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Division II
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NO. 52460-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMISON NYLAND, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 17-1-02410-6

Brief of Respondent

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

1. Did the trial court properly deny defendant's motion to withdraw his guilty plea where the record shows defendant's plea was knowingly, intelligently and voluntarily entered?

2. Should defendant's criminal filing fee and DNA fee be stricken where defendant was sentenced after the effective date of House Bill 1783 and the trial court found defendant was indigent at the time of sentencing?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On June 23, 2017, the Pierce County Prosecuting Attorney's Office charged Jamison Parker Nyland, hereinafter "defendant" with one count of robbery in the first degree and one count of burglary in the first degree based upon events that occurred on June 11, 2017. CP[1] 1-2. Both counts were firearm enhanced, adding additional time to the presumptive sentence pursuant to RCW 9.94A.530 and RCW 9.94A.533. *Id.* Michael Underwood filed his Notice of Appearance to represent defendant on June 23, 2017. CP 34-37.

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[1] Clerk's Papers are referred to as "CP."

An omnibus hearing was set on September 19, 2017, along with a bail hearing and a re-arraignment. CP 156. In the bail hearing, defendant's bail was reduced from $200,000 to $100,000 cash or bond. 9/19/2017 RP 3-6[2]; CP 13-14; 147. Mr. Underwood indicated in the omnibus order that he had reviewed the discovery, received an offer from the State and had met with the defendant about the case. CP 157-59. The parties scheduled a CrR 3.5 hearing, but the State advised the court that there was a good probability that they would not need to have the hearing because there did not appear to be any issue. 9/19/17 RP 8. Defendant refused to sign the omnibus order. 9/19/17 RP 2-3; CP 157-59.

On October 10, 2017, defendant stipulated that his statements to police on June 22, 2017, were knowingly, intelligently, and voluntarily made and fully admissible at trial. CP 15-20; 147. The trial was continued because parties needed more time to prepare as additional discovery just became available. CP 21. Defendant declined to sign the continuance. CP 21.

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[2] The verbatim reports of proceeding (RP) will be referred to by date of proceeding and volume number when available because the RP for 10/27/17, 12/15/17, 1/17/18, 2/28/18, 4/3/18, 5/1/18, and 6/29/18 all have 2 copies of the same proceedings, but with different pagination. These RP will be cited as follows: 10/27/17 vol 1 RP ___; 12/15/17 Vol 2 RP ___ , etc. The RP for 2/14/18 also has two identical copies, but with different pagination; however, they are identified as morning and afternoon. These will be cited as 2/14/18 (PM) RP ___.

A readiness hearing was held on December 15, 2017, at which Mr. Underwood advised the court he was ready for trial; that negotiations were ongoing; and that an amended information would be filed in this case on January 12, 2018. CP 22-24. The amended information was not filed on January 12th because parties were continuing to negotiate a resolution to the case. 2/5/18 RP 5-6; CP 148.

On January 17, 2018, the court continued defendant's trial to February 7th. Defendant refused to sign the continuance order. CP 25. Mr. Underwood hired an investigator and they met with the State's witnesses in late January. 2/5/18 RP 17.

On February 5, 2018, the Pierce County Prosecutor's Office filed an amended information, supported by a memorandum regarding re-arraignment, that charged the defendant with one count of burglary in the first degree; three counts of robbery in the first degree (victims Jared Gratzer, Jacob Gratzer, and Joseph Hopkins); and one count of attempted robbery in the first degree (victim Susan Gratzer). All five counts were firearm enhanced. 2/5/18 RP 7-8; CP 26- 31; 34-37; 148.

After the re-arraignment, defendant told the court that communications had broken down with his attorney and he wanted a new attorney. 2/5/18 RP 8-12. Defendant was frustrated with Mr. Underwood because he felt there was not enough communication and that Mr.

Underwood was not negotiating the case because the offers got worse and not better over time. "...[T]here's been no negotiations because everything - - everything has continuously got worse, anything that he's brought to me from the prosecuting side, saying it's going to be this time, this time or this time. It keeps going up, up, and up, and I've never gotten anything get any better. There was no negotiation, whatsoever." 2/5/18 RP 10. Mr. Underwood agreed that communications had broken down. 2/5/18 RP 12-13. Mr. Underwood told the court "[h]e's not happy with what I'm telling him about this case. I've been negotiating – trying to negotiate with [the State]....And, you know, the offer we have now, which I've advised him of, is it. That's all the prosecutors are willing to go. He is not happy with that offer, and now I'm the one who is responsible because of the prosecutor's stance." 2/5/18 RP 12-13. The court allowed Mr. Underwood to withdraw. 2/5/18 RP 18-19; CP 33; 148.

On February 14, 2018, Matthew McGowan was appointed to represent defendant. 2/14/18 (PM) RP 24-26; CP 38; 149. Mr. McGowan set a bail hearing and the trial was continued to May 15, 2018, to allow the parties to negotiate and Mr. McGowan to prepare for trial. 2/14/18 (PM) RP 24-25; CP 38. The court declined to reduce bail at the bail hearing; bail remained set at $100,000. 2/28/18 Vol 5 RP 34.

On April 3, 2018, a competency evaluation was ordered by the court at the request of Mr. McGowan. 4/3/18 Vol 6 RP 39-40; CP 41-46; 149. An order finding defendant competent was entered on May 1, 2018. 5/1/18 Vol 9 RP 53; CP 58-59; 149.

At the June 29th readiness hearing Defense Counsel advised the court that he was ready for the July 19th trial. 6/29/18 Vol 10 RP 60, 61; CP 63-65. Mr. McGowan also advised the court that while defendant had rejected the State's offer, negotiations were ongoing. 6/29/18 Vol 10 RP 63-64; CP 63-65; 149. On July 26th the case was assigned out for trial; the parties continued to negotiate the case and reached a settlement prior to the court taking the bench. 7/26/18 2; CP 149. As part of the plea agreement, the defendant agreed to plead guilty to a second amended information that resulted in a standard range sentence of 129-171 months. 7/26/18 RP 5-6; *See* CP 67-71. As part of the plea agreement, the State would argue for the high end of the standard range whereas the defendant would argue for the low end. 7/26/18 RP 6. All firearm enhancements were dismissed, which eliminated 23 years from defendant's sentence if he had proceeded to trial and been convicted as charged in the February 5th amended information. 9/14/18 RP 10-11; CP 67-71.

After a recess, the State filed a second amended information charging defendant with one count of burglary in the first degree; three

counts of robbery in the first degree (victims Jared Gratzer, Jacob Gratzer, and Joseph Hopkins); one count of attempted robbery in the first degree (victim Susan Gratzer); one count of kidnapping in the second degree (victim Susan Gratzer); two counts of assault in the second degree (victims Jacob Gratzer and/or Jared Gratzer; and Susan Gratzer and/or Joseph Hopkins). 7/26/18 RP 8-12; CP 67-71. None of the counts were firearm enhanced. CP 67-71.

The court reviewed the statement of defendant on plea of guilty with the defendant. 7/26/18 RP 11-25; CP 73-82. The court confirmed that defendant had reviewed that statement of defendant on plea of guilty with his attorney. 7/26/18 RP 12. The court then went over the defendant's constitutional rights that he would be giving up if he pled guilty including his right to trial and to confront witnesses. 7/26/18 RP 14-15. The court reviewed the standard range and maximum penalty for each crime charged in the second amended information and the State's recommendation. 7/26/18 RP 15-17. The court then reviewed paragraph 11 of the Statement of Defendant on Plea of Guilty in which the defendant states, in part, that he does not agree that he is guilty of the charged crimes, but after

reviewing the evidence he believes there is sufficient evidence to find he was acting as an accomplice in the charged crimes. 7/26/18 RP 21-23; CP 81.

The Court engaged in the following colloquy with the defendant:

> THE COURT: All right. Has anyone made any threats or promises to make you enter this disposition?
>
> DEFENDANT: No, sir.
> THE COURT: Are you doing so voluntarily?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Do you have any questions for Mr. McGowan?
>
> DEFENDANT: No, Sir.
>
> THE COURT: Do you have any questions for the Court?
>
> DEFENDANT: No, Sir.
>
> THE COURT: Sir, when you went over the Statement of Defendant on Plea of Guilty with Mr. McGowan, did Mr. McGowan read it to you, did you read it on your own, or did the two of you read it together?
>
> DEFENDANT: Can you repeat that?
>
> THE COURT: When you went over this fairly lengthy document that I've been going over here, did Mr. McGowan just read it to you or did you read it on your or did the two of you read it together?

DEFENDANT: He read it, but I was looking at it as we're [sic] were going.

THE COURT: Sir, do you feel you're entering this plea knowingly, intelligently, and voluntarily?

DEFENDANT: Yes.

THE COURT: No one has made any threat of harm to you to make you do this against your will?

DEFENDANT: No.

THE COURT: You've indicated no promises of any kind have been made to you. There's obviously a recommendation from the State and I understand that. All right. Sir, it's your intent to plead guilty, correct?

DEFENDANT: Yes, sir.

THE COURT: I'm going to find that Mr. Nyland's plea of guilty is knowing, is intelligent, is voluntarily rendered, I'm going to find him guilty of that which is charged in the Second Information in Count I, Burglary in the First Degree, Count II, Robbery in the First Degree, Count III, Robbery in the First Degree, Count IV, Robbery in the First Degree, Count V, Attempted Robbery in the First Degree, Count VI, Kidnapping in the Second Degree, Count VII, Assault in the Second Degree as to both Jacob and Jerrod Gratzer...Count VIII, finding the defendant guilty of Assault in the Second Degree as to Susan Gratzer and/or Joseph Hopkins. I find that his plea is knowing, is intelligent, is voluntary, I accept the plea, and I find the defendant guilty of those counts which I just identified in the Second Amended Information.

7/26/18 RP 24- 26; CP 82.

At the defendant's sentencing hearing on August 10, 2018, Mr. McGowan advised the court that the defendant wanted to withdraw his guilty plea based, in part, upon ineffective assistance of counsel. 8/10/18 RP 2. Sentencing was set over to September 14, 2018. 8/10/18 RP 8-9.

On September 6, 2018, the defendant's new attorney, Paula Olson, filed defendant's motion to withdraw guilty plea based upon CrR 4.2(f) in which he alleged ineffective assistance of counsel. CP 89-100. Defendant presented no witness testimony or affidavits to support his motion to withdraw his guilty plea. 9/14/18 RP 2-20; CP 89-100. His sole support for his motion was his own unsworn statement. CP 97-100. After reviewing the record and hearing argument of counsel, the court denied the defendant's motion to withdraw his guilty plea. 9/14/18 RP 20; CP 136. The court stated "I see nothing to support his position that he received ineffective assistance of counsel." 9/14/18 RP 20. "I find nothing to support the proposition that the plea was not voluntary. I find that to the Court's satisfaction the defendant ratified the plea, at least insofar as I asked him whether anyone made any threats or promises to make him enter into this plea." 9/14/18 RP 20. The court sentenced the defendant within the standard range for each count and this timely appeal followed. 9/14/18 RP 138; CP 116-31, 138.

On October 22, 2018, the Court entered the findings of fact and conclusions of law regarding defendant's motion to withdraw his guilty plea. CP 146-52. The Court found:

> Finding of Fact #2 – On June 26, 2017 the Department of Assigned Counsel appointed Michael Underwood (WBA 13218) to represent the defendant. Michael Underwood is an experienced defense attorney who represents the defendant in both Pierce and Lewis Counties.
>
> Finding of Fact #19 – Michael Underwood represented the defendant for 224 days. During that time Michael Underwood zealously represented the defendant, including interviewing witnesses and creating a trial notebook.
>
> Finding of Fact #24 – Matthew McGowan (WSBA 41454) was appointed to represent the defendant. Matthew McGowan is an attorney who is experienced in criminal law. Matthew McGowan has been licensed to practice law in the State of Washington since 2009.
>
> Finding of Fact #34 – The fact that Matthew McGowan was still negotiating with the Pierce County Prosecutors Office even after the case was assigned out for trial is evidence that Matthew McGowan was acting diligently to represent the defendant.
>
> Finding of Fact #35 - ...Once the amended information was drafted a copy was provided to Matthew McGowan who provided a copy to the defendant.
>
> Finding of Fact # 36 – Matthew McGowan then met with the defendant in the jury room adjacent to Judge Nevin's Courtroom. Matthew McGowan and the defendant met for an extended period of time. While meeting Matthew McGowan and the defendant completed a Statement of Defendant on Plea of Guilty.

Finding of Fact #37 – Once Matthew McGowan and the defendant completed the Statement of Defendant on Plea of Guilty, Matthew McGowan and the defendant returned to Judge Nevin's Courtroom.

Finding of Fact #38 - …The State of Washington filed the amended information with the Court. Judge Nevin accepted the filing of the amended information.

Finding of Fact #39 – Judge Nevin arraigned the defendant on the amended information…

Finding of Fact #40 – Judge Nevin…conducted an extensive discussion with the defendant regarding the defendant's desire to plead guilty to the amend [sic] information. During this time the defendant displayed an understanding of the crimes charged in the amended information. The defendant indicated that he desired to plead guilty.

Finding of Fact #41 – During the colloquy the defendant indicated that, by pleading guilty, he understood he was giving up the right to trial.

Finding of Fact #42 – During the colloquy the defendant was advised that, by pleading guilty, he was giving up his right to present evidence.

Finding of Fact #43 – During the colloquy the defendant was advised he was, by pleading guilty, giving up his right to confront witnesses.

Finding of Fact #44 – During the colloquy the defendant was advised that he was, by pleading guilty, giving up his right to testify or not testify.

Finding of Fact #45 – The defendant was advised that he could call witnesses at trial at no expense to himself.

Finding of Fact #46 – During the colloquy the defendant was advised of immigration consequences of pleading guilty.

Finding of Fact #47 – During the colloquy the defendant was advised that the parties would make a recommendation to the Court, but the Court would determine the defendant's sentence.

Finding of Fact #48 – During the colloquy the Court advised the defendant of the various standard ranges for the crimes he was charged with committing.

Finding of Fact #49 – During the colloquy the defendant was advised of the possibility of the Court imposing an exceptional sentence.

Finding of Fact #50 – During the colloquy the Court asked the defendant if anyone had made any threats of [sic] promises to have him plead guilty. The defendant replied in the negative.

Finding of Fact #51 – During the colloquy the Court asked the defendant if he was pleading guilty of his own free will. The defendant answered in the affirmative.

Finding of Fact #52 – After the extensive colloquy Judge Nevin accepted the defendant's pleas of guilty to the crimes charged in the amended information.

Finding of Fact #53 – The defendant's entry of his pleas were made knowingly, intelligently and voluntarily.

2. FACTS

On June 11, 2017, around 1:00 a.m. Joseph Hopkins was visiting Jacob Gratzer and Jared Gratzer at their house. CP 3. The three men were in Jacob's[3] bedroom. Jacob's and Jared's mother, Susan Gratzer, also lived at the residence and was sleeping in another room. CP 3.

A black male (Suspect 1) entered Jacob's bedroom. *Id.* Suspect 1's face was covered and he was armed with a firearm. *Id.* Suspect 1 ordered the three people in the room to get on the floor. *Id.* Suspect 2 entered the room with Jacob's and Jared's mother. *Id.* The mother was made to lay on the floor. *Id.*

Suspect 1 demanded to know where the safe was located; the safe was removed from the closet and placed on the bed. *Id.* Suspect 1 began gathering gaming consoles in Jacob's bedroom. *Id.* Jacob was made to open the safe. *Id.* Suspect 1 indicated that he wanted their money. *Id.*

Suspect 1 shot Jacob striking him in the leg. CP 4. Jacob initially did not feel the pain from being shot and erroneously announced that the suspects were shooting blanks. *Id.* Jacob reached toward Suspect 1; Suspect 1 shot Jacob in the chest. *Id.* Jared struggled with the suspects; Suspect 2 repeatedly shot Jared. *Id.*

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[3] Multiple individuals share the same last name; they are referred to by their first names for purposes of clarity.

Suspect 1 and Suspect 2 took Joseph Hopkins' LG brand cell phone, Jared's Samsung Edge cell phone, a PS4 gaming console, an X-Box gaming console, and video games and fled. *Id.* 911 was called and the police responded. *Id.* Jacob and Jared were located upstairs suffering from gunshot wounds; several .380 caliber spent bullet casing were recovered from the scene. *Id.* Police determined that entry to the residence was made through the rear french doors. CP 4.

On June 20, 2017, police learned that defendant had pawned a PS4 at Cash America in Auburn; the serial number of the stolen PS4 defendant pawned matched the one stolen from the Gratzers' on June 11, 2017. *Id.* Store surveillance video showed the defendant at the front counter making the transaction. *Id.*

On June 22, 2017, defendant was taken into custody on a King County warrant. CP 5. After being advised of his ***Miranda*** warnings and signing a waiver of his rights, defendant admitted to pawning the PS4 at Cash America. *Id.* Initially, defendant denied being part of the Gratzers' robbery. *Id.* However, when confronted with evidence located on his cell phone showing he googled prices/buyer/sellers for Samsung Galaxy Edge, Iphone, LG phone and PS4 consoles just one hour after the robbery, defendant admitted he had driven two black males to the Gratzers' home

knowing they were going to rob them of any cash and/or pills the Gratzers had in the house. *Id.*

During his interview, defendant told police that he pointed out to the two black males the surveillance cameras in the front of the Gratzers' house and told them they needed to enter from the rear door. *Id.* The defendant told the two men that Jacob had a safe in his bedroom where he kept his pills and cash. *Id.*

The defendant claims he parked his car at River Road/Gay Rd so the two men could cut through a field to the rear gate and backyard of the Gratzer residence. *Id.* A short time later the two men returned with a PS4, a few video games, a set of gaming goggles and said they only got $200, but he never saw any of the money. *Id.*

The defendant admitted that he was given the PS4, the IPhone, Galaxy Edge, LG and the gaming goggles. *Id.* The defendant said he pawned the PS4 knowing it was stolen, sold the IPhone and Galaxy Edge to someone he met on the street, but still had the video goggles in the trunk of his car. *Id.*

C. ARGUMENT.

1. DEFENDANT'S PLEA WAS KNOWING, INTELIGENT, AND VOLUNTARY WHERE HE ORALLY AND IN WRITING ADVISED THE COURT THAT NO THREATS OR PROMISES WERE MADE TO INDUCE HIS PLEA.

a. Defendant's plea was voluntary.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. U.S. Const. amend. XIV; ***Boykin v. Alabama***, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); ***In re Personal Restraint of Stoudmire***, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001); ***Wood v. Morris***, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976). Whether a plea is knowing, voluntary, and intelligent is determined from a totality of the circumstances. ***Wood***, 87 Wn.2d at 506; ***State v. Branch***, 129 Wn.2d 635, 919 P.2d 1228 (1996). If a defendant has received the information and pleads guilty pursuant to a plea agreement, there is a presumption that the plea is knowing, voluntary, and intelligent. ***In re Personal Restraint of Ness***, 70 Wn. App. 817, 821, 855 P.2d 1191, *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994). "A defendant's signature on the plea form is strong evidence of a plea's voluntariness." ***State v. Branch***, 129 Wn.2d at 642; ***State v. Stephan***, 35 Wn. App. 889, 893, 671 P.2d 780 (1983) (*quoting* ***State v. Perez***, 33 Wn. App. 258, 261-262, 654 P.2d 708 (1982) (*citing* ***In re Personal Restraint of Keene***, 95 Wn.2d 203,

206-207, 622 P.2d 13 (1981)). If the trial court orally inquires into a matter that is on that plea form, the presumption that the defendant understands this matter becomes "well nigh irrefutable." ***Branch***, 129 Wn.2d at 642 n.2; ***State v. Stephan***, 35 Wn. App. at 893. After a defendant has orally confirmed statements in this written plea form, that defendant "will not now be heard to deny these facts." ***In re Keene***, 95 Wn.2d 203, 207, 622 P.2d 13 (1981).

Courts will only permit a plea to be withdrawn to correct manifest injustice. ***State v. Codiga***, 162 Wn.2d 912, 922-23, 175 P.3d 1082 (2008) (*citing* CrR 4.2(f)[4]). A manifest injustice occurs when: (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. DeClue***, 157 Wn. App. 787, 792, 239 P.3d 377 (2010). Defendant bears the burden of proving manifest injustice, which is injustice that is obvious, directly observable, overt, and not obscure. ***State v. Ross***, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996); ***State v. Pugh***, 153 Wn. App. 569, 577, 222 P.3d 821 (2009) (*citing* ***State v. Taylor***, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)).

"Because of the many safeguards that precede a guilty plea, the manifest injustice standard for a plea withdrawal is demanding." ***Pugh***,

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[4] CrR 4.2(f) provides, "The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice."

153 Wn. App. at 577. A trial court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. ***State v. A.N.J.***, 168 Wn.2d 91, 106, 225 P.3d 956 (2010). A trial court abuses it discretion when it bases its decision on untenable grounds or reasons. ***Pugh***, 153 Wn. App. at 576.

In the present case, defendant claims the trial court abused its discretion in denying his motion to withdraw his guilty plea because defendant "was pressured into pleading guilty by his fear that his attorney was unprepared for trial and that his attorney predicted that Nyland would be convicted if he went to trial, and because his attorneys continually pressured him into feeling he had no choice by to waive his rights and plead guilty." Brief of Appellant at 9. Defendant's claim that his plea was not voluntary fails because the defendant knowingly, voluntarily, and intelligently entered his plea of guilt. Trial court properly denied defendant's motion to withdraw his guilty plea.

In ***State v. Williams***, 117 Wn. App. 390, 394, 71 P.3d 686 (2003), defendant and his son were charged with third degree assault of a child. In a package plea deal, both defendant and his son pled guilty to fourth degree assault to avoid a possible felony conviction. ***Williams***, 117 Wn. App. 390, 394. In his statement of defendant on plea of guilty, Williams acknowledged that no one had made promises or threats to harm to him or

any other person to get him to enter his plea. ***Williams***, at 395. During the plea colloquy, Williams reiterated that no one made any threats or promises to make him plead guilty. *Id.* Williams also told the court that his attorney had answered all his questions and that his statements were true and accurate. *Id.*

Prior to sentencing, Williams filed a motion to withdraw his plea arguing that he was forced to plead guilty in order for his son's charges to get reduced. *Id.* at 396. The court denied his motion because the court was aware the plea was joint when the court took the plea. *Id.* at 397. In affirming the trial court's finding that defendant's plea was freely and voluntarily made, the court of appeals focused on the circumstances of the plea. *Id.* at 401. The trial court had specifically asked Williams if anyone had forced him to plead guilty and he unequivocally responded in the negative. *Id.* at 401. The court of appeals held that "[w]here…there is no evidence of any promises or threats to the defendant other than those represented in the written plea agreement, where the defendant signs the written plea agreement acknowledging guilt in his own words, and where the defendant states that no other promises were made other than those in the plea agreement, the trial court properly accepts the plea as being the result of the defendant's own volition and freely and voluntarily made." *Id.* at 401.

Similarly, in ***State v. Osborne***, the trial court denied Everett Osborne's CrR 4.2(f) motion to withdraw his guilty plea when he asserted he had been coerced into pleading guilty. 102 Wn.2d 87, 90, 684 P.2d 683 (1984). Mary and Everett Osborne were charged with second degree felony murder for the death of Shelly Everett, Mary Osborne's 15-year-old daughter. ***Osborne***, at 90. During the pendency of the action, Mary suffered from depression and suicidal ideation. ***Osborne***, at 90. After plea negotiations resulted in a State recommendation of 30 years for Everett and 20 years for Mary, both Mary and Everett pled guilty to second degree felony murder. *Id* at 90-91. "Each defendant stated that the decision to plead guilty was a voluntary act and not induced by threats or promises. *Id.* at 91. Prior to sentencing, Everett sought to withdraw his guilty plea pursuant to CrR 4.2(f) alleging that his plea was coerced by Mary Osborne's threat to commit suicide if the case went to trial. ***Osborne***, at 97. His sole support for his claim of coercion was a bare allegation in his affidavit. *Id.* at 97.

The trial court denied Everett Osborne's motion to withdraw his guilty plea. *Id.* The Supreme Court affirmed, relying upon Osborne's specific representations during his plea proceedings that his plea was voluntary and free from coercion. *Id.* at 97. In affirming the lower court, the Supreme Court stated, "More should be required to over this 'highly

persuasive' evidence of voluntariness than a mere allegation by the defendant." *Id.* at 97.

In the instant case, defendant claims that his plea was involuntary because he was pressured into pleading guilty because he feared that his attorney was unprepared for trial; that his attorney predicted that he would be convicted if he went to trial; and because his attorneys pressured him into feeling he had no choice by to waive his rights and plead guilty. Defendant's claims are without merit.

During the pendency of this action, defendant was represented by three different attorneys: Michael Underwood, Matthew McGowan, and Paula Olson. Mr. Underwood represented the defendant from shortly after arraignment on June 23, 2017, until he withdrew on February 5, 2018. 2/5/18; RP 19; CP 6-7; 33. Mr. McGowan represented defendant from February 14, 2018, through his plea. 2/14/18 (PM) RP 24-26; 8/10/18 RP10. Ms. Olson represented the defendant for his Motion to Withdraw his Guilty Plea and Sentencing. 9/14/18 RP 2-41. Defendant's challenge focuses on Mr. Underwood's and Mr. McGowan's representation; however, a review of the record shows that his attorneys were effective and defendant's plea was knowingly, voluntarily, and intelligently made.

During his representation of defendant, Mr. Underwood engaged in negotiations with the State to resolve the case; convinced the State to hold

off on filing the amended information so negotiations could continue (2/5/18 RP 5-6); and interviewed witnesses. CP 19. On December 15, 2017, a trial readiness status hearing form was filed in which Mr. Underwood advised the court that negotiations were ongoing, but that he was ready for trial. CP 22-24. Additionally, in the Court's unchallenged findings of fact, the Court found that Mr. "...Underwood represented the defendant for 224 days. During that time Michael Underwood zealously represented the defendant..." CP 148. Unchallenged findings are verities on appeal. ***State v. O'Neill,*** 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

On February 5, 2018, Mr. Underwood withdrew and on February 14th Mr. McGowan began representing the defendant. 2/5/18 RP 19-20; 2/14/18 (PM) RP 24-26.

Like Mr. Underwood, Mr. McGowan also diligently represented the defendant. He met with the Deputy Prosecuting Attorney, discussed the case, and advised to court that it would take about 3 months to prepare for trial. 2/14/18 (PM) RP 24. Mr. McGowan immediately set a bail hearing in an attempt to have defendant's bail reduced. 2/28/18 Vol 5 RP 32-34. At the trial readiness hearing, Mr. McGowan advised the court that he was ready for trial both in writing and on the record. 6/29/18 Vol 8 RP 51, 52; CP 63-65. Despite being ready for trial, Mr. McGowan continued

to negotiate the case up to and including the day the case was assigned out to trial. CP 149.

The defendant's plea to the second amended information was voluntary as evidenced by both the written documents and colloquy defendant engaged in with the court. The written documents show defendant was informed of the charges against him and his plea was voluntary. CP 67-71; 72; 73-82. On the day of trial, the State advised the Court that the parties had reached an agreement. 7/26/18 RP 2, 4-5. The State filed a second amended information charging defendant with one count of burglary in the first degree; three counts of robbery in the first degree; one count of attempted robbery in the first degree; one count of kidnapping; and two counts of assault in the second degree. 7/26/18 RP 8; CP 67-71. Defendant's attorney indicated that he had received a copy of the second amended information, gone over it with his client, and waived formal reading. 7/26/18 RP 9. Defendant also acknowledged receiving the second amended information in the statement of defendant on plea of guilty. CP 73-82, No. 7. The statement of defendant on plea of guilty also indicated that defendant was pleading guilty to counts I-VIII as charged in the second amended information and was doing so freely and voluntarily. CP 81, Nos. 7-8.

Defendant himself made several statements indicating his plea was knowing, intelligent, and voluntary. Defendant's statement reads:

> Although I do not agree that I am guilty of the crimes charged, I have reviewed the evidence and agree that the State has sufficient evidence to find that I was acting as an accomplice in the crimes charged and did on June 11, 2017, I did unlawfully and feloniously aid two unknown individuals in the commission of the crimes charged. Those individuals did: burglarize the home of S. Gratzer by entering unlawfully while armed with a deadly weapon; did rob J. Gratzer, Jacob & Jared, and J. Hopkins by taking their personal property against their will by use of immediate force and while armed with a deadly weapon (a firearm); did take a substantial step toward robbing S. Gratzer while armed with a deadly weapon (a firearm) by searching for her jewelry; did abduct S. Gratzer by removing her from her bedroom; and did also intentionally assault J. Gratzer and J. Gratzer, did also assault S. Gratzer and J. Hopkins with a deadly weapon (a firearm). Each of these acts took place in Pierce County, State of Washington.
>
> As well as making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

CP 81, No 11.

In paragraph 12 the plea states:

> My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" and/or "Felony Firearm Offender Registration" Attachment, if applicable. I understand and acknowledge them all. I have been given a copy of this 'Statement of Defendant or Plea of Guilty.' I have no further questions to ask the judge.

CP 81, No. 12. Defendant signed the statement of defendant on plea of guilty. CP 81. After accepting the defendant's plea, the court signed the plea form affirming the voluntary nature of defendant's plea. CP 82. "I find the defendant's plea of guilty to be knowingly, intelligently, and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged." CP 82. The written plea documents support a knowing, intelligent, and voluntary entry into a plea of guilty.

In addition to accepting the written documents, the Court also engaged in a colloquy with defendant on the record. 7/26/18 RP 9-26. Defendant told the court he had reviewed the statement of defendant on plea of guilty with his attorney and wanted to plead guilty. 7/26/18 RP 12-14. The court also verbally read defendant's statement into the record and defendant confirmed that was his statement. 7/26/18 RP 21-24. During the plea, defendant never indicated that he felt coerced into pleading guilty or had any concern that his attorney was not prepared for trial. Instead, when asked by the Court if anyone had made any threats or promises to make him enter this plea, the defendant said "No, sir." 7/26/18 RP 24. Similarly, when asked if he was entering his plea voluntarily, the defendant said "Yes, sir." 7/26/18 RP 24. Like ***Osborne***, defendant's mere allegation that he felt coerced into pleading guilty is insufficient to

overcome the significant evidence that his plea was voluntary. It is clear from the oral record as well as defendant's signed statement that defendant's plea was voluntarily made.

Here, like ***Williams***, defendant has presented no evidence of threats or promises made to induce his plea. Defendant told the court that his plea was made freely and voluntarily and that no threats or promises were made to him to force him to plead guilty. 7/26/18 RP 24-25; CP 81. When the court inquired if the defendant had any questions for the Court or for his attorney, defendant replied that he did not. 7/26/18 24. Defendant advised the court that his attorney had read the statement of defendant on plea of guilty to him "but I was looking at it as we're [sic] were going." 7/26/18 RP 24. The statement of defendant on plea of guilty contained language in which defendant acknowledged that his plea was made freely and voluntarily and that no threats or promises were made to force him to plead guilty. CP 81. Thus, all relevant circumstances surrounding the plea itself undermine defendant's self-serving claim that his plea was coerced.

Defendant relies on ***State v. Frederick***, 100 Wn.2d 550, 576 P.2d 136 (1983) *reversed on other grounds*, ***Thompson v Department of Licensing***, 138 Wn.2d 783, 982 P.2d 601 (1999) to support his argument that his plea was coerced. Defendant's reliance on ***Frederick*** is misplaced.

Frederick stands for the proposition that a defendant can *argue* that his plea was coerced by non-governmental external factors, not that every non-governmental external factor results in a coerced plea. In the present case, defendant's plea was voluntary.

In 1980, a jury convicted Daniel Frederick of first degree robbery and, after a habitual offender proceeding, sentenced him as a habitual offender. ***Frederick***, 100 Wn.2d 550, 552. After his conviction, but before his habitual offender proceeding, Frederick moved to dismiss the habitual offender information by asserting, in part, that evidence of his 1976 convictions for first degree robbery and kidnaping should be excluded because they were the result of an involuntary plea. ***Frederick***, at 552. In support of his motion, Frederick proffered testimony from himself and a former cell mate, Joe Tharp, that Frederick's co-defendant had threatened to kill Frederick if he did not plead guilty to the 1976 charges. *Id.* at 553. The trial court denied the motion to dismiss the habitual offender information, but reserved ruling on whether Frederick could present the same proffered testimony to the jury during the habitual offender proceeding. *Id.* The trial court ultimately excluded evidence regarding the voluntariness of his 1976 plea because Frederick did not claim any State involvement in the alleged threats that induced the plea.

Frederick, at 553. The jury found Frederick was a habitual offender and sentenced him as such. Frederick appealed.

The Supreme Court reversed and remanded for a new habitual offender proceeding. ***Frederick***, at 552. The Supreme Court stated "[r]emand for a new trial is...necessary because the trial court erred in refusing to allow Mr. Frederick to present his evidence of coercion to the jury. That his burden of overcoming the State's prima facie case is heavy does not mean it cannot be met." ***Frederick***, at 558-59.

Unlike ***Frederick***, who was prohibited from presenting evidence that his plea was coerced, the defendant in the present case argued his plea was the result of undue pressure in his supporting documents for his motion to withdraw his guilty plea. CP 97-100. When the defendant alerted the court he wanted to withdraw his guilty plea, the court continued defendant's sentencing hearing to allow for appointment of a new attorney if appropriate and the filing of any motions. 8/10/18 RP 10. In his motion to withdraw guilty plea, defendant argued that his attorneys were ineffective. CP 89-100. This argument was supported by an unsworn statement in which defendant asserted that his attorney pressured him to accept the prosecutor's offer of 10-12 years to avoid being sentenced to almost 40 years if convicted after trial; that he felt pressured to plead guilty because he did not have adequate time to evaluate the State's offer

on the morning of trial; that his attorney used scare tactics to induce a plea; and that he did not believe they were ready for trial. CP 97, 99-100.

Contrary to defendant's assertion that his attorney was not prepared for trial, both Mr. Underwood and Mr. McGowan advised the Court they were ready for trial at their respective trial readiness hearing. 6/29/18 RP 51, 52; CP 22-24; 63-65. There is no evidence to support defendant's bare assertion that defense counsel used scare tactics to induce his plea. To the contrary, when asked if he was entering his plea voluntarily, defendant replied, "Yes, sir." 7/26/18 RP 24.

The trial court in this case properly denied defendant's motion to withdraw his guilty plea stating "I see nothing to support his position that he received ineffective assistance of counsel." 9/14/18 RP 20. "I find nothing to support the proposition that the plea was not voluntary. I find that to the Court's satisfaction the defendant ratified the plea, at least insofar as I asked him whether anyone made any threats or promises to make him enter into this plea." 9/14/18 RP 20. This Court should reject defendant's claim that his plea was not voluntary.

b. Assignment of error 2 should be summarily rejected because defendant failed to support it with any citation to authority or meaningful analysis.

The court reviews challenged findings of fact and conclusions of law to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions. ***State v. Levy***, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006); ***State v. Madarash***, 116 Wn. App. 500, 509, 66 P.3d 682 (2003). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. ***Levy***, 156 Wn.2d at 733. The appellate court defers to the fact finder regarding credibility of witnesses and the weight to be given to reasonable but competing inferences. ***State ex. Rel. Lige & Wm. B. Dickson Co. v. County of Pierce***, 65 Wn. App. 614, 618, 829 P.2d 217 (1992).

Unchallenged findings are verities on appeal. ***State v. O'Neill***, 148 Wn.2d 564, 571. The party challenging the findings bears the burden to show that substantial evidence does not support the superior court's findings. ***A.N.J.***, 168 Wn.2d at 107.

The sole finding of fact challenged by defendant is Finding of Fact 53, in which the court found:

> The defendant's entry of his pleas were made knowingly, intelligently and voluntarily.

CP 151.

However, defendant fails to cite authority or develop an argument regarding the trial court's finding of fact in his brief. *See* RAP 10.3(a)(6) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record).

Arguments unsupported by applicable authority and meaningful analysis should not be considered. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a). *See also,* ***State v. Stubbs***, 144 Wn. App. 644, 652, 184 P.3d 660 (2008), *reversed by* 170 Wn.2d 117 (2010) ("[p]assing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review").

Defendant assigned error to Finding of Fact 53, then apparently abandoned the claim by failing to address it in the body of his opening brief. This Court should decline to review this assignment of error.

Should this Court find that the defendant presented sufficient argument and citation to authority for this Court to address the merits of his assignment of error to Finding of Fact 53, then defendant challenge fails because this finding is supported by substantial evidence.

c. Substantial evidence supports trial court's Findings of Fact #53.

Defendant's sole challenge to the trial court's 63 findings of fact is Finding of Fact #53. The remaining 62 unchallenged findings of fact are verities on appeal. ***State v. O'Neill***, 148 Wn.2d 564, 571. Findings of Fact Nos. 2, 19, 24, 34 through 52 all support the voluntariness of defendant's plea and provide substantial evidence to support Finding of Fact # 53. CP 146-151.

On June 26, 2017, the Department of Assigned Counsel appointed Michael Underwood (WBA 13218) to represent the defendant. Michael Underwood is an experienced defense attorney who represents the defendant in both Pierce and Lewis Counties. CP 146. Mr. Underwood represented the defendant for 224 days. During that time Mr. Underwood zealously represented the defendant, including interviewing witnesses and creating a trial notebook. CP 148. After Mr. Underwood withdrew, Matthew McGowan (WSBA 41454) was appointed to represent the defendant. Mr. McGowan is an attorney who is experienced in criminal law. He has been licensed to practice law in the State of Washington since 2009. CP 149.

On July 26, 2018, the matter was assigned to Judge Jack Nevin for trial. CP 149. Prior to Judge Nevin taking the bench, the parties settled the case. CP 149. The fact that Mr. McGowan was still negotiating with the

State even after the case was assigned out for trial is evidence that Mr. McGowan was acting diligently to represent the defendant. CP 149. Once the amended information was drafted, Mr. McGowan provided a copy to the defendant. CP 149. Mr. McGowan then met with the defendant in the jury room adjacent to Judge Nevin's Courtroom for an extended period of time. Mr. McGowan and the defendant completed a Statement of Defendant on Plea of Guilty. CP 149.

Once Mr. McGowan and the defendant completed the Statement of Defendant on Plea of Guilty, Mr. McGowan and the defendant returned to Judge Nevin's Courtroom. CP 150. The amended information was filed with the Court. CP 150. Judge Nevin arraigned the defendant on the amended information. CP 150.

Judge Nevin conducted an extensive discussion with the defendant regarding the defendant's desire to plead guilty to the amended information. CP 150. At which time the defendant displayed an understanding of the crimes charged in the amended information and indicated that he desired to plead guilty. CP 150. The Court engaged in a colloquy with the defendant during which the defendant indicated that, by pleading guilty, he understood he was giving up the right to trial. CP 150. Defendant was advised during the colloquy that by pleading guilty, he was giving up his right to present evidence, his right to confront witnesses, his

right to testify or not testify, and call witnesses at no expense to him. CP 150. He was advised of potential immigration consequences of pleading guilty. CP 150. Finally, he was advised of the various standard ranges for the crimes he was charged with committing, that the parties would make sentencing recommendations, but that the Court would determine defendant's sentence, which could include an exceptional sentence. CP 150.

During the plea colloquy the Court asked the defendant if anyone had made any threats or promises to have him plead guilty. The defendant replied in the negative. CP 150.

During the colloquy the Court asked the defendant if he was pleading guilty of his own free will. The defendant answered in the affirmative. CP 151.

After the extensive colloquy Judge Nevin accepted the defendant's pleas of guilty to the crimes charged in the amended information. CP 151.

In addition to defendant's oral representations to the court, defendant's statement of defendant on plea of guilty also provides substantial evidence that defendant's plea was knowing, intelligent, and voluntary. In his signed statement of defendant on plea of guilty, defendant acknowledged that he received the second amended information and reviewed it with his lawyer. CP 81, No. 7. He confirmed that his plea

was freely and voluntarily entered and that no threats or promises were made to him. CP 81, Nos. 8, 9, and 10.

The court's careful plea colloquy, defendant's representations during that colloquy and in his statement of defendant on plea of guilty are sufficient to persuade a fair-minded, rational person that defendant's plea was knowing, intelligent, and voluntary. Substantial evidence supports Finding of Fact #53 and this court should reject defendant's claim to the contrary.

2. THIS COURT SHOULD ORDER THAT DEFENDANT'S CRIMINAL FILING FEE AND DNA FEE BE STRICKEN.

a. Defendant's criminal filing fee should be stricken because he was indigent at the time of sentencing and his case was not yet final when House Bill 1783 became effective on June 7, 2018.

In this case, the trial court found the defendant to be indigent. CP 142-43. The defendant's direct appeal is still pending. House Bill 1783, effective June 7, 2018, prohibits the imposition of the $200.00 filing fee on defendants who were indigent at the time of sentencing. As the court held in ***State v. Ramirez***, 191 Wn.2d 732, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and, therefore, not final. The State agrees that the criminal filing fee of $200.00 that was imposed in this case should be stricken. The State further agrees that House Bill 1783

eliminates any interest accrual on non-restitution legal financial obligations.

The State acknowledges that this defendant was found indigent by the sentencing court, and therefore the $200.00 criminal filing fee should be stricken.

b. Defendant's DNA fee should be stricken because his DNA was previously submitted to the State as the result of a prior qualifying conviction.

The defendant in this case also appeals the imposition of a $100 DNA-collection fee in the judgment and sentence, asserting that a DNA sample was previously submitted to the state as the result of a prior qualifying conviction. A legislative amendment to RCW 43.43.7541, which took effect June 7, 2018, requires imposition of the DNA-collection fee "unless the state has previously collected the offender's DNA as a result of a prior conviction." The amendment applies to defendants whose appeals were pending - i.e., their cases were not yet final - when the amendment was enacted. ***State v. Ramirez***, 191 Wn.2d 732, 426 P.3d 714 (2018).

The State's records show that this defendant's DNA was previously collected and is on file with the Washington State Patrol Crime Lab. The State respectfully asks this Court to remand this case to the superior court

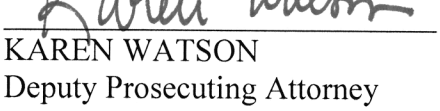
to amend the judgment and sentence to strike the imposition of the $100 DNA collection fee.

D. CONCLUSION.

For the reasons stated above, the State respectfully request this court affirm defendant's convictions and remand for the trial court to strike the imposition of the $200.00 filing fee, the imposition of the $100 DNA collection fee and the interest accrual provision.

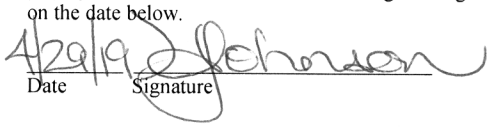
DATED: April 29, 2019

MARY E. ROBNETT
Pierce County Prosecuting Attorney



KAREN WATSON
Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ Efile 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.



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