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

STATE OF WASHINGTON, RESPONDENT

v.

SATNAM SINGH RANDHAWA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 16-1-01398-0

Brief of Respondent

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

1. Was defendant's guilty plea made voluntarily where defendant disclaimed, both orally and in writing, the existence of any unstated promise or agreement?
2. Even though defendant does not challenge the validity of his guilty plea under CrR 4.2(e), should this Court address the undisclosed agreement made between defendant and the prosecuting attorney as part of defendant's plea agreement?
3. Was any error harmless under both CrR 4.2(d) and CrR 4.2(e) where disclosure of the undisclosed agreement to the trial court at defendant's plea hearing would not have altered the outcome of the proceeding?
4. Does the invited error doctrine preclude defendant from seeking appellate review of an error he helped create and then attempted to benefit from?

5. Did the trial court proceed properly by not holding an evidentiary hearing on defendant's motion to withdraw guilty plea where defendant failed to specifically object to any factual statements made by the State, and, moreover, where he failed to request one?

B. STATEMENT OF THE CASE.

On April 5, 2016, the State charged Satnam Singh Randhawa, hereinafter "defendant," with two counts of unlawful sale of a controlled substance, one count of unlawful possession of a controlled substance with intent to deliver, one count of unlawful possession of a controlled substance, and one count of second degree unlawful possession of a firearm. CP 75-77. The State amended the charges on January 17, 2017, to two counts of unlawful possession of a controlled substance with intent to deliver, one count of second degree unlawful possession of a firearm, one count of unlawful delivery of a controlled substance, and one count of unlawful use of a building for drug purposes. CP 1-3.

On January 18, 2017, defendant entered into an agreement with the Pierce County Prosecutor's Office, whereby, upon defendant's completion of promises made in the agreement, including to work as a confidential

informant (CI) for the Puyallup Police Department, refrain from violating any municipal, county, state, or federal law, among other promises, the State would recommend a sentence of time-served. CP 27-68 (Exh. A).

Defendant signed the CI agreement on January 18, 2017. CP 27-68 (Exh. A). Defendant entered a plea of guilty on February 2, 2017. 2-2-17 RP 2-3.¹ Pro Tem Judge Thomas Felnagle presided over defendant's plea hearing. 2-2-17 RP 1. During the plea colloquy, the court inquired:

Other than the State's offer, has anyone promised you anything to get you to plead guilty?

2-2-17 RP 6. Defendant responded, "No." *Id.* The court explained to defendant that the prosecutor's sentencing recommendation was to leave it "open." 2-2-17 RP 4. The court explained that this "means they are free to make their recommendation at a future time." *Id.* Defendant stated that he understood this. *Id.* The court accepted defendant's plea, finding it was made "knowingly and voluntarily." *Id.*

On February 21, 2017, the State charged defendant with second degree assault and felony violation of a protection order under a new cause number. CP 27-68 (Exh. B). The allegations contained in the information indicated that those crimes allegedly occurred on February 18, 2017. *Id.* As a consequence of violating the terms of the contract, the State was no

¹ The Verbatim Report of Proceedings (RP) are contained in two separate folders and are not consecutively paginated. They will be referred to by date and page number.

longer bound by its agreement to recommend a sentence of time-served.
CP 27-68.

Defendant subsequently moved to withdraw his guilty plea under CrR 4.2(f). CP 15-26. Defendant raised three arguments in support of his motion. First, he claimed that because he had not been *convicted* of the new charges, he had not violated the contract, so the State's rescission of its original sentencing recommendation constituted a breach of its agreement with defendant.² *Id.* Second, defendant claimed he was entitled to withdraw his plea on the basis that the contract itself was unconscionable because it gave the Puyallup Police Department sole authority to assess whether defendant complied with the provisions in the contract. *Id.* Finally, defendant claimed that his plea was not voluntary because there was no evidence that he signed the contract with the assistance of an interpreter. *Id.*

On December 18, 2017, Judge Elizabeth Martin heard oral argument on defendant's motion. 12-18-17 RP 2. Deputy Prosecutor John Sheeran appeared on behalf of the State, and Alexander Chan appeared on behalf of defendant. 12-18-17 RP 1. Neither Mr. Sheeran nor Mr. Chan

² The new charges were eventually dismissed without prejudice. 12-18-17 RP 7, 12. However, the court concluded that defendant violated the contract based on the allegations in the police report, specifically when he violated the terms of a no contact order. CP 69-73 (CoL. III).

were present at defendant's guilty plea hearing. 2-2-17 RP 1. However, the parties did not dispute that the existence of the CI agreement was never referenced at defendant's guilty plea hearing. 12-18-17 RP 3-4. Regarding that topic, the court added,

Right. It normally would not be. Often, the Court is completely unaware of there being any kind of contract. Although, when a sentencing recommendation remains open, sometimes we understand that to be the case. And when we get to sentencing, often, the Court will be advised of such at that time.

12-18-17 RP 4. After hearing argument from both sides on the merits of defendant's motion, the following colloquy ensued:

THE COURT: ... I can tell you that I do think there is this understanding, when there is a separate contract like this which could potentially benefit your client, it is never referenced in the plea statement to protect his anonymity. It's been my understanding that that's the case because the very nature of that work is dangerous, and it puts the defendant at risk. And a reward for that risk, of course, is the opportunity for a downward reduction in the sentence recommendation, which is why the sentencing recommendation itself is open. So the plea agreement has an open recommendation.

MR. CHAN: Well, whether or not that's how it's worked in the past, Your Honor, I think, again, there is one easy way around it without putting what -- or misleading statements in the Statement of Defendant on Plea of Guilty. The easy way around it is to reference an agreement that -- you don't have to state confidential informant agreement. You don't have to state anything about this agreement.

THE COURT: Anybody who reads that who knows how CIs work is going to know what that is.

MR. CHAN: Anyone who reads that? You mean other criminal defendants who go -- randomly go on LINX?

THE COURT: Absolutely. I mean, LINX is a public forum, and all of the documents are available publicly.

...

THE COURT: There is no question, is there, counsel, that he had signed this contract before he entered the plea. He knew about it.

MR. CHAN: Sure, yes.

THE COURT: Okay.

12-18-17 RP 19-21. The court denied defendant's motion to withdraw guilty plea and set the case for sentencing. 12-18-17 RP 27. The court ultimately imposed a total of 80 months of confinement, followed by 12 months of community custody. CP 79-92.

Defendant now appeals, arguing that his plea was not made voluntarily under CrR 4.2(f) and (d) because the CI agreement was not mentioned during his oral plea colloquy or in defendant's statement on plea of guilty. Brief of Appellant at 1-3. Defendant further claims that the court erred when it failed to provide defendant with an evidentiary hearing on his motion to withdraw his guilty plea. *Id.* At 2-3.

C. ARGUMENT.

1. DEFENDANT VOLUNTARILY PLEADED GUILTY WHEN HE DISCLAIMED, BOTH ORALLY AND IN WRITING, THE EXISTENCE OF ANY UNSTATED PROMISE OR AGREEMENT.

CrR 4.2(d) prohibits a trial court from accepting a guilty plea that has not been made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. The rule further requires the trial court to be satisfied that there is a factual basis for the plea before entering a judgment upon the plea. CrR 4.2(d). “These strict requirements are designed to assure that guilty pleas will be voluntary, both under the rules of the court and the constitution.” *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982).

Once the safeguards of CrR 4.2(d) have been employed, a defendant will only be permitted to withdraw his plea upon a showing that withdrawal is necessary to correct a manifest injustice. CrR 4.2(f); *State v. Turley*, 149 Wn.2d 395, 398, 69 P.3d 338 (2003). A manifest injustice is one that is “obvious, directly observable, overt [and] not obscure.” *Id.* The burden is on the defendant to show that such an injustice has occurred. *Id.*

An involuntary plea constitutes a manifest injustice. *Id.* A guilty plea is considered involuntary when the State fails to inform the defendant of a direct consequence of the plea. *Turley*, 149 Wn.2d at 398-99 (*citing*

State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (interpreting CrR 4.2(d)). However, “[w]hen a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea’s voluntariness.” *Perez*, 33 Wn. App. at 262 (citing *In re Keene*, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); *In re Teems*, 28 Wn. App. 631, 626 P.2d 13 (1981); *State v. Ridgley*, 28 Wn. App. 351, 623 P.2d 717 (1981)). “When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.” *Perez*, 33 Wn. App. at 262. A trial court’s denial of a defendant’s motion to withdraw guilty plea is reviewed for abuse of discretion. *State v. Williams*, 117 Wn. App. 390, 398, 71 P.3d 686 (2003).

Defendant pleaded guilty on February 2, 2017. CP 5-14. Defendant’s guilty plea was made pursuant to an agreement with the Pierce County Prosecutor’s Office, signed January 18, 2017. CP 27-68 (Exh. A). The agreement provided that the State would recommend a sentence of time-served upon defendant’s compliance with the terms of the agreement, including to refrain from violating any municipal, county, state, or federal law. *Id.* In the time between defendant’s guilty plea and

sentencing, defendant violated the agreement and thus forfeited his opportunity to receive a favorable sentencing recommendation. CP 15-26. Thereafter, defendant filed a motion to withdraw his guilty plea. *Id.* The trial court held a hearing on defendant's motion and ultimately denied it. CP 69-73. Defendant appeals the trial court's order, arguing he is entitled to withdrawal of his guilty plea where the trial court was unaware of the CI agreement when it accepted defendant's plea. Defendant claims that this made his plea involuntary under CrR 4.2(d) and (f). Brief of Appellant at 1, 3.

In his opening brief, defendant attempts, unsuccessfully, to analogize his case to cases where the parties involved were affirmatively misinformed or mistaken about the direct consequences of each of their guilty pleas. In *State v. Kisse*, 88 Wn. App. 817, 822, 947, P.2d 262 (1997), the appellate court vacated Kisse's guilty pleas where all the parties, including the prosecutor, defense counsel, the trial judge, and the defendant Kisse himself, were mistaken about Kisse's eligibility for a SSOSA sentence. *Id.* Holding eligibility for a SSOSA sentence to be a direct sentencing consequence, the appellate court determined that the appropriate remedy in such a case of mistake was withdrawal of the plea. *Id.* Similarly, in *State v. Walsh*, 143 Wn.2d 1, 6-8, 17 P.3d 591 (2001), the Washington Supreme Court held that the defendant was entitled to

withdrawal of his guilty plea based on a mutual mistake about the defendant's standard sentence range.

Randhawa's case is immediately distinguishable from both *Kissee* and *Walsh*. Neither defendant, defense counsel, nor the prosecutor were mistaken or misinformed about the circumstances and consequences of defendant's plea. Defendant, defendant's attorney, and the prosecutor all signed the CI agreement on January 18, 2017. CP 27-68 (Exh. A). Defendant pleaded guilty on February 2, 2017. 2-2-17 RP 6. Although defendant's statement on plea of guilty does not mention the existence of the CI agreement, defendant had already placed his signature on the agreement when he entered his plea and when he signed his statement on plea of guilty. CP 27-68 (Exh. A). This showed defendant was neither mistaken nor misinformed about any consequence of his guilty plea.

Defendant's case is more appropriately analogized to Division II's holding in *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). In *Perez*, the defendant sought to withdraw his guilty plea based on an undisclosed agreement between he and the prosecutor, whereby, upon defendant's plea of guilty, the prosecutor would agree to not oppose intensive parole if the defendant were determined to be eligible. *Id.* at 261. Despite the fact that the agreement was never disclosed to the trial court, Division II found no basis for allowing withdrawal of defendant's plea

based on its voluntariness under CrR 4.2(d). *Id.* at 262. In support of its holding, the Court first noted that review of the record showed that “defendant disclaimed, both orally and in writing, the existence of any unstated promise or agreement.” *Id.* at 261. Second, the record showed that during defendant’s oral plea colloquy, the court specifically asked defendant whether there had been any other agreements or arrangements inducing him to plead guilty, and the defendant replied, “No.” *Id.* at 262. Finally, the agreement by the prosecutor was contingent on the defendant’s eligibility for intensive parole; thus, the defendant was aware of the possibility she would be ineligible but continued with the plea on the hope that she would be. *Id.*

Defendant Randhawa’s plea is similar in the same three ways. First, defendant affirmed, both orally and in writing, that no unstated promises or agreements induced him to plead guilty. 2-2-17 RP 6. CP 5-14. Defendant signed a written statement on plea of guilty affirming that he made his plea “freely and voluntarily” and that “No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.” CP 5-14. Under the State’s recommendation, defendant wrote that the prosecuting attorney would leave the recommendation open and would “formulate a recommendation at a future date.” CP 5-14.

Second, at defendant's oral plea hearing, the court asked defendant a series of questions regarding the voluntariness of his plea. 2-2-17 RP 6. Defendant orally disavowed the existence of any force, threat, or unstated promise or inducement coercing him to plead guilty. *Id.* The series of questions and answers are transcribed as follows:

THE COURT: Is anyone forcing you to plead guilty?

THE DEFENDANT: No.

THE COURT: Have you been threatened by anyone?

THE DEFENDANT: No.

THE COURT: Other than the State's offer, has anyone promised you anything to get you to plead guilty?

THE DEFENDANT: No.

THE COURT: I accept your pleas of guilty, find they are knowingly and voluntarily made and that you've knowingly waived your rights.

Id.

Finally, like *Perez*, the agreement was conditioned on the occurrence of subsequent action. Here, that meant defendant acting in accordance with the law. CP 27-68 (Exh. A). But where *Perez's* agreement was conditioned on her eligibility for intensive parole, defendant's agreement here was conditioned on defendant's own willingness to abide by the terms of his contract. Thus, the voluntariness of defendant's plea

here is arguably even more convincing than the defendant's in *Perez*.

Defendant Randhawa had complete control over the outcome of his plea agreement.

There is no question that defendant signed the CI agreement prior to entering his guilty plea. CP 27-68 (Exh. A). Defense counsel assured the court at defendant's motion to withdraw guilty plea hearing that defendant signed the agreement prior to pleading guilty. 12-18-17 RP 21. The court entered written findings of facts and conclusions of law, and concluded that "defendant entered a knowing, voluntary, intelligent plea." CP 69-73 (CoL I). Defendant disclaimed, both orally and in writing, the existence any unstated agreement between he and the prosecuting attorney. 2-2-17 RP 6. Defendant was informed of the consequences of his plea when he entered it. *See Turley*, 149 Wn.2d at 398-99 (a guilty plea is considered involuntary if the State fails to inform the defendant of a direct consequence of his plea). He knew that if he complied with the conditions of the contract, the State would recommend a sentence of time served. CP 27-68 (Exh. A). He knew that if he failed to abide by the contract's terms, the State's obligation would end. *Id.*

As stated above,

[w]hen a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents

are true, the written statement provides prima facie verification of the plea's voluntariness... When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.

Perez, 33 Wn. App. at 261-62. That is precisely what happened here. The trial court did not abuse its discretion when it denied defendant's motion to withdraw guilty plea. This Court should affirm.

2. ALTHOUGH DEFENDANT FAILED TO ASSIGN ERROR TO THE UNDISCLOSED AGREEMENT BETWEEN HE AND PROSECUTING ATTORNEY UNDER CrR 4.2(e), THIS COURT SHOULD HOLD THAT CrR 4.2(e) WAS NOT VIOLATED HERE.

It is well within the appellate court's discretion to decline to address arguments not raised in the appellee's opening brief. *State v. Leffler*, 142 Wn. App. 175, 178 P.3d 1042 (2007) (n. 5); RAP 10.3.

Devoid of any reference to CrR 4.2(e), defendant relies solely on CrR 4.2(f) and (d) to support his argument that defendant was entitled to withdraw his guilty plea. But *Perez* indicates that the Court's analysis should not cease there. 33 Wn. App. at 262. In the event this Court chooses to exercise its discretion and address the potential CrR 4.2(e) claim, the State addresses the merits of such argument below.

Although *Perez* held that no violation of the voluntariness of the defendant's plea occurred where part of the plea agreement was not

disclosed to the trial court, the court was “not inclined to stop there.”

Perez, 33 Wn. App. at 261-62. The court opined:

We believe the sound administration of justice requires such construction and application of CrR 4.2(e). Therefore, we now hold that, with regard to pleas taken after publication of this opinion, failure to comply with CrR 4.2(e), standing alone, will be grounds for withdrawal of a plea. Compliance with the rule is, of course, the responsibility of the attorneys and particularly of the prosecutor, who has an interest in obtaining a secure plea. No judge can make an agreement part of the record if it is not disclosed.

Perez, 33 Wn. App. at 263.³ *Perez* apparently advises appellate courts to evaluate a court’s adherence to CrR 4.2(e) whenever it appears the rule may have been violated. CrR 4.2(e) provides in pertinent part:

If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney... The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered...

However, since *Perez*, published in 1982, the appellate court has expressed some heightened level of sensitivity to pleas involving CI agreements. See *State v. Hudson*, 192 Wn. App. 1003 (2015).⁴ For example, in *Hudson*, the defendant pleaded guilty pursuant to an

³ It should be noted that *Perez* addressed a previous version of CrR 4.2(e). Prior to 1984, CrR 4.2(e) required plea agreements to be made a part of the record at the time the plea was entered. See former CrR 4.2(e) (1983). It was amended in 1984 to require that only the nature and reasons for the agreement be made part of the record. Former CrR 4.2(e) (1984).

⁴ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

agreement made with the prosecutor much like the CI agreement defendant Randhawa signed. *Id.* at *1. Hudson agreed to provide information about ongoing crimes to the Pierce County Auto Task Force between the time of his release and sentencing, to stay in daily contact with law enforcement, and to commit no further criminal acts. *Id.* Upon compliance, the State agreed to vacate all but one of the charges against the defendant at sentencing. *Id.* During the time between his guilty plea and sentencing, however, Hudson failed to live up to his end of the bargain. He incurred new criminal charges in King County. *Id.* The prosecutor became aware of the new charges and rescinded its prior agreement at sentencing. *Id.* at 2.

Hudson subsequently appealed, arguing that he was entitled to withdrawal of his guilty plea because the trial court failed to enter the CI agreement into the record in violation of CrR 4.2(e). *Id.* The appellate court was able to determine that the trial court reviewed the agreement and was thus “aware of the nature and reasons for the agreement[,]” at the time of the defendant’s guilty plea, in compliance with CrR 4.2(e). However, despite its ultimate holding that CrR 4.2(e) was upheld, the Court went on to note, in dicta, that

[g]iven the sensitivity of this agreement, we expect that the State had good reason to withhold the agreement from the record at the time Hudson’s guilty plea was entered.

Moreover, the parties have now made the agreement part of the record on appellate review. Hudson does not contend that the agreement before us is different than the one he made.

Id.

Judge Martin expressed similar concern and understanding about the sensitivity of such agreements during defendant Randhawa's motion to withdraw guilty plea hearing. She explained:

I can tell you that I do think there is this understanding, when there is a separate contract like this which could potentially benefit your client, it is never referenced in the plea statement to protect his anonymity. It's been my understanding that that's the case because the very nature of that work is dangerous, and it puts the defendant at risk. And a reward for that risk, of course, is the opportunity for a downward reduction in the sentence recommendation, which is why the sentencing recommendation itself is open.

12-18-17 RP 19-20. Furthermore, like in *Hudson*, defendant's CI agreement has now been made part of the record. CP 27-68 (Exh. A). Defendant does not claim that the agreement before this Court is any different than the one he signed prior to pleading guilty, nor does he claim that had the agreement been presented to the judge at his plea hearing, he would have pleaded any differently.

Given the highly sensitive nature of CI agreements, the State urges this Court to adopt the reasoning described by Judge Martin where disclosure of the CI agreement in the record would jeopardize the integrity of the agreement and expose the defendant to a risk of danger. This Court

should hold that the nondisclosure of information related to defendant's CI agreement in the record was *not* a per se violation of CrR 4.2(e). This Court should affirm the trial court's denial of defendant's motion to withdraw guilty plea.

3. ANY ERROR RESULTING FROM THE UNDISCLOSED CI AGREEMENT WAS HARMLESS BEYOND A REASONABLE DOUBT WHERE DISCLOSURE WOULD NOT HAVE ALTERED THE OUTCOME OF DEFENDANT'S GUILTY PLEA.

Regardless of whether the CI agreement was disclosed to the trial court at the time of defendant's guilty plea hearing, the outcome of the proceeding would have been the same. Defendant was well aware of the CI agreement before he entered his guilty plea; he signed it fifteen days prior. CP 27-68 (Exh. A); 2-2-17 RP 6. Thus, any error regarding the voluntariness of defendant's plea under CrR 4.2(d) or the requirements of a plea under CrR 4.2(e) is harmless beyond a reasonable doubt.

In *State v. Williams*, the court of appeals held that although it was error for the State not to inform the trial court that the defendant's plea was part of a package deal with his codefendant, the error was harmless "because it did not prejudice [the defendant] or affect the outcome of the proceeding." 117 Wn. App. 390, 400, 71 P.3d 686 (2003). Similarly, in *Perez*, while indicating that any violation of CrR 4.2(e) is per se grounds for withdrawal of a guilty plea, *Perez* also acknowledges *State v. Ridgley*,

28 Wn. App. 351, 623 P.2d 717 (1981), where Division I held it was reasonable to place some burden on the defendant to establish prejudice when moving a court to withdraw a guilty plea. *Perez*, 33 Wn. App. 258 (n. 1). The *Ridgley* court stated the following:

There is an added element to this case which, while not strictly relevant given our disposition, we think deserved mention. Ridgley's contention is that the trial judge committed error by not complying with the rule. What Ridgley does not contend is that he did not understand the nature of the charges. In short, Ridgley claims no prejudice... Under these circumstances, it seems reasonable to place some burden on the defendant to establish prejudice resulting from a violation of CrR 4.2.

Id. at 357-58. The court quoted *People v. Robinson*, 63 Ill.2d 141, 345 N.E.2d 465, 467 (1976), with approval, which stated, "We will not set aside a judgment entered on such a plea of guilty absent an allegation and proof of prejudice." *Ridgley*, 28 Wn. App. at 359 (*quoting Robinson*, 63 Ill.2d 141).

In both the CrR 4.2(d) and CrR 4.2(e) contexts, failure to disclose information related to defendant's CI agreement to the court at defendant's guilty plea hearing was harmless beyond a reasonable doubt. Defendant signed the agreement prior to entering his guilty plea; he was aware of the agreement when he pleaded guilty; he intended to take advantage of it. CP 27-68 (Exh. A); 2-2-17 RP 6. Defendant makes no claim he would have pleaded any differently had the agreement been disclosed to the trial court.

Only *after* defendant violated the terms of the agreement did he file a motion to withdraw his plea. CP 15-26. It stands to reason that defendant intended to receive the benefit of the bargain at the time he pleaded guilty, and he would have pleaded the same regardless of the trial court's awareness of the CI agreement.

Because defendant cannot show that any prejudice resulted from the nondisclosure of the CI agreement to the trial court, the error is harmless beyond a reasonable doubt. See *Williams*, 117 Wn. App. at 400; *Ridgley*, 28 Wn. App. at 357-58. This Court should affirm the lower court's denial of defendant's motion to withdraw guilty plea.

4. THE INVITED ERROR DOCTRINE
PRECLUDES DEFENDANT FROM SEEKING
APPELLATE REVIEW OF AN ERROR HE
HELPED CREATE AND THEN ATTEMPTED
TO BENEFIT FROM.

The doctrine of invited error precludes a criminal defendant from seeking appellate review of an error he helped create. *State v. Mercado*, 181 Wn. App. 624, 629-30, 326 P.3d 154 (2014). To determine whether the invited error doctrine applies to a case, the court may consider whether the defendant "affirmatively assented to the error, materially contributed to it, or benefited from it." *Id.* at 630. The invited error doctrine prevents a defendant from setting up an error at trial and then complaining of it on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

While defendant may not have *intended* to create the error he complains of on appeal, the record shows that he contributed to it and then attempted, and continues to attempt, to benefit from it. The *Perez* court stated:

Compliance with the rule [CrR 4.2(e)] is, of course, the responsibility of the attorneys and particularly of the prosecutor, who has an interest in obtaining a secure plea. No judge can make an agreement part of the record if it is not disclosed.

33 Wn. App. at 263. Defendant signed the CI agreement as part of a plea deal with the State. CP 27-68 (Exh. A). Compliance with the agreement would entitle defendant to a favorable recommendation by the prosecutor at sentencing. *Id.* That recommendation included a sentence of time served. *Id.* Failure to comply with the agreement would relieve the State of its obligation to make such a recommendation. *Id.* Shortly after defendant signed the agreement and entered a guilty plea, defendant violated the agreement. CP 15-26. Consequently, the prosecutor was no longer obligated to recommend a sentence of time-served. CP 27-68 (Exh. A). Defendant thereafter moved to withdraw his guilty plea. CP 15-26.

The trial court denied defendant's motion, and rightly so. CP 69-73. Defendant had just as much opportunity as the State to make a record of the existence of the CI agreement at defendant's guilty plea hearing and

in defendant's statement on plea of guilty. Whatever error arose as a result of this nondisclosure was an error shared by defendant.

Despite the special responsibility *Perez* places on the prosecutor, who certainly has an interest in securing guilty pleas, compliance with CrR 4.2(e) is a shared responsibility. *Perez*, 33 Wn. App. at 263. Defendant bears some responsibility to inform the trial court of the nature and reasons for any and all agreements between he and the prosecuting attorney at the time his plea. CrR 4.2(e). Defendant failed to do so here, and he attempted to benefit from that failure when he learned it would be in his best interest. It is conceivable that defendant would never have complained about the validity of his guilty plea had he complied with the terms of his contract and received the benefit of the bargain.

It would be inappropriate to allow defendant to withdraw his guilty plea based on a failure, at least in part, by defendant himself—a failure he now attempts to benefit from. *See Mercado*, 181 Wn. App. at 629-30. This Court should affirm the trial court's denial of defendant's motion to withdraw guilty plea.

5. THE TRIAL COURT PROCEEDED PROPERLY
BY NOT HOLDING AN EVIDENTIARY
HEARING ON DEFENDANT'S MOTION TO
WITHDRAW GUILTY PLEA.

Nothing in CrR 4.2 requires a trial court to hold an evidentiary hearing before deciding on a motion to withdraw a guilty plea. However, a

court may be required to hold an evidentiary hearing where a defendant (1) specifically objects to factual statements, and (2) requests an evidentiary hearing to challenge them. *State v. Blunt*, 118 Wn. App. 1, 8, 71 P.3d 657 (2003) (citing *State v. Garza*, 123 Wn.2d 885, 889, 872 P.2d 1087 (1994)). Defendant did neither of those things.

Defendant entered a plea of guilty on February 2, 2017. CP 5-14. Defendant pleaded guilty with knowledge that the prosecutor would recommend a sentence of time-served if he agreed to comply with conditions set forth in the CI agreement, including to work as a CI and to refrain from violating any municipal, county, state, or federal law. CP 27-68 (Exh. A). Defendant was charged with second degree assault and felony violation of a protection order on February 21, 2017; those crimes allegedly occurred after defendant entered his guilty plea. CP 15-26. Defendant subsequently filed a motion to withdraw his guilty plea on December 5, 2017. *Id.* A hearing was held on defendant's motion on December 28, 2017. 12-28-17 RP 1.

At the hearing on defendant's motion to withdraw, neither party disputed what events transpired on February 18, 2017; rather, the parties disputed whether those events constituted a violation of defendant's CI agreement. 12-28-17 RP 1-23. The court heard arguments from both sides. While defense counsel may have objected to the State's legal argument

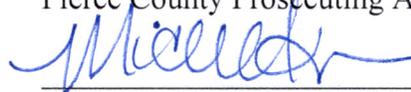
regarding whether defendant's conduct constituted a violation of his agreement, counsel never specifically objected to any factual statements regarding the conduct itself. *Id.* Moreover, defendant neglected to ever request an evidentiary hearing. Without any objection to specific factual statements or any request for an evidentiary hearing to challenge them, defendant's claim fails. *See Blunt*, 118 Wn. App. at 8.

D. CONCLUSION.

For all of the above stated reasons, the State respectfully requests this Court affirm defendant's conviction and sentence below.

DATED: October 16, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Madeline Anderson
Rule 9 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.

10-16-18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

October 16, 2018 - 2:34 PM

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