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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 331067-7-III

MATTHEW DEVORE, Appellant,

v.

STATE OF WASHINGTON, Respondent.

Appellant's Reply Brief

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I. INTRODUCTION

The State made a choice to charge Matthew DeVore with murder in the second degree on November 26, 2014. Mr. DeVore made a choice to plead to that charge at his arraignment on December 4, 2014. The trial court made a choice to accept that plea on December 22, 2014. The State argues in their brief that defense counsel should have informed the State that Mr. DeVore was going to plead guilty, that Mr. DeVore was not prejudiced by the late amendment, and that there was not a factual basis for the plea.

The State cites zero authority for the proposition that defense counsel has an obligation to inform the State that the defendant intends to plead guilty at arraignment. Mr. DeVore was clearly prejudiced by the State filing a late amendment. Finally, the trial court found that Mr. DeVore's plea was knowing, intelligent, and voluntary.

II. REPLY

A. **The Trial Court Erred By Allowing The State To File An Amended Information.**

As *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980), *State v. Ford*, 125 Wash.2d 919, 891 P.2d 712 (1995), and CrR 4.2(d), make clear, the obligation of the trial court is to ensure that a plea is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgement upon a plea of guilty unless it is satisfied that there is a factual basis of the plea. In this case, at the December 22, 2014 hearing, the trial court was satisfied that the plea entered at arraignment was entered voluntarily,

competently and with an understanding of the nature of the charge and consequences of the plea. Further the court found that there was an adequate factual basis to enter the plea. RP 12/22/14 at 29:18-21.

Here, unlike in *Ford*, the Court did not have any concerns about whether the plea was knowing, intelligent and voluntarily made with an understanding of the charges and consequences. Mr. DeVore, being in the best position to understand the case, had spent significant time with his attorney and had discussed possible defenses and the plea in depth. There was no hesitation on the part of defense counsel or Mr. DeVore at the arraignment to enter a guilty plea.

The State is critical of the defense for failing to inform the State of their plans and tactics prior to the December 4, 2014. The State argues that, because of defense counsel's failure to share the defense plan to plead guilty at arraignment, no prejudice can exist. The defense had no obligation in this instance to inform the State that the defendant intended to plead guilty. Defense counsel's duty is to defend his client, not make the State's job easier by sharing defense tactics. Defense counsel is an advocate for his client, not a law clerk for the government.

Mr. DeVore faces a myriad of prejudices due to the trial court allowing the State to file a late amendment. First, the late amendment subjects Mr. DeVore to additional jeopardy in the form of a higher sentence. Second, by accepting responsibility and pleading to second degree murder, Mr. DeVore "showed his hand". As a result, he has no power to plea bargain and he has admitted to the world that he is guilty of murder in the second degree and the aggravating circumstance.

B. A Valid Plea With A Factual Basis Was Entered By Mr. DeVore.

While the State objected to the finding of fact that there was an adequate basis for the entry of the plea, the Court found that there was an adequate basis for the entry of the plea. RP 12/22/2014 at 26-27. A person does not have to intend the result that is a crime, only the action that causes a crime.

Washington Pattern Jury Instructions are instructive on this issue. A person commits the crime of murder in the second degree when with intent to cause the death of another but without premeditation, he or she cause the death of such person or a third person. WPIC 27.01. "To constitute murder there must be a causal connection between the criminal conduct of a defendant and the death of a human being such that the defendant's act was a proximate cause of the resulting death." WPIC 25.02. "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crimes." WPIC 10.01. Knowledge is defined by WPIC 10.02 as:

A person knows or acts knowingly or with knowledge with respect to a circumstance when he or she is aware of that circumstance. If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact. When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally.

Mr. DeVore's statement on plea of guilty stated:

One the date charged in Benton County, Washington, I saw Thomas Christian, the man that was living with and dating my wife, at a business in Kennewick. I went to the business early in an attempt to avoid seeing Mr. Christian. When I unexpectedly saw Mr. Christian, I became overcome with emotion and stabbed Mr. Christian once. As a result of my stabbing Mr. Christian, Mr. Christian died. I also acknowledge that my

acts caused a destructive and foreseeable impact on others, including my wife.

CP 70.

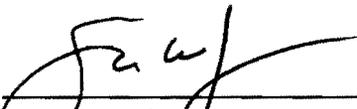
Mr. DeVore only had to intend the act of stabbing Mr. Christian which resulted in his death for there to be a factual basis. Mr. DeVore clearly intended to stab Mr. Christian. Even overcome with emotion, the act of stabbing another individual takes intent but not premeditation. The purpose behind the factual basis requirement is to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. *McCarthy v. United States*, 394 U.S. 459, 467, 22 L. Ed. 2d 418, 426, 89 S. Ct. 1166 (1969), quoting from Fed. R. Crim. P. 11, Notes of Advisory Committee on Criminal Rules; *accord, In re Keene*, 95 Wn.2d at 209. The factual basis requirement of CrR 4.2(d) is satisfied if there is sufficient evidence for a jury to conclude that defendant is guilty, but the trial court need not be convinced of an accused's guilt beyond a reasonable doubt. *State v. Durham*, 16 Wn. App. 648, 653, 559 P.2d 567 (1977).

III. CONCLUSION

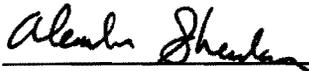
In their brief, the State ignores the fact that they made a choice in this matter to charge Mr. DeVore with murder in the second degree. The State was well aware that Mr. DeVore had the right to plead to guilty at arraignment, which he did. Depending on which version of the State's story they tell, the State either forgot to file the amended information charging murder in the first degree or tactically chose not file the amended charge until after Mr. DeVore pled.

Regardless of the reason, Mr. DeVore exercised his right to plead to the charge the State filed. The trial court accepted that plea as knowing, voluntarily, and with an adequate factual basis. To allow the State to then file an amended charge, after the plea was entered, has no basis in the law and prejudices Mr. DeVore.

Respectfully submitted this 22nd day of January, 2016.



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CERTIFICATE OF SERVICE

I declare, under penalty of perjury under the laws of the State of Washington that on this day I electronically transmitted to the State and delivered to Matthew DeVore a copy of the Response Brief directed to the following:

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