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Division III
State of Washington
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No. 35313-3-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

RONALD ROSCOE HEVEWAH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Judge Annette S. Plese

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in accepting Mr. Hevewah's guilty pleas to the charges in the amended information, because he was not made sufficiently aware of the nature of the charges prior to the entry of his guilty pleas.
2. Mr. Hevewah's guilty pleas were not knowing, intelligent, and voluntary because he was not made sufficiently aware of the nature of the charges prior to the entry of his guilty pleas.
3. The trial court erred in accepting Mr. Hevewah's guilty pleas to counts II and III of the amended information, where there was an inadequate factual basis in the record for each charge.
4. Mr. Hevewah's guilty pleas to counts II and III of the amended information were not voluntary because there was an insufficient factual basis for each charge.
5. An award of costs on appeal against Mr. Hevewah would be improper in the event that the State is the substantially prevailing party.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the guilty pleas were not knowing, intelligent, and voluntary because Mr. Hevewah was not made sufficiently aware of the nature of the charges prior to the entry of his guilty pleas.

Issue 2: Whether the guilty pleas to counts II and III of the amended information were involuntary because there was an insufficient factual basis for each charge.

- a. For count II, whether there was a factual basis establishing that Mr. Hevewah caused bodily harm to Mr. Campbell, which was accompanied by substantial pain that extended for a period sufficient to cause considerable suffering.
- b. For count III, whether there was a factual basis establishing that Mr. Hall was a licensed or certified nurse, physician, or health care provider within the meaning of RCW 9A.36.031(1)(i).

Issue 3: Whether this Court should deny costs against Mr. Hevewah on appeal in the event the State is the substantially prevailing party.

C. STATEMENT OF THE CASE

A City of Spokane Police Officer filed a probable cause statement alleging that Ronald Roscoe Hevewah committed a crime in December 2015. (CP 4-8, 15-19, 22-26). The probable cause statement alleged that Andrew R. Hall can testify to the following statements:

- He was working for AMR . . .
- He responded to 5th and Browne Avenue to transport [Mr. Hevewah] to Sacred Heart Medical Center
- He was with [Mr. Hevewah] who was restrained in soft restraints and in the back of the ambulance
- He was checking [Mr. Hevewah's] vital signs and [Mr. Hevewah] was saying racial slurs . . .
- He saw [Mr. Hevewah] clear his throat and spit on his pants
- He believes [Mr. Hevewah] did this intentionally[.]

(CP 7, 18, 24).

The probable cause statement also alleged that Raymond L. Campbell, an armed security guard for Phoenix Protective Services, can testify “[h]e watched [Mr. Hevewah] charge at him with a black metal weapon . . . in his hand . . . [and] [h]e moved behind his car and put his hand on his firearm[.]” (CP 6, 17, 23). The statement alleged Mr. Campbell can testify “[h]e felt threatened and afraid that [Mr. Hevewah] was going to hurt him with the weapon[.]” (CP 6, 17, 23).

The probable cause statement alleged that a witness can testify to the following facts regarding this incident with Mr. Campbell:

- He saw a marked private security vehicle with a marked security guard, [Mr.] Campbell, contact the male from a distance
- He saw [Mr. Hevewah] charge at [Mr. Campbell] aggressively with the weapon in his hand

-He saw [Mr. Campbell] back behind his security vehicle and put his hand on his firearm[.]

(CP 6, 17, 23).

The probable cause statement also alleged that two other witnesses can testify to seeing Mr. Hevewah charge at a security guard while holding a weapon in his hand. (CP 5, 7, 16, 18, 24-25).

The State charged Mr. Hevewah with the following offenses: fourth degree assault against Mr. Hall; second degree assault against Mr. Campbell; second degree assault against an individual named Anthony Joseph Kyle; and third degree malicious mischief. (CP 20-21).

Defense counsel filed a motion for a competency evaluation of Mr. Hevewah pursuant to RCW chapter 10.77, on the basis that Mr. Hevewah may not be competent to stand trial or assist in his defense. (CP 34-39). The trial court granted the motion, stayed the proceedings, and ordered a competency evaluation of Mr. Hevewah. (CP 33-39).

The competency evaluator administered a Mini-Mental Status Examination for cognitive deficiency, and Mr. Hevewah scored in the moderately impaired range. (CP 43, 45). The evaluator diagnosed Mr. Hevewah with alcohol dependence, post alcohol withdrawal syndrome (wet brain), and antisocial personality features. (CP 41-43). The competency evaluation found Mr. Hevewah not competent to stand trial, and recommended commitment to Eastern State Hospital for competency restoration. (CP 40-46). The trial court ordered

Mr. Hevewah committed to Eastern State Hospital for competency restoration treatment, for a period of 90 days. (CP 47-59).

Following this commitment, Mr. Hevewah was re-evaluated and found competent to stand trial. (CP 53-59). The evaluator wrote the following for Mr. Hevewah's ability to plan a legal strategy with an attorney:

[At his first competency evaluation], when questioned about possible legal strategies in his case, Mr. Hevewah struggled to express an adequate factual knowledge regarding the plea bargaining process. However, when given a hypothetical scenario, he had demonstrated critical thinking in his ability to weigh the benefits and costs and choose a course of action that would produce a desired outcome. [At his re-evaluation for competency], Mr. Hevewah again reflected that he would possibly be amenable to a plea bargain or attempting a trial on his above strategy, but seemed limited in his ideas by the lack of information in his case that had been provided to him. He defined a plea bargain as, "between the prosecutor and my attorney for probation or lighter sentencing, but I would have a record again."

(CP 57-58).

Following his re-evaluation, the trial court entered findings of fact, conclusions of law, and an order finding Mr. Hevewah competent to proceed in this case. (CP 53-59, 63-64). The stay of the proceedings for the competency process was lifted, and the case was set to proceed. (CP 60-64; RP¹ 3-4).

¹ The Report of Proceedings consists of one volume reported by Amy Wilkins and one volume reported by Heather M. Gipson. References to "RP" herein refer to the volume reported by Amy Wilkins. The Verbatim Report of Proceedings for the Guilty Plea Hearing and Sentencing was transcribed prior to this current appeal, and therefore, it is located in the Clerk's Papers. *See* CP 177-194.

Subsequently, the State filed an amended information charging Mr. Hevewah with the following offenses: second degree assault against Mr. Kyle; third degree assault against Mr. Campbell; and third degree assault against Mr. Hall. (CP 135-136). The second degree assault was charged as follows:

That the defendant, [Mr. Hevewah], in the State of Washington, on or about December 05, 2015, did intentionally assault [Mr. Kyle], with a deadly weapon, to-wit: T shaped metal rod[.]

(CP 135).

The third degree assault against Mr. Campbell was charged as follows:

That the defendant, [Mr. Hevewah], in the State of Washington, on or about December 05, 2015, did, with criminal negligence, cause bodily harm to [Mr. Campbell], which was accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering[.]

(CP 135).

The third degree assault against Mr. Hall was charged as follows:

That the defendant, [Mr. Hevewah], in the State of Washington, on or about December 05, 2015, did intentionally assault [Mr. Hall], knowing him to be a nurse, physician or health care provider who was performing his or her nursing or health care duties at the time of the assault[.]”

(CP 135).

Mr. Hevewah pleaded guilty to the three charges in the amended information. (CP 135-136, 138-149, 153-167, 177-194). The amendments to the information were filed on the day of the guilty plea hearing. (CP 134-136, 178).

Mr. Hevewah's statement of defendant on plea of guilty form lists the charges as follows:

I am charged with: 2nd Assault and 2 cts. of 3rd Assault.
The elements are: As amended.

(CP 138).

The form also states:

I plead guilty to:
count I: 2nd Assault
count II: 3rd Assault
count III: 3rd Assault
in the amended Information. I have received a copy of that Information.

(CP 147).

The form does not include a statement by Mr. Hevewah. (CP 147).

Instead, Mr. Hevewah agreed that “[i]nstead of 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 148, 184-185).

At the guilty plea hearing, defense counsel stated:

Your Honor, for the record, we do have a copy of the Amended Information. Mr. Hevewah does have the Amended Information in front of him. However, he does not have his glasses so he would have a hard time reading it.

Your Honor, Mr. Hevewah and I did review the guilty plea last week I believe on Thursday or Friday. I did give him a copy of the plea statement, and I believe we are ready to proceed at this time.

(CP 178).

When asked by the trial court if he has any trouble reading or writing, Mr. Hevewah responded “[n]o, I’m all right. I just need my glasses.” (CP 179). Mr. Hevewah informed the trial court he understood he was going to enter pleas to the charges of second degree assault and two counts of third degree assault in the amended information. (CP 179). The trial court did not read Mr. Hevewah the amended information. (CP 178-193).

In order to establish a factual basis for the charges, the trial court read the following facts into the record, in relevant part:

Mr. Kyle would testify he’s a resident at the South Browne address. He saw you outside. You appeared angry and out of it. He tried to have a conversation with you. He saw a knife² in your hand. You got within one to two feet of him. You threw two or three hard punches attempting to hit him with the weapon. He thought you were out to kill him and definitely a danger. He was going to be injured. . . . The officers responded to this call. They saw you had a black metal object When one of the people, Mr. Raymond [sic], who is a security guard came to help you, you charged at him and looked like you were going to stab him. Mr. Campbell would testify that he saw you in the middle of the street, tried to help the AMR That you charged at him with a black metal weapon still in your hand. That he was able to stop you. He felt threatened and afraid. It says here that you were placed in restraints at the hospital. That at that time, one of the - - Mr. Hall was trying to check your vitals. You said a whole bunch of racial slurs to him. You spit on him while he was trying to check your vitals.

(CP 186-187).

² Defense counsel later clarified Mr. Hevewah never had a knife on him, but rather, the weapon “was I believe rebar formed in the shape of a T, and I believe it was being held between his fingers.” (CP 188-189). The probable cause statemen alleged that Mr. Kyle can testify to “[s]eeing a dark bar or ‘knife’ in [Mr. Hevewah’s] hand.” (CP 4, 15, 22).

The trial court then found that “[b]ased upon the affidavit of facts that’s in the court file, I do believe there’s a factual basis for the second degree assault and two counts of third degree assault.” (CP 188). The trial court accepted Mr. Hevewah’s guilty plea and found him guilty of the three charges in the amended information. (CP 188).

The trial court signed the following statement listed at the end of Mr. Hevewah’s statement of defendant on plea of guilty form:

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 149).

At sentencing, the trial court imposed only mandatory costs. (CP 160-161, 191). Defense counsel informed the trial court “[y]our Honor, one thing Mr. Hevewah wanted me to tell the Court is that he has no income, and we’ve had the discussion that as several courts have said, you know, if they had the discretion to waive the fines, they’d waive the fines, but the legislature.” (CP 192).

The felony judgment and sentence contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 162).

Mr. Hevewah appealed. (CP 201). The trial court entered an Order of Indigency, granting Mr. Hevewah a right to review at public expense. (CP 218-219).

Introduction

As a threshold matter, due process requires that a trial court not accept a guilty plea without first determining that it is made voluntarily, competently and with an understanding of the nature of the charges and consequences of the plea. CrR 4.2(d); *In re Pers. Restraint of Ness*, 70 Wn. App. 817, 821-22, 855 P.2d 1191 (1993); U.S. Const. amend. 14; Wash. Const. art. 1, §3. “A guilty plea does not preclude an appeal as to the circumstances under which the plea was made.” *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 205, 622 P.2d 360 (1980). Involuntariness of a guilty plea is a constitutional error that a defendant can raise for the first time on appeal. *State v. Knotek*, 136 Wn. App. 412, 422-23, 149 P.3d 676 (2006).

The circumstances surrounding entry of a guilty plea are reviewed de novo. *State v. Buckman*, 409 P.3d 193, 197 (Wash. 2018); *see also Young v. Konz*, 91 Wn.2d 532, 536, 588 P.2d 1360 (1979). The State bears the burden of demonstrating the validity of a guilty plea. *See State v. Oseguera Acevedo*, 137 Wn.2d 179, 193, 970 P.2d 299 (1999).

Issue 1: Whether the guilty pleas were not knowing, intelligent, and voluntary because Mr. Hevewah was not made sufficiently aware of the nature of the charges prior to the entry of his guilty pleas.

The trial court did not read the amended information to Mr. Hevewah at the guilty plea hearing, and although Mr. Hevewah received a copy of the amended information at the hearing, he could not read it. Mr. Hevewah was not

made aware of the requisite state of mind required for each of the three charges he pleaded guilty to, nor was he made aware of the law as it related to the facts presented. The guilty pleas were not knowing, intelligent, and voluntary because Mr. Hevewah was not made sufficiently aware of the nature of the charges prior to the entry of his guilty pleas.

“Due process requires that a defendant be apprised of the nature of the offense in order for a guilty plea to be accepted as knowing, intelligent, and voluntary.” *State v. Osborne*, 102 Wn.2d 87, 92-93, 684 P.2d 683 (1984). “A guilty plea cannot be voluntary in the sense that it constitutes an intelligent admission unless the defendant is apprised of the nature of the charge, the first and most universally recognized requirement of due process.” *Keene*, 95 Wn.2d at 207 (internal quotation marks omitted) (quoting *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S. Ct. 2253, 49 L.Ed.2d 108 (1976)). “[B]efore a guilty plea can be valid, the defendant . . . must be given notice of the nature of the charges and the elements the State must prove.” *State v. Lujan*, 38 Wn. App. 735, 737, 688 P.2d 548 (1984) (citing *State v. Chervenell*, 99 Wn.2d 309, 662 P.2d 836 (1983)).

“To be made sufficiently aware of the nature of the offense, the defendant must be advised of the essential elements of the offense; he must be given ‘notice of what he is being asked to admit.’” *State v. Holsworth*, 93 Wn.2d 148, 153, 607 P.2d 845 (1980) (quoting *Henderson*, 426 U.S. at 647). A defendant is adequately

informed of the nature of the charges if made aware of the acts and state of mind necessary to constitute the crime. *Id.* at 153 n.3. A defendant “must have been made aware of the law as it related to the facts.” *Osborne*, 102 Wn.2d at 94 (citing *Chervenell*, 99 Wn.2d at 319).

In *Osborne*, our Supreme Court held that two defendants charged with second degree felony murder were made sufficiently aware of the nature of the charge prior to the entry of their guilty pleas. *Osborne*, 102 Wn.2d at 92-95. The state of mind the State was required to prove was the same state of mind necessary to prove the underlying felony of assault, which required the State to prove the defendants acted knowingly. *Id.* at 93.

The Court found that the defendants were made aware that the State was required to prove they acted knowingly. *Id.* at 93-95. The Court reasoned that the prosecutor read the information to the defendants at the plea hearing, and “[i]t is clear from this language that some sort of knowing, purposeful conduct is contemplated.” *Id.* at 94. The Court also acknowledged that “[m]ore . . . is required of the State than a mere showing that petitioners were made aware of the factual assumptions on which the court and the State were proceeding.” *Id.*

Here, at the time his guilty pleas were taken, Mr. Hevewah was not made sufficiently aware of the nature of the charges set forth in the amended information. He was not given notice of the elements the State must prove. *See Lujan*, 38 Wn. App. at 737. Mr. Hevewah was not made aware of the State of

mind necessary to constitute each crime. *See Holsworth*, 93 Wn.2d at 153. The second degree assault count against Mr. Kyle, and the third degree assault count against Mr. Hall, required the State to prove that Mr. Hevewah intentionally assaulted each individual. (CP 135); *see also* RCW 9A.36.021(1)(c) (second degree assault with a deadly weapon); RCW 9A.36.031(1)(i) (third degree assault against a nurse, physician, or health care provider). The third degree assault count against Mr. Campbell required the State to prove that Mr. Hevewah acted with criminal negligence to cause bodily harm to Mr. Campbell. (CP 135); RCW 9A.36.031(1)(f) (third degree assault, as charged against Mr. Campbell).

In addition, although the facts were read at the guilty plea hearing, Mr. Hevewah was not made aware of the law as it related to these facts. (CP 186-187); *see also Osborne*, 102 Wn.2d at 94. Unlike *Osborne*, the amended information here was not read to Mr. Hevewah at the guilty plea hearing. (CP 178-193); *Cf. Osborne*, 102 Wn.2d at 94. Although Mr. Hevewah was made aware of the facts the trial court and the State were relying on, this is not enough to show that Mr. Hevewah was made sufficiently aware of the nature of the charges. *See Osborne*, 102 Wn.2d at 94.

There is no indication in the record that Mr. Hevewah read the amended information, or that it was read to him. The amendments to the information were filed on the day of the guilty plea hearing. (CP 134-136, 178). Defense counsel informed the trial court he reviewed the guilty plea with Mr. Hevewah, but he did

not state that he had read the amended information to Mr. Hevewah. (CP 178). The guilty plea form did not list the elements of each crime. (CP 138, 147). Although Mr. Hevewah was given a copy of the amended information at the plea hearing, he was unable to read it. (CP 178-179). The guilty plea form does state “I have received a copy of that Information.” (CP 147). However, given Mr. Hevewah’s cognitive deficiency and the competency restoration process, including challenges and limitations in understanding the plea bargain process, it cannot be said that he was made sufficiently aware of the nature of the charges by receiving a copy of a charging document he could not read at the time his guilty pleas were entered. (CP 34-39, 41-59, 60-64).

Under these facts, Mr. Hevewah was not made aware of the law as it related to facts, as required to establish the due process requirement that he was made sufficiently aware of the nature of the charges. *See also Osborne*, 102 Wn.2d at 92-95.

Mr. Hevewah was not made aware of the requisite state of mind (intent or criminal negligence) required for each of the three charges, nor was he made aware of the law as it related to the facts presented. The guilty pleas were not knowing, intelligent, and voluntary because Mr. Hevewah was not made sufficiently aware of the nature of the charges prior to the entry of his guilty pleas. Therefore, his convictions should be reversed.

Issue 2: Whether the guilty pleas to counts II and III of the amended information were involuntary because there was an insufficient factual basis for each charge.

Mr. Hevewah's guilty pleas to count II and count III of the amended information were involuntary, because there was an insufficient factual basis for each charge. First, for count II, there was an insufficient factual basis that Mr. Hevewah caused bodily harm to Mr. Campbell, which was accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering. Second, for count III, there was an insufficient factual basis that Mr. Hall was a "nurse, physician, or health care provider" within the meaning of RCW 9A.36.031(1)(i). Due to these lacking factual bases, Mr. Hevewah cannot be expected to have understood the nature of the third degree assault charges in relationship to his actual conduct. Therefore, his guilty pleas were unknowing and involuntary.

By court rule, "[t]he court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." CrR 4.2(d). While the Constitution does not expressly require the record to establish a factual basis for the plea, the absence of a factual basis may render the plea involuntary and therefore a violation of due process. *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987), *abrogated on other grounds by Buckman*, 409 P.3d at 193; *see also In re Pers. Restraint of Clements*, 125 Wn. App. 634, 645, 106 P.3d 244 (2005) (stating "[e]stablishment of a sufficient factual basis of guilt

is not an independent constitutional requirement, but an inadequate factual basis may affect the constitutional voluntariness of the plea because some information about the facts is necessary to the defendant's assessment of the law in relation to the facts."). Thus, "[t]he necessity for the record to contain a factual basis for a guilty plea is as much a constitutional requirement as it is mandated by the applicable guilty plea rule." *In re Pers. Restraint of Taylor*, 31 Wn. App. 254, 256, 640 P.2d 737 (1982).

The defendant must understand the law, the facts, and the relationship between the two:

A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements. Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty plea.

State v. R.L.D., 132 Wn. App. 699, 706, 133 P.3d 505 (2006).

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. *See Keene*, 95 Wn.2d at 209 (a factual basis is required in order to prevent a conviction where the evidence does not warrant it).

On review, there is not a sufficient factual basis for a plea unless the record contains sufficient evidence from which a jury could find the defendant guilty. *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976). Failure to

sufficiently develop facts on the record at the time of the plea requires vacation of the conviction and dismissal of the charge. *R.L.D.*, 132 Wn. App. at 706.

- a. For count II, whether there was a factual basis establishing that Mr. Hevewah caused bodily harm to Mr. Campbell, which was accompanied by substantial pain that extended for a period sufficient to cause considerable suffering.**

For count II, third degree assault of Mr. Campbell, the State had to prove that Mr. Hevewah “did, with criminal negligence, cause bodily harm to [Mr. Campbell], which was accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering[.]” (CP 135); *see also* RCW 9A.36.031(1)(f).

The record does not contain sufficient evidence from which a jury could find Mr. Hevewah guilty of this charge. *See Newton*, 87 Wn.2d at 370. The facts in the record show that Mr. Hevewah charged at Mr. Campbell with a weapon in his hand, and that Mr. Campbell moved away before Mr. Hevewah had any physical contact with him. (CP 5-7, 16-18, 23-25, 187).

The record fails to show any bodily harm at all to Mr. Campbell by Mr. Hevewah, much less the level of bodily harm required by the statute, “bodily harm *accompanied by substantial pain that extends for a period sufficient to cause considerable suffering[.]*” RCW 9A.36.031(1)(f) (emphasis added). Therefore, there was an insufficient factual basis that Mr. Hevewah caused bodily harm to Mr. Campbell, as required to support a conviction under the applicable statute. *See* RCW 9A.36.031(1)(f).

Accordingly, Mr. Hevewah’s plea of guilty to third-degree assault of Mr. Campbell, as charged in count II of the amended information, lacks a factual basis in the record. The record does not contain sufficient evidence from which a jury could find Mr. Hevewah guilty. *See Newton*, 87 Wn.2d at 370. Therefore, Mr. Hensley’s plea to this charge was not knowing and voluntary, and his conviction should be vacated and dismissed. *See R.L.D.*, 132 Wn. App. at 706 (setting forth this remedy).

b. For count III, whether there was a factual basis establishing that Mr. Hall was a licensed or certified nurse, physician, or health care provider within the meaning of RCW 9A.36.031(1)(i).

For count III, third degree assault of Mr. Hall, the State had to prove that Mr. Hevewah “did intentionally assault [Mr. Hall], knowing him to be a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault[.]” (CP 135); *see also* RCW 9A.36.031(1)(i).

For purposes of the applicable third degree assault subsection:

“Nurse” means a person licensed under chapter 18.79 RCW;
“physician” means a person licensed under chapter 18.57 or 18.71 RCW; and “health care provider” means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW[.]

RCW 9A.36.031(1)(i).

In *State v. Gray*, this Court reversed a third-degree assault conviction where there was insufficient evidence that the assault victim was a “health care

provider,” as required by the same statute at issue in this case. *See State v. Gray*, 124 Wn. App. 322, 325, 102 P.3d 814 (2004). There, the State provided evidence that the assault victim was a “nursing assistant” certified by the state of Washington. *Id.* at 324-25. But there was no testimony that the victim was certified, as the statute required, under Title 18 RCW, even though “[t]he victim’s status as a health care provider is an essential element of the crime.” *Id.* at 325. Furthermore, there was no evidence that the hospital where the assault victim was working at the time of the assault was licensed under chapter 70.41 RCW. *Id.*

Here, similarly, there was no evidence that the assault victim Mr. Hall, whom Mr. Hevewah spit on, was a “nurse” licensed under chapter 18.79 RCW, a “physician” licensed under chapter 18.57 or 18.71 RCW, or a “health care provider” certified under chapter 18.71 or 18.73 RCW, or regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW. *See RCW 9A.36.031(1)(i)*. The facts in the record only show that Mr. Hall “was working for AMR” and checking Mr. Hevewah’s vital signs in the back of an ambulance at the time of the assault. (CP 7, 18, 24, 187). The record does not reflect whether Mr. Hall was a nurse, physician, or other health care provider, or if or how he is licensed or certified. There was no evidence of Mr. Hall’s licensing or certification to establish that he was a provider within the parameters of the charged third-degree assault statute. *See RCW 9A.36.031(1)(i)*; *see also Gray*, 124 Wn. App. at 325-26.

Accordingly, Mr. Hevewah's plea of guilty to third-degree assault of a nurse, physician or health care provider, as charged in count III of the amended information, lacks a factual basis in the record. The record does not contain sufficient evidence from which a jury could find Mr. Hevewah guilty. *See Newton*, 87 Wn.2d at 370; *see also Gray*, 124 Wn. App. at 325-26. Therefore, Mr. Hensley's plea to this charge was not knowing and voluntary, and his conviction should be vacated and dismissed. *See R.L.D.*, 132 Wn. App. at 706 (setting forth this remedy).

Issue 3: Whether this Court should deny costs against Mr. Hevewah on appeal in the event the State is the substantially prevailing party.

Mr. Hevewah preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

The trial court imposed only mandatory costs. (CP 160-161, 191). Defense counsel informed the trial court that Mr. Hevewah has no income. (CP 192). An order finding Mr. Hevewah indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 218-219). To the contrary, Mr. Hevewah's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Hevewah remains indigent.

His report as to continued indigency shows that he has no income other receiving public benefits, including food stamps and temporary assistance for needy families.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835, 44 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate

costs negatively impact indigent appellants' ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, the trial court imposed only mandatory costs and entered an Order of Indigency, and Mr. Hevewah's Report as to Continued Indigency demonstrates a continued inability to pay costs. (CP 160-161, 191-192, 218-219).

In addition, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Hevewah would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). The trial court is required to conduct an individualized inquiry prior to

imposing the costs, not prior to the State’s collection efforts. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. Mr. Hevewah met this standard for indigency. (CP 218-219).

In addition, Mr. Hevewah’s report as to continued indigency states that he receives public benefits, including food stamps and temporary assistance for needy families. In *Blazina*, our Supreme Court stated:

[W]hen determining a defendant's ability to pay . . . Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, *such as Social Security or food stamps* . . . Although the ways to establish indigent status remain nonexhaustive . . . *if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.*

Blazina, 182 Wn.2d at 838-39 (internal citations omitted) (emphasis added).

Because Mr. Hevewah currently receives public benefits, including food stamps and temporary assistance for needy families, the record demonstrates he is indigent and does not have the ability to pay costs on appeal. *See id.*

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 218-219. “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Hevewah to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Hevewah’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Hevewah remains indigent.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the “supreme court . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State’s

requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Hevewah's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Hevewah remains indigent.

Appellate costs should not be imposed in this case.

E. CONCLUSION

Mr. Hevewah's convictions should be reversed, because the guilty pleas were not knowing, intelligent, and voluntary, where he was not made sufficiently aware of the nature of the charges prior to the entry of his guilty pleas.

In addition, Mr. Hevewah's two convictions for third degree assault (counts II and III of the amended information) should be reversed and dismissed because there was an insufficient factual basis to support each conviction.

Mr. Hevewah also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 22nd day of February, 2018.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

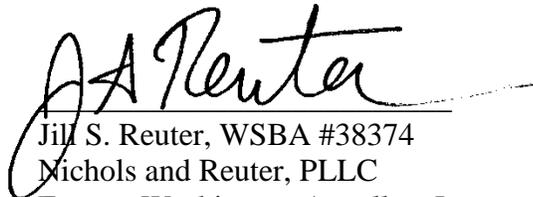
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35313-3-III
vs.) Spokane Co. No. 15-1-04595-5
)
RONALD ROSCOE HEVEWAH) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 22, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Ronald Roscoe Hevewah
c/o American Indian Community Center
610 E. North Foothills Drive
Spokane, WA 99207-0610

Having obtained prior permission, I also served a copy on the Spokane County Prosecutor's Office at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 22nd day of February, 2018.



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