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State of Washington  
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NO. 50928-8-II

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

STATE OF WASHINGTON, RESPONDENT

v.

SOPHEA SAR, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson

No. 16-1-01707-1

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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 find that defendant's custodial statements were voluntary and not the product of coercion?
2. Was defendant's guilty plea made knowingly, voluntarily, and intelligently where the court undertook a full colloquy with defendant and followed all procedural requirements prior to accepting his guilty plea?
3. Did the court properly deny defendant's motion to withdraw his guilty plea when there was no manifest injustice in defendant pleading guilty?
4. Was defendant unable to establish that defense counsel pressured and coerced him into pleading guilty?
5. Should defense counsel be allowed to withdraw as defendant's attorney on appeal when there are no non-frivolous issues to be raised and when counsel has met the requirements of *Anders v. California*, as they apply which apply in Washington State?

B. STATEMENT OF THE CASE.

Sophea Sar, hereinafter, “defendant,” appeals from his conviction for first degree robbery with a firearm enhancement, first degree burglary, and unlawful imprisonment. CP 38-51.

For the purposes of this brief, the State accepts the procedural and factual history as presented in the Appellant’s brief.

C. ARGUMENT.

1. THE ISSUES WHICH DEFENDANT COULD RAISE IN AN APPEAL ARE FRIVOLOUS AND COULD NOT BE MADE BY DEFENSE COUNSEL IN GOOD FAITH.

In defendant’s motion to withdraw, pursuant to RAP 18.3(a)(2), defendant identifies four issues which could be raised on appeal if supported by merit. If raised, each issue would be frivolous. Each is discussed separately below.

- a. The trial court properly ruled that defendant’s custodial statements were voluntary and not the product of coercion.

Under *Miranda v. Arizona*<sup>1</sup>, a confession is voluntary and admissible when defendant has been advised concerning their rights and they knowingly, voluntarily, and intelligently waive those rights. *State v. Aten*, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). Voluntariness for due

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<sup>1</sup> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

process purposes is determined from a totality of the circumstances under which the statement was made. *Id.* These factors include a defendant's physical condition, age, mental capabilities, physical experience, and police conduct. *Aten*, 130 Wn.2d at 664.

When the record has substantial evidence from which a trial court could find that a defendant's confession was voluntary, such a determination will not be disturbed on appeal. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988). A trial court's credibility determinations shall also not be disturbed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A guilty plea generally insulates defendant's conviction from collateral attack, including waiving constitutional rights. *State v. Knight*, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008). This includes waiving protections against self-incrimination and the right to confrontation. *Id.*

Defendant here waived his right to challenge the statements he made to the police as coercion since he entered a factual plea. Because he pleaded guilty and cannot challenge the admissibility of his statements, his convictions should be affirmed.

Even if he could challenge the statement's admissibility, there was substantial evidence here that defendant's confession was voluntary and not a result of coercion. Defendant was read his *Miranda* rights prior to

any interrogation commencing and signed a form indicating he received his rights. RP 48-52; 59-63.<sup>2</sup> Two detectives indicated defendant was not coerced and voluntarily agreed to waive his rights. *Id.* The lead detective specifically indicated how their behavior was not coercive. RP 66. They also indicated defendant understood his rights and while he would speak to them, refused to be recorded. RP 51, 65. Defendant testified, claiming his wife was threatened with arrest if he did not confess. RP 77-79. The Court, however, did not find defendant's testimony credible. RP 93. Rather, it found defendant understood his rights and voluntarily agreed to speak with the detectives. *Id.* As such, he was not coerced into making any statements to the police. This Court should affirm defendant's convictions.

- b. Defendant's guilty plea was made knowingly, voluntarily, and intelligently as the court undertook a full colloquy with defendant and followed all procedural requirements prior to accepting his guilty plea.

Superior Court Criminal Rules (CrR) provide a court will not accept a plea of guilty unless the court is first able to determine that the defendant made such voluntarily, competently, and with the understanding of the nature of the charge and consequence of the plea. CrR 4.2(d).

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<sup>2</sup> The verbatim reports of proceedings are contained in eight volumes with consecutive pagination.

The State bears the burden of proving the validity of a guilty plea, while the defendant has the burden of proving manifest injustice. *State v. Knotek*, 136 Wn. App. 412, 423, 149 P.3d 676 (2006). A trial court's decision on a motion to withdraw a guilty plea is reviewed for an abuse of discretion. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

Due process requires a defendant's guilty plea be knowing, voluntary, and intelligent. *State v. Weydrich*, 163 Wn.2d 554, 556, 182 P.3d 965 (2008). A guilty plea is voluntary if the defendant possesses an understanding of the law in relation to the facts. *In re Personal Restraint Petition of Keane*, 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)). A defendant must be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime. *State v. Smith*, 74 Wn. App. 844, 848, 875 P.2d 1249 (1994) (quoting *State v. Osborne*, 102 Wn.2d 87, 93, 684 P.2d 683 (1984)).

Here, defendant's guilty plea was knowing, intelligent, and voluntary. Defendant acknowledged he had been informed of the charges, understood the elements of the crimes to which he was pleading, the rights he was forfeiting by pleading, the consequences of his plea, and the facts which would prove the charge. CP 16-28; RP 103-108. Defendant stated

On November 22, 2015, in the State of Washington, I and another person knowingly broke into the home of 67-year-old [victim], who was home at the time. We did so with the intent of robbing [victim] and stealing his property. We found [victim] in his bedroom and forced him to the ground. We demanded his property and one of us remained with [victim] holding him against his will, with the other went through the home collecting belongings to steal. I understand that [victim] maintains that we both had firearms that were brandished, including one of us placing a firearm to his head. I deny that I personally had a firearm and maintain only that my accomplice was armed with a firearm. Our actions in the home placed [victim] in a reasonable and immediate appreciation of harm and we designed to effectuate theft of his property. We left the home with a large amount of his property, some of which we intended to turn around and sell to others.

CP 16-28. Defendant orally acknowledged the above was an accurate statement of what happened. RP 107-108. Thus, defendant's plea was made knowingly, voluntarily, and intelligently. This Court should dismiss defendant's claim and affirm his conviction.

- c. The trial court properly denied defendant's motion to withdraw his guilty plea when there was no manifest injustice in defendant pleading guilty.

A court will allow a defendant to withdraw a guilty plea when such is necessary to correct a "manifest injustice." CrR 4.2(f). Manifest injustice is injustice that is obvious, directly observable, overt, and not obscure. *State v. Knotek*, 136 Wn. App. 412, 423, 149 P.3d 676 (2006). The four indicia of manifest injustice are (1) denial of effective assistance

of counsel; (2) failure of the defendant or one authorized by him to do so to ratify the plea; (3) involuntary plea; and (4) violation of plea agreement by the prosecution. *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). In this case, the only indicia of manifest justice that the defendant is claiming is an involuntary plea.

When a defendant fills out a written statement on a guilty plea and acknowledges they have read and understood such, and that its contents are accurate, the written statement provides prima facie verification of the plea's voluntariness. *State v. Perez*, 33 Wn. App.2d 268, 261, 654 P.2d 708 (1982). When a judge then orally inquires of the defendant and satisfies himself on the record of the existence of the criteria necessary for a showing of voluntariness, the presumption of voluntariness is well-nigh irrefutable. *Id.* at 622.

In this case, the trial court made it clear there was no showing of manifest injustice and the "overwhelming" evidence indicated that the plea was valid. RP 156. The trial court reiterated it conducted a full and proper colloquy with defendant and at no time did he indicate that the plea was not voluntary until weeks after he pled and after he had spoken to friends, family, and cellmates. RP 138-139; 156-160. Defendant simply had a case of remorse versus pleading involuntarily. As such, this Court should affirm his conviction.

- d. Defendant is unable to establish that defense counsel pressured and coerced him into pleading guilty when defendant had ample time without his attorney present to decide to plead guilty prior to actually pleading guilty.

The right to effective assistance of counsel is the right “to require the prosecution's case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such an adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) his or her attorney’s performance was deficient, and (2) he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters which go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under

the second prong, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Under this prong, the defendant must show that but for the alleged error, he would not have pleaded guilty and would have gone to trial. *State v. Buckman*, 409 P.3d 193, 200 (2018) (internal citations omitted). To establish a plea was involuntary or unintelligent because of counsel's inadequate advice, *Strickland* still applies. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). However, ordinary due process analysis does not apply. *Id.*

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. 668 at 689. This Court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988).

When a defendant states in a colloquy in open court that they were not coerced is “highly persuasive” evidence that defendant’s plea is voluntary, but it is not conclusory. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

Here, defendant stated nobody threatened him or forced him to plead guilty. RP 104. Counsel testified he explained the State’s offer to defendant both before and after the CrR 3.5/3.6 hearing. RP 143-144. They talked to up to an hour-and-a-half that afternoon. *Id.* When counsel left for the day, he did not know if defendant was going to plead guilty. RP 146. The next day, counsel and defendant spoke again and defendant informed counsel that he wanted to plead guilty. RP 147. Counsel subsequently went over the plea paperwork with defendant for another 45 minutes to an hour that day. RP 148. Defendant was informed in all aspects of the plea and appeared to be doing so under his own volition. RP 149. At no point did counsel feel as though defendant was being coerced in pleading guilty. RP 150. Only after talking to some people at the jail did defendant decide to move to withdraw his plea. RP 152. He eventually admitted the only pressure he felt to plead guilty was due to the amount of time in jail he was facing if convicted. RP 152-153.

Defendant’s plea was clearly voluntary. Counsel gave him ample time to decide whether or not to plead guilty. Defendant had a night by

himself to decide what to do. Only after time to himself did defendant decide to plead guilty. As such, this Court should affirm defendant's conviction.

2. DEFENSE COUNSEL SHOULD BE ALLOWED TO WITHDRAW AS DEFENDANT'S ISSUES ON APPEAL ARE FRIVOLOUS.

Pursuant to RAP 15.2(h), a court appointed counsel for an indigent defendant may move to withdraw as counsel if he finds no good faith argument can be advanced on behalf of his client on appeal. This rule codifies federal and state decisional law announced in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970). In *Theobald*, the court quoted *Anders* with approval, stating:

[Defense counsel's] role as advocate required that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, (1) be accompanied by a brief referring to anything in the record that might arguably support the appeal; (2) a copy of counsel's brief should be furnished to the indigent; and (3) time allowed him to raise any point he chooses; (4) the court - not counsel - then proceeds, after a full examination of all proceedings, to decide whether the case is wholly frivolous.

*State v. Theobald*, 78 Wn.2d at 185.

When all four of the *Anders* requirements are met, a defense counsel's motion to withdraw should be granted and the appeal dismissed as frivolous.

Appellant has filed a motion to withdraw and incorporated a brief into such. The court has served the defendant with a copy of the brief. There has been no response from the defendant. Thus, the first three *Anders* requirements have been met. The State believes the court's examination of the record will reveal that there are no meritorious issues on appeal.

The Court of Appeals, Division III, added an additional step that the defense counsel must take before his representation of his client is complete. *State v. Folden*, 53 Wn. App. 426, 767 P.2d 589, *rev. denied*, 112 Wn.2d 1022 (1989). In *Folden*, the court ruled that there are procedures that must be used in a case involving a defense counsel's motion to withdraw. *Folden*, at 428 (following *State v. Rolax*, 104 Wn.2d 129, 702 P.2d 1185 (1985)).

In accordance with *Rolax*, the defendant must receive a copy of the commissioner's ruling and a notice that failure to file a motion to modify will terminate his appellate review. *Rolax*, at 135-136; *see* RAP 17.7. The defense counsel must then notify his client that he is there to assist the defendant in preparing the motion to modify. If the defendant chooses not

to file the motion, or if the court denies the motion, the defense counsel's obligation is completed. Only if the defendant files a motion to modify that the court grants must the defense counsel continue to represent the defendant.

The State acknowledges that *State v. Folden* appears to control the court's determination of a defense counsel's motion to withdraw but notes that, in order to be entitled to file a motion to modify, one must be "an aggrieved party." RAP 17.7. The defendant in an appeal is aggrieved as contemplated by RAP 17.7 only if he files a pro se brief and objects to his counsel's motion to withdraw. *See Folden*, at 427.

The defendant in the instant case has filed no such brief or objection to his counsel's motion. Thus, he has no standing to file a motion to modify. The *Folden* requirement is inapplicable where the defendant has not filed a pro se brief or objection to his counsel's motion to withdraw. There being no objection, defense counsel's motion to withdraw should be granted.

D. CONCLUSION.

The State asks that this Court dismiss defendant's appeal as being without merit and grant Stephanie Cunningham's motion to withdraw as

counsel. Also, unless this Court finds further issues requiring response, the State will waive oral argument in this case.

DATED: March 27, 2018

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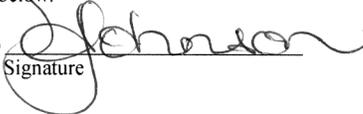


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Nathaniel Block  
Rule 9 Legal Intern

Certificate of Service:

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

3/27/18   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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