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AUG 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 291707

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ADRIAN BENTURA OZUNA,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes one assignment of error.

- 1) Trial counsel was ineffective.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1) Trial counsel for Ozuna was effective.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

RESPONSE TO ASSIGNMENT OF ERROR – COUNSEL FOR OZUNA WAS EFFECTIVE.

State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982):

The test in Washington is whether "[a]fter considering the *entire record*, can it be said that the accused was afforded an *effective representation* and a *fair and impartial trial*". State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). This court has refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics. State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980); see also State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error.

State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2000):

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions.. **If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.** (Emphasis mine, citation omitted.)

The allegation in this case is “ineffective” assistance on the part of trial counsel. Ozuna plead guilty and the record is very clear that this particular defendant knowingly, intelligently, and voluntarily pleaded guilty and by that plea received a significant benefit by and through the effective actions of his counsel. This court need only read the verbatim transcript of the testimony of trial counsel, Mr. Banda, who in a very rare occurrence testified at the hearing to withdraw guilty plea, as well as Marlene Goodman, private investigator for Ozuna.

In this very unusual hearing trial counsel testified as to what occurred between he and his client. This officer of the court, a licensed member of the Washington State Bar, and well seasoned trial attorney

testified under oath that the allegations made by Ozuna were and are baseless.

Ozuna is an individual who has seven prior felonies and who was trying to get out of a plea agreement that sent him to prison for a lengthy time. Rarely does this court have the benefit of actual testimony from the attorney accused of ineffective assistance. It is even rarer that this testimony is bolstered by that of the investigator for the case.

To put it mildly the “motivation” to lie on the part of Ozuna is enormous, the possibility that an officer of the court, a member of the bar, would risk his livelihood with false testimony is absurd.

Mr. Banda’s testimony refutes both the allegation of ineffective counsel and the claim the plea was not voluntary. This is bolstered by the statements from Ms. Goodman and the deputy prosecutor.

Appellant says that his counsel was not effective at trial and yet with the facts and the record before this court it is easy to say that the reason trial counsel was able to extract the new plea agreement from the State was because of the very method and outcome of the portion of the trial that had been conducted by the time the new offer was forthcoming. The State, in the middle of trial, offered Ozuna a new deal which resulted in the most serious charge being dismissed as well as all weapon enhancements were dismissed and all the time imposed was to run concurrently. The result of

this plea is that Ozuna will spend a lengthy period of time in prison BUT the sentence is far less than he would have spent if he was found guilty at trial of all of the charges as well as the enhancements. This new plea was all a result of the effective actions of his trial attorney, Mr. Banda.

This is nothing more than a case of buyer's remorse. The record is clear that there were other offers made and rejected. This was not some last minute first offer which was shoved down the throat of an eighteen year old, non-English speaking person, who had never been convicted of a crime. The record of the colloquy between the Court Ozuna is undisputed. Ozuna's only complaint is that he felt he had to do this because his attorney, in his opinion, was not doing what he had asked or what he should have been doing and that some "jailhouse lawyer" told him he could challenge the plea later.

The claim is that "Mr. Ozuna, at the time of trial, had basically lost all confidence in Mr. Banda as this attorney." (RP 12) and yet there was never a single indication on the before the trial court nor in the record before this court that Ozuna made a motion to the court to remove his attorney or have a new attorney appointed or even a statement made to indicate that he was in any way dissatisfied with his attorney.

In fact when the possibility of a plea arose during the trial the Court stated:

In any event, Adrian, I've been watching you carefully, as I do everybody during a trial. I'm impressed that you behaved yourself in my court, number one. I give you credit for that. Number two, you've been following closely with everything that's been going on and talking to your lawyer and Ms. Goodman. So I've watched that. You seem like an intelligent young man.
(CP 43)

There was not a word from Ozuna that he was not satisfied with his attorney or that he was not given what he needed for a proper defense. This was all BEFORE the actual plea occurred. Even after the plea the court stated the following "I would say to you this was a very tough case, and your attorney worked under sane very difficult conditions not that he created but that were dealt to him as far as being a lawyer. I hope that you understand that the conduct that I've just found you guilty of is very serious. MR. OZUNA; I understand."

Even at this time Ozuna said nothing about this "complete loss of confidence"

Appellant now uses the statement made by Mr. Banda that his "client was not being rational" to mean that Banda was trying to force this plea and Ozuna would not take the deal. It can as easily be read, in context, to mean that Mr. Banda was saying finish the trial do not take the plea and Ozuna wanted to take the plea, an act which Banda did not think was rational given the results of the trial at that point.

It is the State's position that this is supported by the statement made by the defendant himself which would seem to indicate he was considering this other act, the plea, rather than continue the trial as well as the testimony of Banda who indicated he was very confident about the robbery charge, the kidnapping charge and felt that he would at least get a hung jury on the assault charge.

MR. OZUNA: I'm not going to say nothing wrong. I do want to say, you know, that I just need some time to think about this. I'm not only making decisions for myself but I'm making decisions for my family as well, you know. There's other people involved, and I just need a little bit of time. (CP 38)

This is after what were apparently similar offers put forth earlier and which were not take. So now in the middle of trial once again Ozuna wants to plead guilty not just finish the trial. The deputy prosecutor had just stated:

MS. HANLON: If the defendant wants to plead guilty, I'm really tired of making these offers and sitting around and waiting for him to make up his mind. So I'd like to a (sic) statement of guilty plea signed and I entered by noon. I think that's doable.

This has been ongoing negotiations. I make offers. I give deadlines. They're ignored or rejected, and I don't want to have this where, ah, the jury is in the jury room. We want to make an offer now. I'm getting really tired of it, So I would l i k e to have a guilty plea on the record before noon or I ' m not going to mess around with this anymore. So that's --

Ozuna couch's the request for an investigator as too little too late. But a fair reading of this discussion would lead a reasonable person to view this as Mr. Banda had tried to locate these witnesses and so had the State so now in a last ditch effort they needed to try to use their own person. This was not some total lack of action on the part of Banda. See also Declaration of Adolfo Banda CP 730-32.

THE COURT: Now the purpose of appointing an investigator is to assist the defense in -- securing I or finding potential witnesses who -- which -- who I have been difficult to locate up to this point. Is that a fair statement?

MR. BANDA: Yes Your Honor. The State has not had a - - can't find them, I've made phone calls I and can't find them but -- I

THE COURT: Well, that was my impression that there was (sic) some people who may have some awareness of this case but who have been difficult to locate.

MR. BANDA: Yes. (CP 170-71)

The record of the portion of the trial that was conducted when read in the light most supportive of the State shows that the cross examination of the victim by Banda was effective. The victim testified in a manner that would support a defense theory or strategy that the victim was making up most or all of this case. Mr. Banda cross-examined the victim for almost fifty pages. (CP 269-311, 315-19, 329-333)

Ozuna's own testimony also refutes his allegation;

A. That's what -- that's what I wanted to meet with him for, to be able to get a -- cover all -- because what I seen in the trial

with the way he was doing his representation or his defense, -- I -- I was -- I didn't agree to it. I wasn't satisfied with -- there as a lot more that should have been put on record and -- and you know, I feel like that Banda, he did -- maybe the best to his knowledge but there was a lot more if he would have put in the effort to -- to study the case more or -- or even went over the case with me, you know, we would have -- had a better outcome. (Supp RP 102)

By his own statements Ozuna says he told Banda during the trial "I would tell him, you know, you're doing good -- I was like you're doing good the way you're aggressive and -- and -- and stuff like that; that's the way you -- you know, that -- that's good but man you've got to -- you've got to throw all of these things in too; but he -- he wouldn't listen to me, he was just like "Alright, alright." Like he was lost in his own little world you know?" (Supp RP 111-12)

Throughout his testimony Ozuna contradicts himself. This court need only read the sections where he states Banda never came to see him and yet throughout the testimony Ozuna describes numerous occasions where he had discussions with his counsel.

GUILTY PLEA.

The Statement of Defendant on Plea of Guilty is set forth at CP 23-31. The memorandum opinion denying the motion to withdraw the guilty plea is set forth at CP 720-29, 736-37. This nine page decision should not be over turned by this court. "We review a trial court's decision denying a motion to withdraw for an abuse of discretion." State v. Zhao, 157 Wn.2d

188, 197, 137 P.3d 835 (2006) (citing State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001)).

Ozuna pleaded guilty to three counts Robbery 1 without the enhancement; Felony elude which is a class C felony and Assault 2 without the enhancement. The most serious charge, Kidnapping 1 with the weapons enhancement was dismissed as a portion of the plea agreement. Further, as indicated these sentences were run concurrent not consecutive

Ozuna initials the statement of defendant on plea of guilty in three locations and his signature appears at the end of the document. He does not use an interpreter, he speaks English, he had the ability to easily communicate with his attorney and to the court and yet there was never any attempt to remove Mr. Banda or request a new attorney.

Once again this is not some young person with no education or contact with the judicial system. Mr. Ozuna was 23 years old at the time of the plea, had a twelfth grade education and had seven prior felony convictions. Ranging in severity from to a taking a motor vehicle without owners permission as a juvenile in 2003 to possession of stolen property to a drive by shooting in 2007, just one year before these crimes. (CP 23-31) As was stated by Ozuna when asked about his prior crimes. "... But a lot of those I just took pleas cause -- cause that's -- that's usually what they always come after me with."

The transcript of the “trial” where there is a discussion of the State’s final offer makes it clear that Mr. Ozuna has full knowledge of what is going on here. He directly addresses the court about the impact of the plea he has been offered. The claim that his counsel was ineffective is negated by the plea. The defendant was apprised of the plea as evidenced by the transcript. All parties, except Ozuna state this was not the first plea offer made. It is clear that he understood the other offers and was given apparently ample time to consider those offers which apparently were rejected. This plea resulted in Ozuna realizing a significant benefit. Yes he did go to prison BUT, the State agreed to dismiss the most serious charge of Kidnapping in the First degree and agreed to dismiss the weapon enhancements which would each have carried.

The section of the trial transcript where the court and the parties discuss the possibility of a plea covers nineteen pages of transcript. The colloquy between the court and Ozuna leaves no doubt that he knew what he was doing and the result of this plea. The “ineffectiveness” alleged in this appeal is of no consequences if the defendant made this informed decision. Once again this is not some eighteen year old person new to the criminal justice system. This is a twenty-three year old man who has seven prior offenses. It is clear from this record that Mr. Ozuna has a complete grasp of the legal system and the consequences of this plea. Here Ozuna took a

plea based on the extensive negotiation between he and the State and the final result was clearly vetted by the court to the extent the court suggested Ozuna consult with his family if possible Ozuna and the court discussed the impact of the sentence on both he and his family. CP 33-52

The testimony of his own attorney and investigator are stunning in their insight into this case. There can be no doubt that Ozuna knew what he was doing. It is absurd to think that someone who went so far as to get a document produced, during a plea negotiations, so that he would get “conjugal” visits did not take the plea voluntarily. (Supp RP 53-54) The allegation by Ozuna that he **had to** take this plea is not supported by the facts or the testimony. The agreement by the State, in the middle of trial, to offer an even more attractive plea offer and the ability of the defendant to demand such, indicates and supports the statement by Banda that he was confident with regard to the outcome of the trial. This position of strength allowed Ozuna to garner this deal which the Deputy Prosecutor when asked by the court stated “significantly” reduced Ozuna’s exposure.

Ozuna contradicts his own testimony first he states he was did not participate in any plea discussions until the negotiation during trial;

- A. Well, eventually -- the day that we were already going to go to trial that’s when I heard that I was going to get fourteen years. That’s what – that’s what Ms. Hanlon was offering. And I was like “No, I want to go to trial.” And then later on he ended bringing

some other paper and he was like well, this is another offer that – that’ she had offered -- look, compare this to -- to fourteen years. He goes “I never showed you this „cause I knew you wouldn’t take it anyways.” And he goes “So -- so you know, here’ s this one though, look at -- look at the difference, you know. This is your life.” And he would always like -- like -- in a sense kind of pressure me into taking it and I just felt that pressure; but --(Supp RP 103-04)

And then just ten lines later he says that he had participated in discussions with his attorney about offers and had even suggested what Banda needed to ask for;

Q. Okay. Had you and Mr. Banda had discussions about plea negotiations prior to trial?

A. Yeah.

Q. Had you indicated to him what you would accept?

A. Yes. He -- he asked me “Well, what’ s the lowest would you take if I try to get you a plea?” and this and that and he would -- we would try to talk about it real quick and I told him “Well, man, you know, **I’ m not guilty of this case or nothing and you know, maybe -- maybe one charge I’ m guilty of** but -- but man, that’ s -- that’ s not even nothing, you know, compared to what I’ m looking at.” I told him “Man, try to get me five years if anything you know?” (Emphasis mine.)

Ozuna claims that Banda somehow forced this plea and one of the methods he used to convince Ozuna was the ability to use a collateral motion to challenge this conviction. While Ozuna does state he discussed this type of challenge with Banda the fact is Ozuna came by that this information from a “jailhouse lawyer”;

...I was under a lot of pressure you know. And finally, I was like my only way out is to come back and collaterally attack within a year.

Q. Where did you learn about collateral attack?

A. I -- I heard it from the jail, from one -- like a -- a jailhouse lawyer.

Q. Mmm hmm. [Affirmative].

A. One that study up on -- studies up on a lot of law, they told that -- that I can be able to collaterally attack because I wasn't explained that -- that my lawyer's not doing nothing. I always had a lot of complaints about what Banda was doing

=

Q. Mmm hmm. [Affirmative].

A. -- he don't come to see me and he would -- and I explained everything and he was like "Well, that's insufficient effective counsel, you can be able to -- you know, if they don't let you -- fire him or anything," because I was telling him too, they're not letting me fire him or nothing; the judge said that he felt that he was sufficient. (Supp RP 106-07, emphasis mine.)

Ozuna's stated reason for pleading guilty is "just so that I can get out of here and come back and collaterally attack it." (Supp RP 115) He never says that it was not voluntary.

Earlier he was asked;

"What was the first offer you ever heard of that the State made on your case? A. Well, eventually -- the day that we were already going to go to trial that's when I heard that I was going to get fourteen years. That's what -- that's what Ms. Hanlon was offering" ... Q. So are you saying then the first time you ever learned of any type of plea offer was during the trial or on the first day of trial? A. Well the day -- the day the trial was supposed to already proceed yes." (Supp RP 102-03) And yet on cross-examination he states that he was going to withdraw his plea "like a week before -- before I even took the plea." (Supp RP 115)

Ozuna also claims that he contacted Mr. Banda's staff and another attorney and told them that he wanted to "fire" Mr. Banda. (Supp. RP 97,107, 113-114) It is very noteworthy that these people were not part of the hearing to determine if he should be allowed to withdraw his plea.

This section is very telling:

THE COURT:...

All right. Adrian, I need you to be able to talk quietly now with your lawyer and be able to also get input -- I don't know how -- from family members, if that's possible, but that can be done by communication,

MR. BANDA: It is serious. He's got children.

He's got a little girl, your Honor, a wife. Of course, I understand the state's position. They make an offer and they have to have a deadline. This is not an offer of twelve months or ten months. This is an offer of a lot of time. So consultation with the family is --

THE COURT: Well, there are bad consequences and there are worse consequences. You have to measure on a scale --

MR. OZUNA: May I speak, your Honor?

THE COURT: Not if -- I don't want you to say something that probably --

MR. BANDA: No. It's okay.

THE COURT: -- is not in your best interests. I don't know what you want to say.

MR. OZUNA: I'm not going to say nothing wrong. I do want to say, you know, that I just need some time to think about this. I'm not only making decisions for myself but I'm making decisions for my family as well, you know. There's other people involved, and I just need a little bit of time.

(CP 37-38)

This court should next read the entire testimony of Ozuna and the testimony of Mr. Banda and Ms. Goodman. There can be no doubt that

Ozuna was able to take an incredible period of time to review this last plea offer and have personal input, while in custody in the middle of trial, from his family and girl friend.

"Under these circumstances, his understanding of the nature of the charge may be assumed from his representation by presumptively competent counsel." In re Personal Restraint of Harris, 111 Wn.2d 691, 698, 697, 763 P.2d 823 (1988). (citing Marshall v. Lonberger, 459 U.S. 422, 437, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983) (absent evidence to the contrary, counseled defendant may be presumed to have been informed of the nature of the charges))."

Ozuna's allegation that Banda's trial skills were ineffective is akin to a person on an airplane complaining about the pilot's ability to fly while the plane was still on the ground. Counsel never had the chance to actually try his portion of the case because his client took the plea offer. Counsel on appeal, who was also counsel for the motion to withdraw the plea in the trial court, when queried by the court stated the following with regard to Banda's trial skills in conjunction with the officers who testified:

MR. MORGAN: But otherwise, as far as the officers were concerned, I thought Mr. Banda did a very good cross-examination of the officers. (Supp RP 25)

CrR 4.2(f) Motion to Withdraw CrR 4.2(f), which governs the withdrawal of a guilty plea, provides in part: 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. A "manifest injustice" is "an injustice that is obvious, directly observable, overt, not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). (Emphasis mine.) In Taylor, the Supreme Court discussed four indicia, any one of which would independently establish manifest injustice: (1) the denial of effective assistance of counsel, (2) the plea was not ratified by the defendant, (3) the plea was involuntary, and (4) the plea was not honored by the prosecution. CrR 4.2(f) places a "demanding standard" on the defendant. Taylor, 83 Wn.2d at 597. See also State v. Watson, 63 Wn. App. 854, 856-57, 822 P.2d 327 (1992).

“We review a trial court's decision denying a motion to withdraw for an abuse of discretion.” State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) (citing State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001)).

Ozuna's claims fall under the first indicia set forth in Taylor, supra. The test for effective assistance of counsel is whether, upon reviewing the entire record, the defendant received effective representation and a fair and impartial hearing. State v. Ermert, 94 Wn.2d 839, 849, 621 P.2d 121 (1980). See State v. Butler, 17 Wn. App. 666, 678, 564 P.2d 828 (1977) ("a serious dereliction of duty"); State v. Perez, 33 Wn. App. 258, 264, 654 P.2d 708 (1982) ("outside the range of competence required of attorneys

representing criminal defendants"); State v. Stephan, 35 Wn. App. 889, 895, 671 P.2d 780 (1983) counsel's erroneous reading of statute overcome by court's act of informing defendant of the correct interpretation. "In a plea bargaining context, 'effective assistance of counsel' merely requires that counsel 'actually and substantially [assist] his client in deciding whether to plead guilty.'" State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)).

Counsel for Ozuna state's with regard to the allegation that he did not "voluntarily" take the plea;

"When we come to the issue of the voluntariness of the plea, that's a situation where probably more testimony is going to be needed on that; but he felt -- I don't have a choice. I've heard all of this testimony there hasn't been effective cross-examination, there wasn't an investigation done, we haven't had any kinds of -- cons -- conversations between us; I really don't know what the heck is happening, I may as well take what I can get. And that's not what not what (sic) it's supposed to be; it's supposed to be a truly understandable plea. I think what Mr. Ozuna was doing as the Court went through the colloquy that it's required to do was basically saying yes to everything just to get it over with. Now, we do know that that does happen with criminal defendants that they just want to get it over with but usually that happens up -- up front. I just want to get out of jail if it's -- I'll take a guilty plea; just get me out of jail. In this particular case we're not in that situation, Mr. Ozuna was facing significant amounts of time, he got a significant amount of time, or will have when the sentencing is completed unless this plea is withdrawn.

I submit that if the matter -- if the plea is withdrawn and the matter goes back to trial he does have defenses to

those charges of first degree robbery and first kidnapping –
(Supp RP 17-18)

What is clear from this record is that counsel on appeal and at the time of the motion for withdrawal had spoken to Ozuna. Now Ozuna has this second perspective, not better than that given by Banda but different. So now Ozuna suddenly says that he was only telling the court what was needed for the court to take his plea and for him to get it over with.

This is completely refuted by the one statement made by Ozuna on the record that he needed time to consider this because it not only affected him but his family. It is completely refuted by the testimony of Mr. Banda, Ms. Goodman and the information proffered by the deputy prosecutor who handled the case. They all either made statements on the record under oath or responsive to the courts inquiry that show Ozuna was in discussion with his attorney, investigator, girlfriend, and family throughout the time leading up to and including the actual taking of the plea.

Just because another lawyer looks at a case and says well I would have done this that and the other, does not render the services of the first lawyer ineffective. Nor does it suddenly render the actions of the trial court when it took the plea nor the statements of the defendant at the time of that plea moot. Those words are the record this court must look to, to see if this was a valid plea entered into voluntarily by this defendant who after time to

reflect or as the State believes, after learning something from appellate counsel or a “jailhouse lawyer” suddenly says well I really did not mean all of those words I said when I plead or before I plead or during all those other offers. I was unclear of the situation even though I have seven other felonies but now let’s do that over again because my new lawyer says he would have done this all differently.

As the case law cited above indicates, this court will not second guess the trial tactics and strategies of an attorney. Obviously the trial court ruled on this very motion did just that.

Here we have a defendant that takes advantage of a plea, gets a deal that significantly reduces the amount of time that he will serve and now is trying to using the system for a “do over.” This is why the law says that once you plead guilty you do not get to appeal. This is why the courts take such great pains to insure that the act of pleading guilty is minutely detailed on the record, as it was here. This is not a situation where the defendant stands and makes single word responses to some script read by a busy trial judge. The judge who took this plea made a very specific effort to insure that Ozuna understood what he was doing and the consequences of those actions. The entire plea section of this case covers twenty pages, CP 33-52. During portion of the trial the court takes special care to insure Ozuna understands what he is doing and that the plea meets the proper standards.

This court need only review that portion of the record of this case to determine that this appeal is frivolous.

THE COURT:... An Alford plea is fine. An Alford plea is the same as a regular plea. All you're doing if you're pleading -- when you're saying an Alford plea, Adrian, is you're saying I'm pleading guilty but I'm not agreeing with them that I did this. I am pleading guilty to take advantage of the deal that's been offered. That's what an Alford plea is. It's the same as a regular plea. It goes on your record, it subjects you out to the penalties, which we will go over. Do you understand that?

MR. OZUNA: Yes, your Honor.

THE COURT: You can't come back here next week and say I change my mind. If you do this now, that's it. Is that clear?

MR. OZUNA: Yes. (CP 42-3)

In this case not only had the defendant had experienced trial counsel he had had occasion to actually listen to the testimony of the witnesses against him. He had heard what the jury had heard. What better method to evaluate your chances of success or an acquittal than to preview the other side's case. Ozuna obviously evaluated what he had heard, what his attorney had been able to do with regard to the witnesses and their testimony and based on this extensive information determined the best thing for him to do was to take the plea offer and reduce his exposure.

It is of great importance that the record reflects Ozuna approached the State for a new offer. Because of the more lenient nature of that request and the stage of the proceedings the parties, both counsel, went to

discuss the case with either the elected prosecutor or the chief criminal deputy prosecutor for authorization to make this new offer. The nature of this conversation is very extensive and is attached to this motion as Appendix A.

Ozuna does not dispute that the trial court engaged in extensive colloquy with him about his guilty pleas and that it only accepted his plea when satisfied that his decision to plead guilty was knowing, voluntary, and intelligent. The trial court even took the extraordinary step and granted Ozuna a hearing and ordered his trial counsel and investigator to testify under oath. The trial court could have relied solely on the written document, that was within its discretion. See for example State v. Kilgore, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002) (trial court need not take testimony in ruling on ER 404(b) evidence); State v. McLaughlin, 74 Wn.2d 301, 444 P.2d 699 (1968) (whether to hear testimony in pretrial suppression hearing is within trial court's discretion).

When 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. 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 various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable. State v. Perez, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982); State v. Hystad, 36 Wn. App. 42, 45, 671 P.2d 793 (1983).

Here, the trial court had before it Ozuna's eight-page Statement of Defendant on Plea of Guilty. The court questioned Ozuna to determine if he understood an Alford plea.¹ The court asked him if he understood the sentencing possibilities. The court questioned Ozuna about the constitutional rights he was giving up. The court questioned Ozuna about whether he understood the consequences of pleading guilty. And the court questioned Ozuna about whether his pleas were freely given or the product of coercion. The court asked him to explain why he was making the plea. The court explained the elements of the crime and that the State would have to prove them beyond a reasonable doubt and went so far as to ask Mr. Banda if the testimony to that point if "unrefuted" would substantiate the charges. See In re Pers. Restraint of Montoya, 109 Wn.2d 270, 278, 744 P.2d 340 (1987). Finally, the court found that the plea was "knowingly, intelligently, and voluntarily" given.

¹ North Carolina v. Alford, 400 U.S. 25, 915 S.Ct. 160, 27 L.Ed.2d 162 (1970).

To overturn such a finding, this court would need to consider the finding to be "manifestly erroneous". State v. McLaughlin, 59 Wn.2d 865, 870, 371 P.2d 55 (1962). Here there is no evidence justifying such a finding.

IV. CONCLUSION

The actions of the trial court should be upheld, the State's and this appeal should be dismissed.

The trial court properly denied an almost identical motion. A review of the Appellant's brief and the Memorandum of Authorities submitted for the trial courts review prior to Ozuna's motion to withdraw his guilty plea shows that the two documents are for all intent and purpose, identical. (CP 669-95)

The trial court judge reviewed this very same case law; considered his personal observations and knowledge of all of the parties; their interactions and participation during the trial and the testimony and statements at the hearing to withdraw the guilty plea. The trial court then issued a nine page memorandum decision which in great detail, supported by case law denied the motion; the self-same motion which has now been submitted to this court as an appeal.

Ozuna's own testimony does not support his allegation that his plea was not voluntary nor does the testimony of his attorney, his investigator or the plea bargain which his attorney was able to wrest from the State.

It is the States position that this final offer demonstrates that his attorney was effective. Ozuna has buyers' remorse; this is not enough to overturn a valid plea.

This appeal should be dismissed.

Respectfully submitted this ²⁴ day of August 2011,

A handwritten signature in black ink, appearing to read "David B. Trefry". The signature is written in a cursive style with a large, circular flourish at the beginning.

David B. Trefry WSBA # 16050
Special Deputy Prosecuting Attorney
Yakima County, Washington

APPENDIX 'A'

THE COURT: Now, did you have discussions with Mr. Banda before the trial about -- resolution of the case?

MS. HANLON: I did Your Honor.

THE COURT: How many?

MS. HANLON: I can't say --

THE COURT: More than one?

MS. HANLON: -- definitely more than one but I can't say -- I can't put a number on how many because I didn't keep track exactly how many but we talked at -- you know, Omnibus across the jail or at triage we'd talk. I had -- prepared an offer letter that set forth, you know, ranges and how much time he was looking at and so we had discussions, you know, probably months before this trial, many months.

THE COURT: Did you change your offer? Was there an evolution -- evolutionary process whereby if -- if -- if you follow that, where -- where the State modified its approach, where the State modified its offer, where the defense made counter offers with -- did that process take place?

MS. HANLON: That process did take place and -- up to the point at -- at trial where it got -- you know, we had a specific offer and then that offer got better even during trial after --

THE COURT: That's exactly my point. Prior to trial there was -- there was discussions about resolution of the case; there were offers, counter offers, there was discussion.

MS. HANLON: Correct.

THE COURT: Then during the trial there were further discussions.

MS. HANLON: Correct. And Mr. Banda wanted an offer better than I could make and because of our office guidelines I needed to talk to Ken Ramm or Jim Hagarty to get approval on offers, especially in the middle of a trial, because we don't like to do that in the middle of a trial once -- you know, we've already invested this time and resources into having a trial.

So we went upstairs and talked to -- I believe it was Mr. Hagarty about what type of offer we could make and I went up with Mr. Banda and --

THE COURT: So Mr. Banda actually participated in that discussion with Mr. Hagarty?

MS. HANLON: We both went up there. Yes. And -- or it might have been Ken Ramm; it was one of the two -- Mr. Hagarty or -- Ken --

THE COURT: Ken -- Ken -- Mr. Hagarty is the prosecutor; Ken Ramm is the chief criminal deputy prosecutor.

MS. HANLON: Correct. And discussed basically what we were proposing to do. And that offer was accepted and we came --

THE COURT: So you got authority from the State -- from -- from your boss to modify --

MS. HANLON: Right.

THE COURT: -- an offer that you had made prior to trial?

MS. HANLON: Correct.

THE COURT: You didn't just renew the offer you had made prior to trial?

MS. HANLON: Correct. The offer got better.

THE COURT: When you -- alright. When you say better you mean you were willing to let the defendant plead guilty and you -- the State was willing to recommend less prison time?

MS. HANLON: Correct Your Honor. (Supp RP 38-41)

....

THE COURT: Alright. So you had rested. That's the point in the trial -- we sent the jury out after you rested and it was then that these intense discussions to try to resolve the case took place?

MS. HANLON: Well, I -- I guess I would say additional discussions because we had been, you know, prior to us resting we had been in negotiations as well.

THE COURT: In other words, while you were presenting your witnesses?

MS. HANLON: Correct.

THE COURT: Mr. Banda and you were having discussions? MS.

HANLON: Correct.

THE COURT: Were you under the impression that -- Mr. Banda was talking to the defendant about those?

MS. HANLON: Yes Your Honor. And I think that came about in terms of him telling me my client wants X number of years or my client will take X number of years.

THE COURT: Well, did you have any actual knowledge that it took place or did you -- are you basing that just on what Mr. Banda told you?

MS. HANLON: Well, after --

THE COURT: Sometimes it --

MS. HANLON: -- after we talked I would see him go back and talk to his client or I --

THE COURT: -- that's what I mean. You -- you -- you had a visual.

MS. HANLON: Right. A visual or I stepped out of the room. Often times, you know, if he wanted to talk to him I would just step out in the hall so that he could do that freely.

THE COURT: Okay. Was it your observation that -- Mr. Ozona's family was also nearby participating in any of those discussions?

MS. HANLON: I saw all of them. They were -- they were seated -- right behind us here in the gallery and I didn't --

THE COURT: I didn't know who those people were but eventually I learned that he had family members; a father maybe?

MS. HANLON: I think there was a -- yeah, a father and a girlfriend or a wife --

THE COURT: Other somebody.

MS. HANLON: -- of something or another of his child. But they were back there and I did see him talking with them.

THE COURT: I could -- I saw them talking to Mr. Ozuna a lot and -- now, -- okay. So eventually the agreement that you were willing to do -- and that was accepted by the defendant, was a modification downward of the -- of the offer that you had made prior to trial?

MS. HANLON: Correct Your Honor.

THE COURT: Had there been other modify-- I guess I want to narrow that also. There were other modifications prior to trial?

MS. HANLON: I believe so Your Honor. Perhaps Mr. Banda can testify more to that; but --

THE COURT: More than one maybe.

MS. HANLON: I believe there was more than one.

THE COURT: Now, if Mr. Ozuna had not pled guilty and gone to trial and been convicted, what was his exposure?

MS. HANLON: On a robbery I with a firearm enhancement at nine points -- the range, I believe, would be a hundred and twenty-nine to hundred and seventy-one months and there -- with a firearm enhancement as an additional sixty months. On a kidnapping first degree with a firearm enhancement -- one forty-nine to one hundred ninety-eight months, again, plus sixty months for enhancement. Eluding with nine points is twenty-two to twenty-nine months and assault in the second degree is sixty-three to eighty-four months.

THE COURT: So the exposure, because of the firearm enhancements, was deep and --

MS. HANLON: Oh, and we had an eluding enhancement as well.

THE COURT: -- and -- and some of these enhancements have to run consecutive, is that correct?

MS. HANLON: Correct Your Honor. We can't run them concurrent by law.

THE COURT: So his exposure was, compared to the agreement that was made, would you say it was significant or -- or -- or mod -- or just nominal?

MS. HANLON: I think it was significant Your Honor.

THE COURT: Now, the charge that you agreed to drop was the kidnapping correct?

MS. HANLON: Correct. (Supp RP 42-46)