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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WADE ALEXANDER ROBINSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Stephanie Arend, Judge

No. 16-1-01024-7

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**Brief of Respondent**

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MARK LINDQUIST  
Prosecuting Attorney

By  
JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Did the trial court abuse its discretion in determining there was insufficient reason to order a formal competency evaluation when defendant's only expert witness retreated from his original affidavit during testimony and refused to render an opinion regarding defendant's competence before the court?..... 1

    2. Did the trial court abuse its discretion when it denied the defendant's motion to withdraw his plea based on incompetence when the defendant failed to provide evidence of incompetence to the court, and all other factors regarding defendant showed he was legally competent to the court, his family and defense attorney? ..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 7

    1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DID NOT ORDER A FORMAL COMPETENCY EVALUATION BECAUSE THE ONLY EVIDENCE DEFENDANT PRODUCED IN SUPPORT OF HIS MOTION WAS A PSYCHOLOGIST'S AFFIDAVIT, AND THE PSYCHOLOGIST MODIFIED THE FINDINGS TO NO LONGER SUPPORT A FINDING OF INCOMPETENCY DURING THE EVIDENTIARY HEARING. .... 7

    2. THE DEFENDANT FAILED TO SHOW THAT DENIAL OF THE MOTION TO WITHDRAW HIS PLEA WOULD AMOUNT TO MANIFEST INJUSTICE, AND THEREFORE PROPERLY EXERCISED ITS DISCRETION IN DENYING DFENDANT'S MOTION..... 21

D. CONCLUSION..... 26

## Table of Authorities

### State Cases

<i>In re Fleming</i> , 142 Wn.2d 853, 861, 16 P.3d 610, 614 (2001).....	9, 11
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	12
<i>State v. Bernard</i> , 182 Wn. App. 106, 118, 327 P.3d 1290 (2014).....	12
<i>State v. Blackwell</i> , 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).....	21
<i>State v. Calvert</i> , 79 Wn. App. 569, 576, 903 P.3d 1003 (1995).....	10, 22
<i>State v. Carlson</i> , 143 Wn. App. 507, 519, 178 P.3d 371 (2008).....	7
<i>State v. Cross</i> , 156 Wn. App. 568, 580, 234 P.3d 288 (2010).....	12
<i>State v. DeClue</i> , 157 Wn. App. 787, 239 P.3d 377 (2010).....	10, 16, 17, 18, 22
<i>State v. Dodd</i> , 70 Wn.2d 513, 514, 424 P.2d 302 (1967).....	18
<i>State v. Harris</i> , 122 Wn. App. 498, 505, 94 P.3d 379 (2004).....	19
<i>State v. Hicks</i> , 41 Wn. App. 303, 306, 704 P.2d 1206 (1985).....	19
<i>State v. Hovig</i> , 149 Wn. App. 1, 8, 202 P.3d 318 (2009).....	7
<i>State v. Johnson</i> , 84 Wn.2d 572, 576, 527 P.2d 1310 (1974).....	19
<i>State v. Marshall</i> , 144 Wn.2d 266, 279-81, 27 P.3d 192 (2001).....	9, 10, 11, 12, 13, 15, 16, 18, 21
<i>State v. Newton</i> , 87 Wn.2d 363, 552 P.2d 682 (1976).....	9
<i>State v. O'Neill</i> , 148 Wn.2d 564, 571, 62 P.3d 489 (2003).....	7

<i>State v. Rundquist</i> , 79 Wn. App. 786, 793, 905 P.2d 922 (1995).....	12
<i>State v. Sisouvanh</i> , 175 Wn.2d 607, 290 P.3d 942 (2012) .....	11, 12, 18
<i>State v. Smith</i> , 74 Wn. App. 844, 850, 875 P.2d 1249 (1994) .....	10
<i>State v. Taylor</i> , 83 Wn.2d 594, 598, 521 P.2d 699 (1974).....	21, 22
<i>State v. Wicklund</i> , 96 Wn.2d 798, 805, 638 P.2d 1241 (1982).....	11
Federal and Other Jurisdictions	
<i>Drope v. Missouri</i> , 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).....	9
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).....	1, 9
<i>United States v. Schlette</i> , 842 F.2d 1574, 1577 (9th Cir. 1988).....	13
Statutes	
RCW 10.77 .....	11
RCW 10.77.010(15).....	9
RCW 10.77.050 .....	9
RCW 10.77.060 .....	11, 18, 20
RCW 10.77.060(1)(a) .....	10
Rules and Regulations	
CrR 4.2(f).....	21

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

1. Did the trial court abuse its discretion in determining there was insufficient reason to order a formal competency evaluation when defendant's only expert witness retreated from his original affidavit during testimony and refused to render an opinion regarding defendant's competence before the court?
2. Did the trial court abuse its discretion when it denied the defendant's motion to withdraw his plea based on incompetence when the defendant failed to provide evidence of incompetence to the court, and all other factors regarding defendant showed he was legally competent to the court, his family and defense attorney?

B. STATEMENT OF THE CASE.

On March 9, 2016, Wade Alexander Robinson, hereinafter "defendant," was charged with four counts of Incest in the First Degree, two counts of Rape of a Child in the Third Degree, two counts of Child

Molestation in the Third Degree and two counts of Assault in the Third Degree with sexual motivation. CP 4-10; CP 341-353 (FoF I)<sup>1</sup>. The victim of all counts was defendant's biological daughter, P.R.. Defendant's wife, Tiffany Robinson, was charged as a co-defendant. CP 1-3. Tiffany Robinson committed suicide on January 29, 2017. The trial date originally scheduled for February 6, 2017 was continued to March 27<sup>th</sup>, 2017, to allow defendant "time to process and grieve his wife's death" and to allow both parties additional time to prepare. CP 341-353 (FoF I).

On March 15, 2017, amended charges were filed pursuant to Amended Information. The amended charges included all original charges and an additional charge of Rape of a Child in the Second Degree. Trial was still to proceed on March 27, 2017. CP 11-16; CP 341-353 (FoF II).

On March 27, 2017, defendant entered an *Alford/Newton* guilty plea to two counts of Incest in the Second Degree as charged in the Second Amended Information. CP 65-66; CP 341-353 (FoF III). During the plea hearing, the trial court tried to ensure that defendant understood the consequences of the plea deal he was entering. Defendant engaged with the court, demonstrated an understanding of the questions asked, and

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<sup>1</sup> (FoF #) refers to the trial court's Findings of Fact and the specific finding number.

asked clarifying questions when needed. 03/27/2017 RP 10<sup>2</sup>; CP 341-353 (FoF III).

Additionally, defense counsel assured the court that he had explained to defendant the rights he was waiving, the elements of the amended charges the state would need to prove beyond a reasonable doubt at trial, and the maximum penalties associated with those charges.

03/27/2017 RP 5; CP 341-353 (FoF III).

The court found that defendant was pleading guilty freely and voluntarily, and that he understood all the rights he was giving up and the consequences of the plea. CP 341-353 (FoF IV). Defendant was subsequently sentenced to 36 months on each count to run concurrent, with community custody to follow. 10/26/2017 RP 4.

After defendant entered the guilty plea, he was taken into custody and booked into the Pierce County Jail, pending sentencing and a presentence investigation. CP 341-353 (FoF V). In response to defendant's request to be in protective custody, he was withheld from the general population and held in solitary confinement. CP 341-353 (FoF VI); 09/08/2017 RP 16.

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<sup>2</sup> The verbatim reports of proceedings are contained in both numbered and dated volumes. The volumes labeled by date will be referred to by date. The volumes labeled by volume number will be referred to by volume number.

Defendant subsequently filed a motion to either withdraw his plea or be given a competency hearing. CP 84-96. Defendant claims that at the time of his plea, he was distraught over his wife's death and could not appreciate the consequences of his decision. 09/08/2017 RP 5; CP 84-96. The defense employed Dr. Mark Whitehill, a psychologist, to evaluate defendant on May 30, 2017. CP 84-96.

Dr. Whitehill conducted a two-hour psychological evaluation of defendant that consisted of several self-reporting diagnostic tests and symptom checklists. *Id.*; CP 341-353 (FoF XVIII). Dr. Whitehill did not examine any additional information or reports included in the record. *Id.* 08/18/2017 RP 37-38. After the evaluation, Dr. Whitehill concluded that defendant experiences major depressive disorder, post-traumatic stress disorder and anxiety disorder. 08/18/2017 RP 62; CP 341-353 (FoF XVII). Dr. Whitehill's affidavit and initial testimony state that his professional inference is that, due to his diagnosis, defendant's capacity to "have knowingly and intelligently enter a plea would have been significantly compromised." CP 84-96; 08/18/2017 RP 66-67; CP 341-353 (FoF XVII). However, on cross examination Dr. Whitehill stated that he did not actually know what defendant knew or understood at the time he entered the guilty plea on March 27, 2017, and would have to defer to the

court for the determination of defendant's competency. 08/18/2017 RP 33; CP 341-353 (FoF XVIII and XIX).

The state called Robert Freeby, defendant's counsel at the time of the plea, to testify. Mr. Freeby explained to the court that during negotiations, defendant expressed his concerns to Mr. Freeby, and that he understood and was prepared to change his plea. 08/18/2017 RP 88-89; CP 341-353 (FoF XV and XVI). Mr. Freeby also explained that at no time did he have concerns that defendant did not understand what he was doing when he was engaged in the plea colloquy with the court. 08/18/2017 RP 90-96; CP 341-353 (FoF XVI).

On September 8, 2017, defendant testified that he pleaded guilty because it would give him the possibility of seeing his children and grandchildren. He also expressed he knew and understood pleading guilty to the second amended charges meant he would only face three years in custody as opposed to 23 if convicted at trial. 09/08/2017 RP 21; CP 341-353 (FoF XXI).

Defendant contradicted himself when testifying as to when he first experienced the "moment of clarity" that lead him to want to change his plea. Defendant testified that it was at the point he walked through the door from the courtroom to the jail holding area that the pressure was off and he was able to think clearly. 09/08/2017 RP 41; CP 341-353 (FoF

XXII). Defendant then says he couldn't think clearly until after he was in protective custody. 09/08/2017 RP 42; CP 341-353 (FoF XXII).

Defendant later states that he couldn't think clearly until he got out of protective custody, or until after he spoke with other inmates in the jail, or until two months of not being able to sleep in the jail. 09/08/2017 RP 18, 26, 27, 41, 42, 66; CP 341-353 (FoF XXII).

The state obtained recordings of defendant's jail calls starting from the day he entered custody. CP 108-185. Portions of the calls were presented to the trial court during the hearing regarding defendant's motion. The state also included excerpts from several of the calls in the state's response to defendant's motion. CP 108-185. Recordings of all 96 calls are included in a CD disc entered as Exhibit 1. CP 354. The relevant calls include information as to why defendant chose to enter into a plea agreement with the state, and that he is now regretting the decision after talking to other inmates and learning that someone in a similar circumstance just "got off." CP 108-185; Exhibit 1; 09/08/2017 RP 35-38.

After considering Dr. Whitehill's, Mr. Freeby's and defendant's testimony, together with defendant's behavior during the plea hearing and the judge's recollection of defendant's demeanor, the trial court found that defendant expressed a level of understanding beyond that normally expressed by defendants. CP 341-353 (FoF XXV). There was no

indication that defendant did not understand the court's questions or that he was not entering the plea knowingly, intelligently and voluntarily. *Id.* A timely appeal was filed.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DID NOT ORDER A FORMAL COMPETENCY EVALUATION BECAUSE THE ONLY EVIDENCE DEFENDANT PRODUCED IN SUPPORT OF HIS MOTION WAS A PSYCHOLOGIST'S AFFIDAVIT, AND THE PSYCHOLOGIST MODIFIED THE FINDINGS TO NO LONGER SUPPORT A FINDING OF INCOMPETENCY DURING THE EVIDENTIARY HEARING.

A trial court's unchallenged Findings of Fact are treated as verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

When reviewing a trial court's Findings of Fact and Conclusions of Law, the court determines whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009), citing *State v. Carlson*, 143 Wn. App. 507, 519, 178 P.3d 371 (2008). Appellant has not assigned any error to the trial court's Findings of Fact.

The trial court in this case relied on the following Findings of Fact: Defendant was engaged with the court, demonstrated an understanding of the questions asked, ability to answer those questions, and knew when to

ask clarifying questions. CP 341-353 (FoF III). Defendant was pleading guilty freely and voluntarily, understanding all the rights he was giving up and all the consequences of the plea. CP 341-353 (FoF IV). Defendant told his mother-in-law he was taking the plea because people that were making derogatory statements in the courtroom could end up on the jury. CP 341-353 (FoF VI). Defendant suffered from major depressive disorder, PTSD and anxiety that the psychologist opined would have “effectively rendered him incompetent to plea.” CP 341-353 (FoF VIII). Psychologist ultimately deferred to the court as to the defendant’s competency and did not actually know what defendant knew or understood at the time of the plea. CP 341-353 (FoF XVII and XX). Defense attorney had no trouble communicating with defendant before and after his wife’s death and had no concerns about defendant’s competency at the time of the plea. CP 341-353 (FoF XIV). Defendant expressed specific concerns to his attorney during negotiations with the State. CP 341-353 (FoF XV and XVI). Defendant demonstrated a level of understanding beyond that normally expressed by defendants, such as his accurate understanding of the requirement to register as a sex offender within three days of release from custody and his questioning of

requirements of a plea pursuant to *Alford/Newton*<sup>3</sup>. Nothing about defendant's demeanor, composure or responses to the court's questions raised any concerns that defendant did not understand the court's questions or that he was not entering into the plea knowingly, intelligently and voluntarily. CP 341-353 (FoF XXV).

The United States Supreme Court has held that the Fourteenth Amendment's due process clause prohibits the conviction of a person who is not competent to stand trial. *In re Fleming*, 142 Wn.2d 853, 861, 16 P.3d 610, 614 (2001) citing *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Washington law affords greater protection by providing that "no competent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. The competency standard for pleading guilty is the same as the competency standard for standing trial. *State v. Marshall*, 144 Wn.2d 266, 279-81, 27 P.3d 192 (2001).

Incompetency is defined as a person that "lacks the capacity to understand the nature of the proceedings against him or to assist in his own defense as a result of mental disease or defect." RCW 10.77.010(15). Washington

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<sup>3</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970), *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

law provides specific procedures for courts to follow if there is a doubt as to a defendant's competence. RCW 10.77.060(1)(a) provides:

Whenever [...] there is a reason to doubt [a defendant's] competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

The mere existence of a mental disorder or the existence of delusions does not prevent a defendant from being competent. See *State v. Smith*, 74 Wn. App. 844, 850, 875 P.2d 1249 (1994). If a defendant fails to support his motion to withdraw a guilty plea with substantial evidence of incompetency, the defendant has not demonstrated a manifest injustice and the trial court may deny the motion without holding a formal competency hearing. *State v. DeClue*, 157 Wn. App. 787, 793, 239 P.3d 377 (2010), citing *State v. Calvert*, 79 Wn. App. 569, 576, 903 P.3d 1003 (1995).

The defense relies on *State v. Marshall*, 144 Wn.2d 266, 27 P.3d 192 (2001), to support the claim that defendant supplied sufficient evidence to trigger a competency hearing. Brief of Appellant, 11-12. However, the evidence in *State v. Marshall* was quite different from the evidence presented in this case. In *Marshall*, the evidence included determinative expert testimonies, reliable psychological testing, and a purported severe extent of the defendant's illness.

Originally, the Washington State Supreme Court held in *State v. Marshall* that “where a defendant moves to withdraw a guilty plea with evidence that defendant was incompetent when the plea was made, the trial court must either grant the motion to withdraw the guilty plea or convene a formal competency hearing required by RCW 10.77.060.” Citing *In re Fleming*, 142 Wn.2d at 863. In *In re Fleming*, the court explained that the procedures of RCW 10.77 are mandatory and not merely directory. Citing *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982). In *Marshall*, the defendant moved to withdraw his guilty plea, presenting undisputed testimony from three medical experts who independently found that the defendant suffered from severe brain damage, average to low intelligence, and brain atrophy. A magnetic resonance imaging (MRI) scan was also presented that showed a lack of activity in parts of the defendant’s brain. The court heavily discounted this information and instead concluded, based solely on the judge’s own observations, that defendant was competent without holding a formal hearing. *State v. Marshall*, 144 Wn.2d at 281.

However, the Supreme Court subsequently clarified the *Marshall* standard in *State v. Sisouvanh*, 175 Wn.2d 607, 290 P.3d 942 (2012). In *State v. Sisouvanh*, the basis of the defendant’s appeal relied on the evaluating doctor’s cultural competency, however the Court engaged in a

lengthy discussion regarding the standard of review for a trial court's competency decision. *Id.* at 620-23. Ultimately, the court held the proper standard of review is abuse of discretion. *Id.* The court clarified in footnote 3 that it did not intend *State v. Marshall* to change the review standard, and Washington law mandates that competency determinations are to be reviewed for abuse of discretion.

“An abuse of discretion occurs when the trial court's decision is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *State v. Cross*, 156 Wn. App. 568, 580, 234 P.3d 288 (2010), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). To apply this standard, the court must determine that, “first, the court has acted on untenable grounds if its factual findings are unsupported by the record; second, the court has acted for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard; third, the court has acted unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard.” *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), *State v. Berniard*, 182 Wn. App. 106, 118, 327 P.3d 1290, 1296 (2014). Under this standard, an appellate court should reverse the ruling only if it has “a definite and firm conviction that

the court below committed a clear error of judgment in the conclusion it reached.” *United States v. Schlette*, 842 F.2d 1574, 1577 (9th Cir. 1988).

In *State v. Marshall*, the expert witnesses testified definitively that the defendant would have been incompetent at the time of the plea. In the present case, Dr. Whitehill initially opined the same of this defendant, but then retreated from his initial opinion on the stand.

In his affidavit, Dr. Whitehill explains his findings following a two-hour evaluation of defendant:

To a reasonable degree of psychological certainty, the undersigned opines that Mr. Robinson’s mental state two months prior to these findings (i.e., at the time that he entered the plea), was even more compromised and would have effectively rendered him incompetent to enter a plea. In particular, the extent of his depression would have resulted in grossly compromised judgment and diminished cognitive efficacy, resulting in his being unable enter [sic] a plea knowingly and intelligently. It is also highly likely that his capacity to do so voluntarily would have been significantly impaired.

CP 95.

However, Dr. Whitehill became more uncomfortable during direct examination at the evidentiary hearing and did not make the same conclusive statement regarding defendant’s competency:

Q: And do you believe that he would have been competent to enter a plea at the time on March 27<sup>th</sup>?

A: Well, I have to say that, typically, my practice is to defer to the trier of fact what I see as the ultimate issue here. I can speak to his capacity to knowingly and intelligently even, if

you will, voluntarily enter a plea, but I believe – I’d defer to the court for the ultimate decision on whether he’s competent. What I feel most comfortable saying is that, based on my assessment of his symptoms and what I believe to be a reasonable inference as to their presence at the end of March of this year, that his capacity to have knowingly and intelligently entered a plea would have been significantly compromised. *I’d defer to the court with respect to the ultimate question of whether he was competent.*

(Emphasis added) 08/18/2017 RP 33; CP 341-353 (FoF XVII).

On cross examination, Dr. Whitehill further retreated from his original affidavit of defendant’s purported condition:

Q: So you really can’t render an opinion on whether or not this was voluntary?

A: I cannot.

08/18/2017 RP 53; CP 341-353 (FoF XIX).

The state then questioned the extent defendant’s condition would have affected his ability to evaluate the plea bargain and his options, inquiring about defendant’s ability to knowingly and intelligently enter this plea. Dr. Whitehill then further modified his opinion of defendant’s condition:

Q: Right. It’s unclear because you don’t know those things. But my question to you is: if somebody, this defendant, is saying Mr. Freeby, and then it’s getting to the state: these are the things that are important to me that I want out of

this plea bargain, that suggests to you that he did, in fact, have the ability to evaluate the plea bargain and his options.

A: With that hypothetical, it does suggest he had some level of involvement in that. I would certainly acknowledge that, yes.

08/18/2017 RP 55; CP 341-353 (FoF XIX).

The expert witness in *State v. Marshall* also presented test results that showed brain damage to support findings of diminished brain function in the defendant at the time of the plea. The lack of brain function was ascertainable in an MRI and various intelligence tests that the defendant had no ability to alter. *State v. Marshall*, 144 Wn.2d at 279. Certainly, the self-reporting tests and symptom checklists defendant offered as evidence of his claimed incompetency are not comparable to the test results presented in *State v. Marshall*, particularly following Dr. Whitehill's testimony where he seemed to retreat from the foundation of defendant's claim.

Brain atrophy and depression are not similar mental health issues. Brain atrophy is organic brain damage that leads to long-standing brain dysfunction that can be mapped in brain scans and can be shown to affect parts of the brain that influence one's ability to know and understand. *Id.* Depression is different. The defense did not offer any kind of objective evidence that proves the cognitive impairment from depression. There is

no basis for the argument that those suffering from depression inevitable also have cognitive impairment.

This court distinguished *State v. Marshall* in *State v. DeClue*. Despite defendant's attempt to distinguish *State v. DeClue* from this case, the facts in *State v. DeClue* are more analogous to our facts than *State v. Marshall*. In *State v. DeClue*, the defendant attempted to withdraw his guilty plea due to incompetence. The defendant's motion was supported by his own affidavit asserting that the medications he was taking at the time of his plea impaired his ability to understand the consequences of pleading guilty. *State v. DeClue*, 157 Wn. App. at 790. The trial court also heard testimony from DeClue's attorney. The attorney testified that he knew DeClue was experiencing problems with pain management and depression, but DeClue never appeared incompetent to him. He described DeClue as "very sharp," "astute," "paying very close attention to his case," and "a fairly intelligent individual who I had no problems communicating with." *Id.* The attorney further testified that DeClue "extensively discussed the pros and cons of his case and that DeClue participated in formulating the terms of the plea agreement that the state ultimately accepted." *Id.* at 791.

This court found that the trial court's decision to first hold an evidentiary hearing to learn more about the effects of the DeClue

defendant's medication was proper, reasoning that because "the judge had not yet found substantial evidence calling DeClue's competency into question, [the judge] was not required to hold a formal competency hearing at that point." *Id.* at 794-95.

This court then affirmed the trial court's denial of the motion to withdraw the plea without a formal competency hearing because after reviewing all the evidence, the trial court found "DeClue presented no credible evidence that the medications affected his ability to understand the consequences of pleading guilty" and therefore had not demonstrated a manifest injustice. *Id.*

The trial court in this case properly exercised its discretion much like the trial court in *State v. DeClue*. The trial court in this case heard from defendant's attorney at the time of the plea. Mr. Freeby stated he had spent approximately 21.6 hours working directly with defendant. 08/18/2017 RP 83. Defendant could effectively communicate with counsel before and after his wife's death. 08/18/2017 RP 82-83. During plea negotiations, defendant expressed his concerns to Mr. Freeby about the length of incarceration and his ability to see his children. 08/18/2017 RP 88-89; CP 341-353 (FoF XV). Defendant told counsel that he understood and was prepared to change his plea. 08/18/2017 RP 90-96; CP 341-353 (FoF XVI). Mr. Freeby also stated he was never concerned

that defendant did not understand what he was doing when he was engaged in the plea colloquy with the court. *Id.* Moreover, the self-reporting nature of defendant's psychological evaluation is more like the defendant in *State v. DeClue* submitting an affidavit of his own symptoms than the objective medical evidence supplied in *State v. Marshall*, particularly after Dr. Whitehill's testimony.

As in *State v. DeClue*, the trial court properly exercised its discretion in determining that defendant lacked sufficient evidence to require a competency hearing by considering medical evidence as well as observations of the defendant. The original foundation for defendant's motion, Dr. Whitehill's affidavit, was eroded after Dr. Whitehill modified his findings during testimony. Any remaining opinion Whitehill may have rendered was not necessarily binding on the trial court to order a formal hearing due to the other evidence that undercut defendant's position. *State v. Sisouvanh*, 175 Wn.2d at 622-623, citing *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967). (An expert's evaluation and report is only one consideration among these factors, and "may be of relatively little importance to the trial court in making its competency determination in a given case, regardless of whether the examination and report are accepted as adequate for the purposes of satisfying RCW 10.77.060."). As discussed above, the remaining factors the court considered in its

competency determination indicated there was no legitimate concern defendant was competent. *State v. Hicks*, 41 Wn. App. 303, 306, 704 P.2d 1206 (1985) quoting *State v. Johnson*, 84 Wn.2d 572, 576, 527 P.2d 1310 (1974)). (A trial court may make its competency determination based on many factors, including a defendant's appearance, demeanor, conduct, history, behavior, counsel's statements and psychiatric reports.), *State v. Harris*, 122 Wn. App. 498, 505, 94 P.3d 379 (2004) (Considerable weight should be given to defense counsel's opinion regarding a defendant's competency.)

Defendant also testified at the evidentiary hearing. Defendant told the court that he pleaded guilty because it would give him the possibility of seeing his children and grandchildren. 09/08/2017 RP 48. He also expressed he knew and understood pleading guilty to the amended charges meant he would only face three years in custody as opposed to 23 if convicted at trial. 09/08/2017 RP 21; CP 341-353 (FoF XXI).

Defendant seemed to contradict himself when testifying as to when he first experienced the "moment of clarity" that lead him to want to change his plea and brought him back into the realm of competency. Defendant testified that it was at the point he walked through the door from the courtroom to the jail holding area that the pressure was off and he was able to think clearly. 09/08/2017 RP 41; CP 341-353 (FoF XXII).

Defendant then says he couldn't think clearly until after he was in protective custody. 09/08/2017 RP 42; CP 341-353 (FoF XXII).

Defendant later states that he couldn't think clearly until he got out of protective custody, or until after he spoke with other inmates in the jail, or until two months of not being able to sleep in the jail. 09/08/2017 RP 18, 26, 27, 41, 42, 66; CP 341-353 (FoF XXII). Defendant first admitted he weighed the options of the plea and understood the benefits of taking it. Defendant also presented as incredible to the trial court from his contradictory testimony. These facts from the defendant's testimony support the trial court's finding that the defendant was legally competent at the time of the plea.

Considering the case law and abuse of discretion standard, the trial court properly exercised its discretion to discern that no legitimate question of defendant's competency existed, and therefore there was no reason to hold a formal hearing under RCW 10.77.060. The defense's argument would have the court equate the presence of mental illness with incompetence. The record shows that, whatever the defendant's mental condition at the time of the plea, there was no evidence to show it incapacitated his ability to understand the charges or assist in his defense. The trial court properly exercised its discretion in denying the motion for a competency hearing.

2. THE DEFENDANT FAILED TO SHOW THAT DENIAL OF THE MOTION TO WITHDRAW HIS PLEA WOULD AMOUNT TO MANIFEST INJUSTICE, AND THEREFORE PROPERLY EXERCISED ITS DISCRETION IN DENYING DFENDANT’S MOTION.

This court will reverse a trial court’s ruling on a motion to withdraw a guilty plea only for an abuse of discretion. *State v. Marshall*, 144 Wn.2d at 280. Under an abuse of discretion standard, the reviewing court will find error only when the trial court’s decision adopts a view that is “manifestly unreasonable,” is based on “untenable grounds” or was made for “untenable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

A trial court must allow a defendant to withdraw a guilty plea “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f); *State v. Marshall*, 144 Wn. 2d at 280-81. A manifest injustice exists where (1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) counsel was ineffective; or (4) the plea agreement was not kept. *State v. Marshall*, 144 Wn.2d at 281. The injustice must be “obvious, directly observable, overt [and] not obscure.” *State v. Taylor*, 83 Wn.2d 594, 598, 521 P.2d 699 (1974). A defendant's claim that he lacked competence to plead guilty is equivalent to claiming the plea was not voluntary. *State v. Marshall*, 144 Wn.2d at 281. The defendant’s burden when seeking to withdraw a plea is

demanding because ample safeguards exist to protect the defendant's rights before the trial court accepts the plea. *State v. Taylor*, 83 Wn.2d at 596-97.

If a defendant fails to support his motion to withdraw a guilty plea with substantial evidence of incompetency, the defendant has not demonstrated a manifest injustice and the trial court may deny the motion without holding a formal competency hearing. *State v. Declue*, 157 Wn. App. at 793, citing *State v. Calvert*, 79 Wn. App. at 576. Such is the case here. Per the discussion above, the trial court properly denied defendant's motion to withdraw his plea without holding a formal competency hearing because the defendant has not demonstrated a need for a formal hearing, therefore failing to establish a manifest injustice. The denial of both requests was appropriate.

The record indicates that the defendant simply regrets his decision to enter a guilty plea in this case. The jail call evidence supports this. These calls show that the defendant was not concerned he was incompetent when the plea was entered, but rather that he fully understood the consequences and now feels remorse over his decision. Portions of these calls were played for the trial court during the evidentiary hearing regarding this motion.

On the day of the plea, defendant made a phone call to a female later identified as his mother-in-law. During the call, defendant's mother-in-law explained to him that courtroom observers had been making derogatory statements about his case. Defendant replied that he agreed to the plea deal because people like that could end up on the jury. CP 341-353 (FoF VI); 09/08/2017 RP 37-38.

After spending two days in solitary confinement, defendant placed a phone call on April 1, 2017 to his mother-in-law stating he had been thinking a lot and was going to "reverse" his plea and go to trial. CP 341-353 (FoF VI); Exhibit 1. Defendant told his mother-in-law that he was not in the same "bad place" as he was three days earlier when he pleaded guilty. CP 108-185; Exhibit 1. Defendant said he heard from other inmates that someone else in the jail just "got off," was found "not guilty," in the same situation defendant is in. *Id.*; 09/08/2017 RP 35-38.

The following day, defendant placed a call to a different woman. Defendant tells this woman that he has had a "moment of clarity," he did not think it was too late to withdraw his plea, and that a "couple of guys" in the jail have said that a plea can be reversed. Exhibit 1; CP 108-185. Defendant says that when he pleaded guilty he was caught at a "weak moment" and "feeling despair" and at eight minutes and nine seconds into the call, he tells her that is he "perfectly fine now." *Id.* Approximately

nine minutes and 15 seconds into the call, defendant says that the only thing he wants is “*that punk daughter of mine to get what’s coming to her.*” (Emphasis added) *Id.*

On April 4, 2017, two days later, defendant placed another call to the same female. During this call, defendant tells the female that what “tricked” him “into taking the deal” was that if he lost at trial, he would have to register as a sex offender for life and would not be able to see his children until they turned 18, and if they had children, he would not be able to see his grandchildren. *Id.* Defendant further explains that the possibility of losing his kids was what “messed me up” and that was what was “weighing heavy on the decision.” Defendant tells her he was in a bad place, had lost his wife and could not see his kids whenever he wanted to and feared losing what he had left, but now he is not and he wants to “get this shit beaten.” *Id.*

A final call of importance was placed on June 19, 2017, again to defendant’s mother-in-law. Defendant told his mother-in-law that the hearing on his motion to withdraw his guilty plea was continued, and that if the plea is withdrawn, the prosecutor may have a psychiatrist or

psychologist come to determine his competency to stand trial. *Id.* When the female says she thought “they already did that,” defendant tells her that no, the one that happened was to determine if he was competent when he entered his plea, because of “losing my wife and all that.” That statement is made approximately 3 minutes into the call. *Id.* Defendant’s tone is matter-of-fact and unemotional while saying “losing my wife and all that.” CP 108-185.

It was only after defendant spoke with other inmates and learned that “others” had “got off” that defendant began to change his mind about his plea. The record clearly supports that defendant made a plea that represents a voluntary and intelligent choice among the alternative courses of action open to him and is now regretting the decision he made.

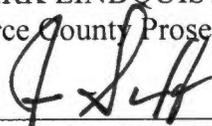
Defendant has failed to show any evidence that denial of his motion to withdraw amounts to a manifest injustice. The trial court properly exercised its discretion in denying defendant’s motion.

D. CONCLUSION.

For the above stated reasons, the state respectfully requests that this court affirm the defendant's convictions.

DATED: July 26, 2018.

MARK LINDQUIST  
Pierce County Prosecuting Attorney

  
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JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB/# 17298

  
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Angela Salyer  
Legal Intern

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.

7-26-18 Therun Kar  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**July 27, 2018 - 3:00 PM**

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