of the offense. *Id.* at 415. Unlike in *S.M.*, the trial court here specifically inquired whether defendant's attorney had explained to him the elements of each offense charged in the amended information, to which defendant replied in the affirmative. 7/12/16 RP 52-53.

Courts "may consider written statements of the defendant and the charging document when determining if the defendant was informed of the nature of the charge." *State v. Smith*, 74 Wn. App. 844, 849, 875 P.2d 1249 (1994) (citing *In re Ness*, 70 Wn. App. at 821 and *In re Keene*, 95 Wn.2d at 206-09). In *Smith*, the defendant claimed his plea to second

degree murder was involuntary, because he did not understand the nature of the charge. *Smith*, 74 Wn. App. at 848. However, the court determined the defendant was made aware by the amended information as well as his own statement on plea of guilty. *Id.* at 849.

Here, defendant's amended information outlined the elements of the charged offenses. CP 62-64. The court asked defendant whether his attorney had explained the elements of the crimes, and defendant answered that he had. 7/12/16 RP 52-53. Defendant also affirmed in his statement on plea of guilty that he reviewed the amended information and the elements of the crimes charged therein with his attorney. CP 65. Thus, the trial court properly found that defendant's guilty pleas to robbery in the first degree, assault in the first degree, and unlawful possession of a firearm in the first degree were made knowingly, intelligently, and voluntarily.

- b. Defendant fails to show he can raise his factual basis claim for the first time on appeal under RAP 2.5(a)(3).

Appellate courts generally will not consider an issue that a party raises for the first time on appeal unless it is a manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); RAP 2.5(a)(3). Courts use a three-part analysis to determine

whether an issue raised for the first time on appeal may qualify for RAP 2.5(a)(3)'s manifest constitutional error exception. *State v. Fehr*, 185 Wn. App. 505, 511, 341 P.3d 363 (2015); *State v. Grimes*, 165 Wn. App. 172, 185, 267 P.3d 454 (2011). “The defendant has the initial burden of showing that (1) the error was “truly of constitutional dimension” and (2) the error was “manifest.” *Grimes*, 165 Wn. App. at 185-86 (quoting *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Only if a defendant proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error (part three of the analysis). *O’Hara*, 167 Wn.2d at 98; *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *McFarland*, 127 Wn.2d at 333.

Here, defendant challenges the factual basis for his plea. Brief of Appellant at 1-2, 7. Defendant did not dispute the factual basis for his plea in the trial court. Accordingly, he cannot challenge the factual basis for his guilty plea for the first time on appeal unless it is a manifest error affecting a constitutional right.

The factual basis requirement found in CrR 4.2(d) is procedural and is not an independent constitutional requirement. See *In re Personal Restraint of Hews*, 108 Wn.2d 579, 592 n. 2, 741 P.2d 983 (1987); *Branch*, 129 Wn.2d at 642 (procedural requirements of CrR 4.2 are not constitutionally mandated). “[T]he establishment of a factual basis is not

an independent constitutional requirement and is constitutionally significant only in so far as it relates to the defendant's understanding of his or her plea.” *In re Hews*, 108 Wn.2d at 592. The requirement is intended simply to enable the trial court to verify the accused’s understanding of the charges. *In re Personal Restraint of Hilyard*, 39 Wn. App. 723, 726-27, 695 P.2d 596 (1985).

Here, defendant was fully informed of the nature of the charges. *See* argument section 1(a) above. Defendant did not object below to the factual basis for his plea. The record demonstrates that defendant’s guilty plea was knowing, intelligent, and voluntary. The factual basis for his plea is not constitutionally significant and he cannot challenge that factual basis for the first time on appeal. Thus, he fails to show a manifest error affecting a constitutional right.

- c. A factual basis for defendant’s plea is plain in the plea itself as well as the attending record.

Even if defendant could raise this issue for the first time on appeal, a factual basis supports his guilty plea to each offense. Here, defendant specifically challenges the factual basis for his pleas to first degree robbery and first degree unlawful possession of a firearm.<sup>8</sup> Brief of

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<sup>8</sup> Again, the State will limit its response to the challenged offenses of first degree robbery and first degree unlawful possession of a firearm.

Appellant at 5-6. However, the relevant record contains sufficient evidence for a jury to conclude that defendant was guilty of these crimes.

A defendant must prove there was an insufficient factual basis for the trial judge to accept a challenged plea. *State v. Easterlin*, 159 Wn.2d 203, 210, 149 P.3d 366 (2006). CrR 4.2(d) provides, “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.” A factual basis requires factual statements rather than legal conclusions. *State v. Hystad*, 36 Wn. App. 42, 671 P.2d 793 (1983); *State v. Zumwalt*, 79 Wn. App. 124, 131, 901 P.2d 319 (1995), *disapproved of on other grounds by State v. Bisson*, 156 Wn.2d 507, 130 P.3d 820 (2006). “A factual basis for a plea of guilty exists if there is sufficient evidence for a jury to conclude that the defendant is guilty.” *State v. Knotek*, 136 Wn. App. 412, 429, 149 P.3d 676 (2006). “The trial court need not be convinced of the defendant’s guilt beyond a reasonable doubt.” *Id.* (citing *In re Ness*, 70 Wn. App. at 824).

To find a sufficient factual basis, a court may consider any reliable source of information in the record. *State v. Saas*, 118 Wn.2d 37, 43-44, 820 P.2d 505 (1991); *Osborne*, 102 Wn.2d at 95-96. Reviewing courts look to the circumstances surrounding the plea to identify the supporting record. *State v. Zhao*, 157 Wn.2d 188, 201, 137 P.3d 835 (2006). A specific colloquy on the record is not required. *Id.* at 200-01; *Osborne*,

102 Wn.2d at 96 (“Although the record of the plea proceedings makes no specific mention of the prosecutor’s affidavit [], numerous references are made to [] statements [] therein”).

Through paragraph 11, defendant explained his guilt for robbery in the first degree (firearm enhanced), assault in the first degree, and unlawful possession of a firearm in the first degree as follows:

On September 9th, 2015, in Pierce County Washington, I robbed three people at gun point and shot at another with a firearm with intent to cause great bodily harm after having been previously convicted of a serious offense. [initialed: T.M.]

CP 73. The elements of those crime are set out in the amended information, which defendant received and reviewed. CP 62-64, 65.

Defendant asserts that “the record does not affirmatively show [that he] understood the law in relation to the facts.” Brief of Appellant at 7. Defendant specifically claims that his factual statement did not include sufficient information that he: 1) “threatened to use force and that the threat of force was used to obtain or retain possession of the property” as to the multiple counts of robbery, and 2) “possessed or controlled a firearm ‘after having previously been convicted... of any serious offense’” as defined in RCW 9.41.010. Brief of Appellant at 6. Defendant’s claims ignore the circumstances and record surrounding his guilty plea.

First, contrary to defendant's assertion, the trial court found a factual basis for defendant's plea. *See* Brief of Appellant at 7. On page 10 of defendant's statement on plea of guilty, the court signed below the following paragraph:

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. **There is a factual basis for the plea.** The defendant is guilty as charged.

CP 74 (emphasis added). The court properly found a factual basis for defendant's plea based on the record before the court.

Regarding defendant's plea to three counts of first degree robbery, defendant stated that he "robbed three people at gun point." CP 73. Defendant's use of the term "robbed" was informed not only by the amended information, which advised him of the nature of the offense, but also by the colloquial use of the term. CP 62-64. "Rob[bed]" is defined as follows: "to take something away from (a person) by force" or "to take personal property from (the person or presence of another) feloniously and by violence or threat of violence." *Webster's Third New International Dictionary* 1964 (2002). In everyday language, by stating that he

“robbed” three people at gun point, defendant admitted that he took property from three people by force or threat of violence.<sup>9</sup>

In *State v. Heaps*, 36 Wn. App. 718, 724-26, 677 P.2d 1141 (1984), the defendant pled guilty to forgery. The court found that the defendant’s statements in his guilty plea that he made, altered and forged a check with intent to cheat and defraud were not merely legal conclusions. *Heaps*, 36 Wn. App. at 724-26. Rather, “[t]he trial court correctly found that words such as ‘forge,’ ‘cheat’ and ‘defraud’ are common terms within a layman’s understanding, and that a sufficient factual basis for the plea existed.” *Id.* at 726. Like in *Heaps*, “robbed” is a common term within a layman’s understanding, and defendant’s use of that term provided a sufficient factual basis for his plea.

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<sup>9</sup> In *State v. Rigsby*, 49 Wn. App. 912, 747 P.2d 472 (1987), the defendant challenged a prior robbery conviction used to support a finding that he was a habitual criminal. During the plea hearing, the court asked the defendant: “How do you plead to [the] information... which alleged...robber[y] in the second degree, in that on the 2nd of October, 1972, you did rob the Kaiser Hospital of the sum of \$6,000.00, guilty or not guilty?” *Rigsby*, 49 Wn. App. at 915. The defendant answered “Guilty.” *Id.* On appeal, the court found that the defendant’s robbery conviction could not be used to support the habitual criminal finding, because 1) there was no indication in the record that he was informed by the court or his attorney of any of the elements of the crime, and 2) there was “nothing else in the record relating to a factual basis for the plea.” *Id.* at 915-16. The court noted in a footnote that “[r]obbery is not a term within the common knowledge of the average person” and cited to *State v. Davis*, 27 Wn. App. 498, 505, 618 P.2d 1034 (1980). *Id.* at 916 n. 3. However, *Davis* concerned the trial court’s failure to define “robbery” or “first-degree robbery” in an instruction where the defendant was charged with and convicted of attempted first degree robbery. *Id.* at 503-04. Thus, the jury instructions omitted an essential element of the crime and left the jury to “guess” at the legal definition of robbery. *Id.* at 505-06. Here, unlike in *Rigsby* and *Davis*, defendant was informed of the elements of each offense he pled guilty to, including the multiple counts of first degree robbery, and the record surrounding defendant’s plea and his plea statement provided a sufficient factual basis for his plea.

Defendant's plea also followed preliminary motions, which provided the trial court with additional information and formed the supporting record for defendant's plea. Preliminary motions were heard before Judge Leanderson on July 11, 2016, and included discussion of motions in limine and various audio and video evidence. 7/11/16 RP 1-32. Defendant's plea hearing was held the very next day before the same trial judge. 7/12/16 RP 50-69.

The trial court, in defendant's presence, acknowledged that it received defense's trial brief and accompanying motions in limine. 7/6/16 RP 2-4; 7/11/16 RP 1-2. The parties proceeded to discuss defense's motions in limine on the record. CP 47-59; 7/11/16 RP 2-12. Defendant's trial brief provided the following recitation of alleged facts:

The defendant, Mr. Terry Moser, is charged three counts of robbery in the first degree, one count of assault in the first degree, and unlawful possession of a firearm in the first degree. It's alleged that in Pierce County, Washington, on or about the 9th day of September, 2015, the Defendant entered the AutoZone Store on Pacific Avenue and pointed a firearm at the AutoZone clerk working behind the counter. The defendant demanded money from the clerk, and he shot twice into the ceiling. The defendant then demanded money from two patrons whom he reportedly held at gun point. Both patrons gave the defendant some cash. As he left the store, the defendant reportedly fired a shot at a person seated in a vehicle. The defendant then fled the scene in a vehicle. Law enforcement found the vehicle disabled and abandoned a short time later. Some small bills were seen on the vehicle floorboard.

The vehicle was registered to the defendant. The vehicle the defendant used for the getaway was located and impounded. A search warrant was served on the defendant's vehicle. A cellular telephone was recovered and analyzed by the Pierce County Sheriffs Department. Information that linked the cellular telephone to the defendant was recovered from the cellular telephone. Also found was a 9mm handgun, 9mm ammunition and a brown wig.

CP 48. These facts are consistent with the State's Declaration for Determination of Probable Cause filed September 16, 2015 (approximately 10 months before the plea hearing). CP 4-6. This factual summary was part of the record before the court when defendant entered his plea of guilty.

Also part of the record were Plaintiff's Exhibits 1 and 2, which were each played for the court in the presence of defendant during preliminary motions. Exhibits 1, 2; 7/11/16 RP 1, 14-27, 29-32. Exhibit 1 contains several 911 calls made by various witnesses to the robbery. Exhibit 1; 7/11/16 RP 14-16, 19, 22-23. The witnesses reported words to the effect of, "There was just a robbery" and "Oh, my god. We have a robbery" and "There was a robbery right now."<sup>10</sup> Exhibit 1; 7/11/16 RP 16, 19-20, 22-23. Exhibit 2 contains a cellphone video recording of the robbery itself. Exhibit 2; 7/11/16 RP 29-30. The video contains footage of defendant and records statements made by him during the course of the

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<sup>10</sup> These are further examples of the colloquial use of the term "rob" or "robbery."

robbery, including his demand, "Give me your wallet right now." Exhibit 2; 7/11/16 RP 30-31. The video also records the sounds of several gunshots and contains footage of defendant holding a gun and firing off shots in the parking lot. Exhibit 2.

Regarding defendant's plea to first degree unlawful possession of a firearm, a factual basis for defendant's plea also exists in the plea statement itself as well as the supporting record. In defendant's statement, he admitted that he "shot at [a person] with a firearm... after having been previously convicted of a serious offense." CP 73. Defendant's trial brief recounted that defendant was in possession of a firearm during the Autozone robbery. CP 48. Exhibit 2 shows defendant with gun in hand. Exhibit 2. Defendant entered a stipulation for purposes of trial whereby he stipulated that "as of the date of the incidents giving rise to these charges, [he]... had been previously convicted of a serious offense." Exhibit 3; 7/11/16 RP 12. Defendant also signed a stipulation on prior record and offender score as part of his plea, which outlined his criminal history. CP 75-77. This criminal history included his previous convictions for a serious offense as defined in RCW 9.41.010. *Id.*

As outlined above, defendant's trial brief contained a summary of the facts of the case. CP 48. Defendant was present when the State played Exhibits 1 and 2 for the court. 7/11/16 RP 1, 14-27, 29-32.

Defendant was also provided a copy of the amended information which informed him of the nature of the charges. CP 62-64. Defendant signed a stipulation for purposes of trial that he had been previously convicted of a serious offense. Exhibit 3. As part of his plea, defendant signed a stipulation on prior record and offender score, which detailed his criminal history. CP 75-77. Defendant orally acknowledged his written plea statement which detailed the conduct that made him guilty of his offenses. CP 73; 7/12/16 RP 58-59. All of the above was part of the record when the court accepted defendant's knowing, intelligent and voluntary plea of guilty. The court correctly found a sufficient factual basis to support defendant's plea.

2. IF THE STATE PREVAILS ON APPEAL AND SUBMITS A COST BILL, THE COURT WILL EXERCISE ITS DISCRETION IN DECIDING WHETHER TO AWARD COSTS.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 367 P. 3d 612 (2016).

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank, supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

By enacting RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.73.160 was enacted in 1995. The Legislature has amended the statute somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, *see e.g. State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Legislature has yet to show any sympathy.

In exercising its discretion, the Court of Appeals will consider the circumstances of the case and the defendant. Here, defendant was convicted of five felonies, one with a firearm sentencing enhancement. *See* CP 78-92. He was sentenced to 300 months in prison. CP 85. The record reflected that defendant is a career criminal who has approximately 20 prior felony convictions for which he likely has outstanding debts for previously imposed legal financial obligations. *See* CP 75-77. The trial court chose to impose only the mandatory legal financial obligations and then found him indigent for the appeal. CP 83, 106-107; 7/12/16 RP 62-63, 65-67.

If the State prevails in this appeal, it will remain to be seen if the State will submit a cost bill. The State will have to consider the new burden of proof imposed by recent amendments to RAP 14.2. Cost bills regarding defendants such as Mr. Moser who choose life of criminal indolence are likely an exercise in futility. However, to do otherwise flies in the face of the will of the Legislature.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm defendant's conviction and sentence.

DATED: March 28, 2017

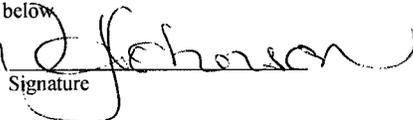
MARK LINDQUIST  
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BRITTA HALVERSON  
Deputy Prosecuting Attorney  
WSB # 44108

Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>file</sup> ~~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.

3/28/17   
Date Signature

**PIERCE COUNTY PROSECUTOR**  
**March 28, 2017 - 8:48 AM**  
**Transmittal Letter**

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