

NO. 49412-4-II

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

STATE OF WASHINGTON, RESPONDENT

v.

NATHEN R. TERAULT, APPELLANT

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

No. 15-1-03228-5

Brief of Respondent

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

1. Did the trial court err in accepting defendant's guilty plea after determining that the plea was knowingly, voluntarily and intelligently made?
2. Should the Court consider the issue of the factual basis for the plea where the defendant failed to object or seek remedy in the trial court?
3. Was the factual basis for the plea sufficient?

B. STATEMENT OF THE CASE.

On August 17, 2015, the Pierce County Prosecuting Attorney (State) charged Nathen Terault, the defendant, with one count of premeditated murder, robbery in the first degree, 12 counts of assault in the first degree, one count of assault in the second degree, felony eluding, and unlawful possession of a firearm in the first degree. CP 1-8. Fifteen of the counts included a firearm sentencing enhancement. *Id.*

The charges resulted from a series of violent acts committed by the defendant on August 11, 2015. The defendant had shot at several persons, killed one, and robbed another before leading police on a high-speed chase. CP 9-10.

Nearly a year later, the parties reached an agreed resolution of the case. On August 11, 2016, the State filed an amended Information

reducing the charges to one count of premeditated first degree murder, one count of robbery in the first degree, and five counts of assault in the second degree. CP 19-21. The firearm enhancements were dropped on the murder and robbery charges, and changed to deadly weapon enhancements on three of the five counts of assault in the second degree. *Id.* The defendant entered a guilty plea to the amended Information. CP 25-34; 8/11/2016 RP 11-12¹. After accepting the plea, the court proceeded to sentencing. The court imposed a sentence of 620 months, which included the applicable sentence enhancements. CP 42.

The defendant filed a timely notice of appeal². CP 242.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN ACCEPTING DEFENDANT’S GUILTY PLEA AFTER DETERMINING THE PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE.

A “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.” CrR 4.2(d); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The State bears the burden of proving the validity of a guilty plea. *Wood v. Morris*, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976). “Whether a

¹ The only Report of Proceedings applicable to this appeal is from the plea and sentencing on August 11, 2016, which is one volume. Therefore, it will be cited hereafter simply as RP.

² The defendant did not file a motion to withdraw his plea.

plea was entered voluntarily and intelligently is determined from the totality of circumstances.” *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (citing *Wood*, 87 Wn.2d at 511). When a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998) (citing *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982)).

Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain, there is a presumption that the plea is knowing, intelligent and voluntary. *In re Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994). “A defendant’s signature on the plea form is strong evidence of a plea’s voluntariness.” *Branch*, 129 Wn.2d, at 642. If the trial court orally inquires into a matter that is on this plea statement, the presumption that the defendant understands this matter becomes “well nigh irrefutable.” *Branch*, 129 Wn.2d at 642 n.2; *State v. Stephan*, 35 Wn. App. 889, 894, 671 P.2d 780 (1983). 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 Keene*, 95 Wn.2d 203, 207, 622 P.2d 13 (1981).

- a. Defendant was advised of the charges against him, completed a written plea statement, pleaded guilty pursuant to a plea bargain, was represented by counsel and acknowledged his plea on the record indicating that his plea was knowingly, voluntarily and intelligently made.

For a plea to be voluntary, the defendant must be advised of the nature of the charge. *Henderson v. Morgan*, 426 U.S. 637, 645 n.18, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). But the court in that same case indicates that advising the defendant of the offense does not mean going through every element of the offense. *Keene*, 95 Wn.2d. at 207 (citing *Henderson*, 426 U.S. at 647). The minimum would be that the defendant needs to be made aware of the acts and state of mind required to constitute the crime. *State v. Holsworth*, 93 Wn.2d 148, 153 n.3, 607 P.2d 845 (1980). “Notifying a defendant of the nature of the crime to which he pleads via an information creates, at the very least, a presumption that the plea was knowing, voluntary, and intelligent.” *In re Hews*, 108 Wn.2d 579, 596, 741 P.2d 983 (1987).

Therefore, the trial court in this case was not required, *sua sponte*, to describe every element or define terms for the defendant. The court inquired several times if the defendant fully understood the nature of the charges and whether defense counsel had answered any questions the defendant had. The efforts of the trial judge in this case were beyond constitutional sufficiency.

In *Keene*, the defendant signed a plea agreement that indicated, among other things, that he had received a copy of the information. *Keene*, 95 Wn.2d. at 205. The court found that the defendant had notice of the elements of the crime he was pleading to since he plead to the crime as charged in the information and acknowledged receiving a copy. *Id.* at 208-9.

Similarly, in *State v. Smith*, 74 Wn. App. 844, 848, 875 P.2d 1249 (1994), the defendant claimed his plea was involuntary because he did not understand the nature of his charge. 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, the presumption is defendant understood the nature of the charge he was pleading to as the record shows that defendant was advised of the charge more than once. From the outset, the defendant was informed in the original information that he was charged with first degree murder, and that premeditated intent was an element. CP 1. The amended Information repeated this notification. CP 19. Both informations accurately stated the elements of murder in the first degree. CP 1, 19.

In his written plea of guilty, the defendant acknowledged receiving the second amended information. CP 25 (page 1). Defense counsel made clear that they had received a copy of the amended information. RP 2. The defendant's plea statement also indicated that he

was charged with murder in the first degree and that the elements were set out in the Amended information. CP 25 (page 1).

The court inquired further:

THE COURT: The elements are contained in the Amended Information. Do you understand the elements?

THE DEFENDANT: Yes, I do.

RP 4. Defendant signed statements indicating that he received the charging document and had gone over the plea paperwork with his attorney. CP 25 (page 1). The defendant was certainly informed of the nature of the charge against him.

In his written statement, the defendant also wrote that he “with premeditated intent to cause the death of another person, I caused the death of [victim].” CP 33 (page 9). His understanding of the mental state involved, premeditated intent to cause death, shows a knowing and voluntary plea regarding this element. Defendant has failed to show any evidence that he did not understand the elements of the crime he was pleading to.

In addition, defense counsel informed the court that he had gone over the amended Information with the defendant. RP 2. Defense counsel represented to the court that the defendant was “making a knowing, voluntary, and intelligent plea”. RP 3. To confirm these representations, the court asked if the defendant agreed with what his attorney had said. The defendant replied: “Yes”. *Id.* The court asked the defendant if he had

any questions about the statement on plea of guilty. RP 4. The defendant said: “No”. *Id.* Referring to page 9 of the statement on plea of guilty, the court went on to quote back to the defendant’s own words to describe the crime. RP 9. The defendant’s own statement included “with premeditated intent to cause the death”. *Id. See also* CP 33. The court asked if this was a true statement. RP 10. The defendant replied “Yes”. *Id.*

The court went over the rights the defendant was giving up, advised him of the sentencing range for murder in the first degree and that murder in the first degree, and assault in the second, are strike offenses. RP 4-5, 7-8.

The defendant was represented by counsel, who informed the court that he had discussed the charges and the plea with the defendant. Presumably, counsel explained the elements in detail and answered any questions that the defendant had. *See, State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Presumably, in the year during which counsel prepared for trial, counsel discussed the case, strategy, the elements the State had to prove, including premeditated intent, and the evidence that supported each of those elements.

The defendant filled out a written plea statement as well as engaged in a colloquy on the record before the judge. The defendant never indicated any confusion, and in fact repeatedly indicated that he understood the charges. The defendant never asked any questions. To quote *Keene*, 95 Wn. 2d at 206-207: “[He] told the trial court that he had

read it, and that the statements contained in it were true. He will not now be heard to deny these facts.” The defendant has failed to show that his plea was anything but knowing and voluntary.

- b. Defendant failed to preserve possible error as to the establishment of a factual basis for the plea in the trial court. As it is not of constitutional magnitude, defendant cannot raise this issue for the first time on appeal.

In Assignment of Error #2, the defendant asserts that the court accepted the plea without an adequate factual basis. App. Br. at 1.

Although CrR 4.2(d) requires a factual basis for a charge before the court accepts the plea, this is a procedural requirement and not a constitutional requirement. Because it is procedural and not constitutional, it may not be raised for the first time on appeal. *In re Barr*, 102 Wn.2d 265, 269, 684 P.2d 712 (1984). “[The] 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 579, 592, 741 P. 2d 983 (1987). The requirement is intended simply to enable the trial court to verify the accused's understanding of the charges. *In re Hilyard*, 39 Wn. App. 723, 726-7, 695 P.2d 596 (1985). The lack of a factual basis only affects the voluntariness when the defendant is unable to understand how the law relates to the facts in the defendant's case. *Hews*, at 592. Reviewing

courts have “steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967).

A claim of error may only be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). The factual basis requirement is found in CrR 4.2(d) and is not an independent constitutional requirement. Therefore, it may not be the basis for an appeal if it was not preserved at the trial level.

As discussed above, in the context of a knowing and voluntary appeal, the court did review the factual basis with the defendant. RP 8-10. The defendant asserted these facts, including premeditated intent, in a signed written statement and then confirmed them orally to the court. There are sufficient facts to support the plea.

If defendant wanted to challenge the court’s finding of a factual basis, it would have been proper to raise it at the trial level. If the defendant had questions or was confused by anything in the hearing, the time to raise it was when the court specifically asked him if he understood. That is why the court was asking those questions. Then the court or defense could have cleared up any confusion.

But this issue was not preserved, and it is not of constitutional magnitude. It cannot be raised for the first time on appeal. This issue should not be considered by this Court.

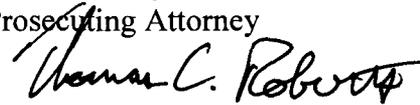
D. CONCLUSION.

With the assistance of counsel, the defendant entered a plea to an agreed resolution where the defendant benefitted³ from a reduction in counts and sentence enhancements. Before accepting the plea, the trial court was careful to make sure that the defendant understood the charges and the elements. The record reflects that the plea was knowing, voluntary, and intelligently made.

The State respectfully requests that the judgment be affirmed.

DATED: April 18, 2017.

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Certificate of Service:

The undersigned certifies that on this day she delivered by 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.

4-19-17 Therese Kar
Date Signature

³ Under the original charges, the defendant was facing the same standard range of 411-548 months, but firearm enhancements of 75 years.

PIERCE COUNTY PROSECUTOR
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