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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

RONALD HEVEWAH, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. Did the defendant knowingly, intelligently, and voluntarily enter pleas of guilty to the charges contained within the amended information?

2. Is the defendant's mere assertion of incompetence based upon his successful completion of a competency restoration process at Eastern State Hospital and an asserted "cognitive deficiency" sufficient to establish he did not understand the nature of the charges as contained within the amended information?

3. Were the guilty pleas voluntary to the amended charges of third degree assault for which there was no factual basis, if there was a sufficient factual basis to convict the defendant of the original charges contained in the information and the defendant pleaded guilty to the two third degree assault charges to take advantage of a negotiated plea settlement?

## **II. STATEMENT OF THE CASE**

### Procedural history.

On December 9, 2015, the defendant was charged by information in the Spokane County Superior Court with two counts of second degree assault, third degree malicious mischief, and fourth degree assault. CP 20-

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On February 21, 2017, the trial court granted the State's motion to amend the information pursuant to a plea agreement, and the defendant was charged and pleaded guilty to one count of second degree assault and two counts third degree assault. CP 135-36; RP 2.

Substantive facts.

On December 4, 2015, at 10:00 a.m., the defendant was standing in the street blocking traffic at 508 South Brown in Spokane.<sup>1</sup> CP 23. The defendant was holding a weapon described as a "T" shaped tool. CP 23. At the time, the defendant attempted to stab the front grill of an ambulance, which was passing through the intersection with a patient, several times after the ambulance sounded its siren. RP 23. Contemporaneously, the defendant charged at a private, armed security guard,<sup>2</sup> Raymond Campbell, with the weapon. RP 23. Mr. Campbell took cover behind his vehicle and placed his hand on his firearm. CP 23. Mr. Campbell felt threatened, afraid and believed the defendant was going to injure him with the weapon. CP 23, 25. As police sirens became audible, the defendant ran westbound on South Howard between two buildings. CP 23.

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<sup>1</sup> The following facts are taken from the Affidavit of Facts filed in the Spokane Superior Court on December 9, 2015, and were relied upon by the trial court at the time of plea. CP 22-26.

<sup>2</sup> Mr. Campbell was in a fully marked security uniform and he was driving a fully marked security vehicle. CP 23.

Anthony Kyle observed the defendant at 518 South Brown at 10:14 a.m., and the defendant appeared angry or “out of it.” CP 22. Mr. Kyle attempted to engage the defendant in a conversation and the defendant lunged at him several times with a knife or a bar. CP 22. The defendant was within one or two feet of Mr. Kyle. CP 22. Mr. Kyle believed the defendant was trying to kill him. CP 22. The defendant also punched and scraped the front door of a business at 518 South Browne with the “T” metal object which cracked and caused other damage to the door’s glass. CP 25.

The defendant was transported to the hospital by ambulance attendant, Andrew Hall. CP 24. As Mr. Hall checked the defendant’s vital signs in the rear of the ambulance, the defendant said “fuck you white boy,” cleared his throat, and spit on Mr. Hall’s pants. CP 24.

### **III. ARGUMENT**

#### **A. THE DEFENDANT UNDERSTOOD THE NATURE OF THE AMENDED CHARGES AND ENTERED HIS PLEAS TO THOSE CHARGES INTELLIGENTLY AND VOLUNTARILY.**

##### Standard of review.

Whether a plea agreement was voluntarily and intelligently entered into by the defendant is reviewed de novo. *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). A trial court may not accept a defendant’s guilty plea unless it is knowing, intelligent, and voluntary. CrR 4.2(d); *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Whether a plea was

voluntary and intelligent is determined from the totality of the circumstances. *Branch*, 129 Wn.2d at 642. The State bears the burden of showing that a guilty plea is valid. *Wood v. Morris*, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976).

Voluntariness of the guilty plea.

“Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily.” *State v. Buckman*, --Wn.2d--, 409 P.3d 193, 198 (2018). In that regard, a guilty plea must be made with the knowledge that certain rights will be waived, including the right to a jury trial, the right to confrontation, and privilege against self-incrimination. CrR 4.2(d); *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748, *as corrected* (Apr. 13, 2015); *State v. Robinson*, 172 Wn.2d 783, 794, 263 P.3d 1233 (2011). CrR 4.2 provides sufficient safeguards to protect a defendant against an involuntary plea. *Robinson*, 172 Wn.2d at 792.<sup>3</sup>

*1. Nature of the charge.*

CrR 4.2 governs guilty pleas by defendants.

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the

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<sup>3</sup> A strong public interest supports enforcement of voluntary and intelligently made pleas. *State v. Chambers*, 176 Wn.2d 573, 586-87, 293 P.3d 1185 (2013).

consequences of the plea. The 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). This rule comports with due process requirements, which similarly requires that all guilty pleas be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297-98, 88 P.3d 390 (2004). “A plea is not voluntary in the constitutional sense unless the defendant has adequate notice and understanding of the charges against him.” *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 590, 741 P.2d 983 (1987), *abrogated on other grounds, by State v. Buckman*, 409 P.3d 193 (2018).

At a minimum, defendant must be aware of the requisite state of mind necessary to constitute the charged crime. *In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 278, 744 P.2d 340 (1987). However, the trial court is not required to orally recite the elements of each crime or the facts that satisfy those elements, and is not required to orally question the defendant to ascertain whether he or she understands the nature of the offense. *State v. Codiga*, 162 Wn.2d 912, 924, 175 P.3d 1082 (2008); *See also In re Pers. Restraint of Keene*, 95 Wn.2d 203, 204-09, 622 P.2d 360 (1980). Instead, the trial court can rely on the written plea agreement if the defendant confirms that he or she read the agreement and that its statements were true. *Id.* at 923-24. Also, “notifying a defendant of the nature of the

crime to which he pleads via an information creates ... a presumption that the plea was knowing, voluntary, and intelligent.” *Hews*, 108 Wn.2d at 596.

When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he has read it, understands it, and that its contents are true, a “strong presumption” of voluntariness arises, and the written statement is prima facie verification of the plea’s voluntariness. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); *see also Branch*, 129 Wn.2d at 642 (defendant’s signature on the plea is “strong evidence” of a valid plea). When the court goes on to inquire orally of the defendant and satisfies itself on the record of the existence of various criteria for voluntariness, the presumption of voluntariness is “well nigh irrefutable.” *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

In the present case, the defendant acknowledged he reviewed his entire statement on plea of guilty with his lawyer, had been given a copy of it, and had no further questions for the judge. CP 148. His lawyer provided the defendant with a copy of the amended information. RP 2. The amended information contained elements of the crimes of second degree assault and

third degree assault. CP 135. At the time of the plea, the defense attorney remarked:

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.

RP 2.

In the defendant's statement on plea of guilty, the defendant acknowledged that as a part of the plea agreement, he would be charged with and would plead guilty to one count of second degree assault, and two counts of third degree assault, and that the elements of those crimes were as amended. CP 138. The amended information clearly informed the defendant he was being charged with second degree assault and two counts of third degree assault. Although defense counsel remarked that the defendant would have a hard time reading the amended information, there is nothing in the record to support a conclusion that the defendant could not or did not read the amended information. There are certainly different degrees of being farsighted. For instance, to compensate, some individuals hold a document at arms-length to read it. Other than defendant's supposition on appeal, there

is nothing in the record to conclude the defendant did not have knowledge of the elements of the offenses.

In addition, during plea bargaining, defense counsel had a duty to assist the defendant “actually and substantially” in determining whether to plead guilty. *See State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); *State v. Stowe*, 71 Wn. App. 182, 186, 858 P.2d 267 (1993). It is counsel’s responsibility to aid the defendant in evaluating the evidence against him and in discussing the possible direct consequences of a guilty plea. *State v. Holley*, 75 Wn. App. 191, 197, 876 P.2d 973 (1994). There is nothing in the record to suggest that defense counsel<sup>4</sup> did not review the elements of the charges, as contained within the amended information or statute, when he met with the defendant in jail, nor is there a suggestion from the record that counsel did not answer any questions the defendant may have had concerning the amended charges.

In addition, there is nothing in the record to suggest that Mr. Lorenz did not fulfil his duty to discuss the amended information, including the elements of the crimes, with the defendant at the time of plea. Indeed, the

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<sup>4</sup> Mr. Lorenz is an experienced attorney with the Spokane County Public Defender’s Office. He was admitted to practice in the State of Washington on July 15, 1986 and his bar number is 16095. [https://www.mywsba.org/LegalDirectory/LegalProfile.aspx?Usr\\_ID=000000016095](https://www.mywsba.org/LegalDirectory/LegalProfile.aspx?Usr_ID=000000016095) (last accessed on March 23, 2018).

trial court asked the defendant if he had questions about the amended charges before the court accepted the plea, and the defendant responded “no.” RP 9. The trial court engaged in a colloquy to confirm the pleas’ validity, in pertinent part:

THE COURT: You’ve been through the 11th grade. Any trouble reading or writing?

THE DEFENDANT: No, I’m all right. I just need my glasses.

THE COURT: Other than your glasses. Your attorney indicated you have a copy of this new Amended Information charging you with second degree assault and two counts of third degree assault. You’re going to be entering pleas to those charges. Is that your understanding?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The maximum on a second degree assault is 10 years and a \$20,000 fine. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: On each of the third degree assaults, the maximum is five years and a \$10,000 fine. Do you understand that?

THE DEFENDANT: Yes.

RP 3

THE COURT: Okay. So as a six, your range would be 33 to 43 months on the second degree assault. The Court could sentence you up to 18 months of community custody.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: As a six on each of the other counts of third degree assault, your range is 22 to 29 months, and then you could get 12 months of community custody. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: It says that the prosecutor's office has made some promises to you that if you pled guilty to the Amended Information, they would make a recommendation to the Court of the 36 months on Count I.

You're just recommending whatever time is imposed on Count II and III run concurrent?

[DEPUTY PROSECUTOR]: Yeah. Just to be clear, I just ask for the 29.

THE COURT: 29 months on Count II and III?

[DEPUTY PROSECUTOR]: Yes, Your Honor.

THE COURT: So they're asking for the 36 months on Count I, 29 on Count II and III, but the 29 will run at the same time. So the total amount you would do is 36 months. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

RP 4-5.

THE COURT: I have the affidavit of probable cause. I can summarize it because they're going to have to prove the facts in this case. So as far as this plea statement, though, do you have any questions that you want to ask me about it?

THE DEFENDANT: No, Your Honor.

RP 8.

The defendant pleaded guilty to the charges of second degree assault and two counts of third degree assault as charged in the amended information, a copy of which he acknowledged receiving at the time of the plea, and the defendant signed the statement on plea of guilty, which incorporated the amended information by reference. The language of the amended information, together with his statement on plea of guilty, after review with his attorney, signed by him in the presence of his attorney, having no questions for the trial court concerning the elements of the amended charges, provide prima facie verification of his understanding of the nature of the charge. *In re of Keene*, 95 Wn.2d at 208-09; *see also Perez*, 33 Wn. App. 258. The defendant has presented no evidence refuting the record to show that he was not sufficiently aware of the essential elements of the crime.

2. *Competency to enter into the plea.*

The defendant claims, without any citation to the record to support that proposition, that his “cognitive deficiency” and Eastern State Hospital’s “restoration process” contributed to his lack of understanding of the nature of the charges against him. Appellant’s Br. at 13. Significantly, a criminal defendant is presumed competent. *State v. Coley*, 180 Wn. 2d 543, 557,

326 P.3d 702 (2014). The party challenging the defendant’s competency must prove incompetency by a preponderance of the evidence. *Id.* at 557.

The defendant was diagnosed by an Eastern State Hospital psychologist with Alcohol Dependence and Antisocial Personality Disorder. CP 53. The psychologist determined that the defendant had “the capacity to act competently in his legal proceedings.” CP 53. Thereafter, the trial court entered findings of fact and conclusions of law finding the defendant understood the nature of the proceedings against him and could assist in his defense. CP 63-64.

The defendant does not provide any authority that being diagnosed with Alcohol Dependence and an Antisocial Personality Disorder inhibited or interfered with his understanding of the plea bargain process or that it inhibited or interfered with his ability to knowingly, intelligently, and voluntarily plead guilty to the amended charges. In fact, the defendant has not assigned error to the trial court’s findings of fact and conclusions of law finding him competent to understand the nature of the proceedings against him or to assist in his defense.<sup>5</sup> The trial court duly considered the defendant’s diagnosis and recommendation from the psychologist that the defendant was competent to proceed in his legal proceedings and that that

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<sup>5</sup> Unchallenged findings of fact are treated as verities on appeal. *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

he possessed the necessary level of mental functioning to assist his attorney in his defense and the nature of the charges against him. The fact that he proceeded through a “competency restoration” is of no consequence as to whether the defendant understood the nature of the charges against him at the time of the plea.<sup>6</sup> A mere unsupported allegation of incompetence is insufficient to overcome the finding by Eastern State Hospital and the evidence of voluntariness. *See Osborne*, 102 Wn.2d at 97.

Moreover, the record from the plea hearing provides no indication the defendant lacked mental capacity to appreciate the nature of the amended charges against him. The record establishes the trial court had ample opportunity to observe the defendant’s demeanor and conduct to examine him regarding his competency. The court’s colloquy with the defendant at the time of the plea objectively demonstrates that the plea was voluntarily given and intelligently understood. The court utilized a question and answer approach to proceed through the plea form. The defendant

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<sup>6</sup> At the time of Eastern State Hospital’s evaluation, the psychologist opined: “On March 3, 2016, 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. On April 27, 2016, 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.”

responded intelligently to the court's questions. The court received the defendant's assurances at each critical point during the plea hearing. Finally, the defendant fails to bolster a claim of incompetence with any medical testimony or statements at the time of plea.

Finally, the trial court's determination that the defendant had the necessary understanding of the nature of the legal proceedings against him, the defendant possessed the capacity to assist his attorney in his defense, and that his competency had been restored at the time he entered his plea of guilty is supported by the record. Other than by innuendo, the defendant provides no evidence that he was unable to understand the nature of the charges against him.

**B. THE DEFENDANT'S PLEA TO THE AMENDED CHARGES OF THIRD DEGREE ASSAULT WAS KNOWING, INTELLIGENT, AND VOLUNTARY BECAUSE THERE WAS A FACTUAL BASIS FOR THE ORIGINAL CHARGES AND THE DEFENDANT PLEADED GUILTY TO TAKE ADVANTAGE OF THE PLEA AGREEMENT WITH THE STATE. MOREOVER, THIS COURT SHOULD DECLINE TO CONSIDER THE ISSUE RAISED FOR THE FIRST TIME ON APPEAL UNDER RAP 2.5.**

The defendant argues for the first time on appeal that the trial court erred in accepting his guilty plea without first determining whether the pleas to the amended charges of third degree assault, as contained in counts two and three of the amended information, had an adequate factual basis, which

renders his pleas on counts two and three involuntary.<sup>7</sup> Apart from asserting there was no factual basis for the pleas to the amended third degree assault charges in support of his claim, the defendant fails to establish the pleas were not knowing, intelligent and voluntary.

As a general rule, an appellate court does not consider issues raised for the first time on appeal unless the alleged error is a manifest constitutional error. RAP 2.5(a)(3); *State v. Gentry*, 183 Wn.2d 749, 760, 356 P.3d 714 (2015); *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015); *State v. Arredondo*, 188 Wn.2d 244, 262-63, 394 P.3d 348 (2017). It is the appellant's burden to show that the alleged error was both "truly of constitutional dimension" and "manifest." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). A defendant attempting to withdraw his guilty plea for the first time on appeal must demonstrate a manifest constitutional error. RAP 2.5(a)(3); *State v. Walsh*, 143 Wn.2d 1, 6-7, 17 P.3d 591 (2001).

Regarding RAP 2.5(a)(3), our courts have indicated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional

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<sup>7</sup> There has been no assignment of error regarding the direct sentencing consequences of the plea.

issue not litigated below.” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

CrR 4.2(d) states that the trial court “shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.” Although CrR 4.2(d) requires a trial court to be “satisfied that there is a factual basis for the plea,” this requirement is procedural and not constitutionally required.<sup>8</sup> *Branch*, 129 Wn.2d at 642; *Hews*, 108 Wn.2d at 591-92; *State v. Bird*, 187 Wn. App. 942, 945, 352 P.3d 215 (2015); *In re Pers. Restraint of Hilyard*, 39 Wn. App. 723, 727, 695 P.2d 596 (1985). For instance, in *State v. Branch*, the defendant was prohibited from arguing “the sufficiency of the record on appeal” because he agreed to pay the restitution amount and did not raise the issue at the trial court. 129 Wn.2d at 651. At his plea hearing, Branch agreed to the restitution amount and orally waived his right to a restitution hearing. *Id.* He did not raise any issue as to the amount of the restitution during the plea hearing, the sentencing hearing, or at a later reconsideration hearing. *Id.* Because Branch agreed to pay the restitution amount and failed to challenge the amount awarded by the trial court, the court concluded that Branch “waive[d] his right to argue the

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<sup>8</sup> However, alleged involuntariness of a guilty plea is the type of constitutional error that a defendant can raise for the first time on appeal. *Walsh*, 143 Wn.2d at 6.

sufficiency of the record on appeal,” and the restitution amount was affirmed. *Id.*

Here, the defendant did not raise the issue below. The record reveals the plea was the result of consultation with his attorney and the defendant made a reasoned decision to accept the State’s low-end recommendation so that “he could get out.” He was silent when both lawyers represented to the trial court that the proposed plea was the result of a negotiated settlement and he was equally reserved when the court orally reviewed the affidavit of facts supporting the plea on the record. RP 10-11, 13-14. The defendant had no retort to the court’s review of the probable cause affidavit concerning the facts the State would have presented if the matter had proceeded to trial. When asked by the court what he remembered during commission of the crimes, the defendant remarked, “[n]othing.” RP 11. However, the defendant reassured the court that he was pleading guilty “so I can get out and get this over with.” RP 11-12.

To the extent that defendant argues a manifest error affecting a constitutional right, he fails to show a manifest error. As in *Branch*, the defendant has waived any challenge to the factual sufficiency because he did not challenge the factual basis of the plea under CrR 4.2(d) in the trial court. This Court should decline to consider the argument for the first time on appeal.

If the Court determines review is appropriate concerning the factual sufficiency issue, the defendant's statement on plea of guilty and the lower court's review of the facts on the record established a basis for the original, charged offenses contained within the information, and the defendant pleaded guilty to take advantage of the plea agreement as discussed below.

The original information, filed on December 9, 2015, read as follows:

COUNT I: SECOND DEGREE ASSAULT, committed as follows: That the defendant, RONALD HEVEWAH, in the State of Washington, on or about December 05, 2015, did intentionally assault ANTHONY JOSEPH KYLE, with a deadly weapon,

COUNT II: THIRD DEGREE MALICIOUS MISCHIEF, committed as follows: That the defendant, RONALD HEVEWAH, in the State of Washington, on or about December 05, 2015, did knowingly and maliciously cause physical damage to front door, the property of New Horizon Care Facility under circumstances not amounting to malicious mischief in the first or second degree,

COUNT III: SECOND DEGREE ASSAULT, committed as follows: That the defendant, RONALD HEVEWAH, in the State of Washington, on or about December 05, 2015, did intentionally assault RAYMOND L. CAMPBELL, with a deadly weapon,

COUNT IV: FOURTH DEGREE ASSAULT, committed as follows: That the defendant, RONALD HEVEWAH, in the State of Washington, on or about December 05, 2015, did intentionally assault ANDREW R. HALL[.]

CP 20-21.

The amended information, filed on February 21, 2017, reads as follows:

COUNT I: SECOND DEGREE ASSAULT, committed as follows: That the defendant, RONALD HEVEWAH, in the State of Washington, on or about December 05, 2015, did intentionally assault ANTHONY JOSEPH KYLE, with a deadly weapon, to-wit: T shaped metal rod,

COUNT II: THIRD DEGREE ASSAULT, committed as follows: That the defendant, RONALD HEVEWAH, in the State of Washington on or about December 05, 2015, did, with criminal negligence, cause bodily harm to RAYMOND L. CAMPBELL, which was accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering,

COUNT III: THIRD DEGREE ASSAULT, committed as follows: That the defendant, RONALD HEVEWAH, in the State of Washington, on or about December 05, 2015, did intentionally assault ANDREW R. 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.

In *Hews*, our high court held while the existence of a factual basis for a guilty plea is likely to shed light on whether the plea is voluntary, “the establishment of a factual basis is not an independent constitutional requirement, and is constitutionally significant only insofar as it relates to the defendant’s understanding of his or her plea.” 108 Wn. 2d at 591-92. The defendant must demonstrate more than a deficiency in the factual basis

for his plea; he must demonstrate that the deficiency affected his understanding of the plea. *Id.* at 591-92.

Later on, in *In re Pers. Restraint of Barr*, our Supreme Court held that “[a] plea does not become invalid because an accused chooses to plead to a related lesser charge that was not committed in order to avoid certain conviction for a greater offense.” 102 Wn.2d 265, 269-70, 684 P.2d 712 (1984). Such a plea is proper if “the accused understands the nature and consequences of the plea bargain and has determined the course of action that he believes is in his best interest.” *Id.* at 270. As the Supreme Court stated in *Barr*, a plea can be both voluntary and intelligent, even in the absence of a factual basis for the ultimate charges, so long as the defendant reviewed all the alternatives and understood the nature and consequences of the plea.

A plea does not become invalid because an accused chooses to plead to a related lesser charge that was not committed in order to avoid certain conviction for a greater offense. The choice to plead to such lesser charges is voluntary if it is based on an informed review of all the alternatives before the accused. What must be shown is that the accused understands the nature and consequences of the plea bargain and has determined the course of action that he believes is in his best interest.

For the trial court to make the proper evaluation, the plea bargain must be fully disclosed. The trial court must find a factual basis to support the original charge, and determine that defendant understands the relationship of his conduct to that charge. Defendant must be aware that the evidence

available to the State on the original offense is sufficient to convince a jury of his guilt.

*Id.* at 269-70 (internal citations omitted).

More recently, in *State v. Zhao*, 157 Wn.2d 188, 137 P.3d 835 (2006), the defendant was originally charged with two counts of first degree child molestation. *Id.* at 190. Ultimately, the defendant pleaded guilty to two counts of conspiracy to commit indecent liberties and one count of second degree assault, even though there was no coconspirator. *Id.* at 191. Without admitting guilt, the defendant entered an *Alford* plea.<sup>9</sup> In doing so, the defendant avoided an indeterminate sentence which potentially could have resulted in a life sentence. *Id.* at 191.

At the plea hearing, defense counsel advised the court that it could rely on the probable cause affidavit and suggested the court could rely on *Barr* for a basis to accept the charges contained within the amended information. *Id.* at 192. The court reviewed the plea statement with the defendant, reviewing the charges as contained within the amended information, the maximum and standard range sentences, the elements of the charge, and the elements of the charges the State would have to prove at a trial, and the defendant's relinquishment of certain rights. *Id.* at 192.

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<sup>9</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), holds that a defendant who professes innocence may plead guilty to limit his penalty if there is an independent factual basis for the plea.

The defendant confirmed he probably would be found guilty if the case proceeded to trial. *Id.* at 192. Thereafter, the court declined to allow the defendant to withdraw his plea. *Id.* at 194-96.

Zhao appealed claiming his plea was not knowing, intelligent, and voluntary and that he had received ineffective assistance of counsel. Specifically, he claimed the trial court erred when it did not expressly confirm on the record that the defendant understood he was pleading guilty to crime for which there was no factual basis.

The Supreme Court held that a defendant can plead guilty to amended charges for which is there no factual basis, but only if the record establishes that the defendant did so knowingly and voluntarily and that there “at least exists a factual basis for the original charge, thereby establishing a factual basis for the plea as a whole.” *Id.* at 200. The Court reasoned:

[s]ince the factual basis requirement, both in case law and in this court’s rule is founded on the concept of voluntariness, we hold that a defendant can plead guilty to amended charges for which there is no factual basis, but only if the record establishes that the defendant did so knowingly and voluntarily and that there at least exists a factual basis for the original charge, thereby establishing a factual basis for the plea as a whole. Doing so supports a flexible plea bargaining system through which a defendant can choose to plead guilty to a related charge that was not committed, in order to avoid near certain conviction for a greater offense.

*Id.* at 200.

Here, the defendant was originally charged with two counts of second degree assault (victims Kyle and Campbell), third degree malicious mischief (office building), and fourth degree assault (victim Hall). CP 20-21. To prove the second degree assaults, the State needed to prove that the defendant assaulted the victims with a deadly weapon. RCW 9A.36.021(1)(c). Washington courts recognize three common law definitions of assault: “(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.” *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). RCW 9A.04.110(6) defines “deadly weapon” as “any ... weapon, device, instrument, ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” “Substantial bodily harm” is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

The essential elements of fourth degree assault are found in RCW 9A.36.041(1): “A person is guilty of assault in the fourth degree if,

under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.041(1).

Finally, a conviction for third degree malicious mischief requires proof that the defendant knowingly and maliciously caused physical damage to another’s property. RCW 9A.48.090(1)(a).

“The factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty; there must only be sufficient evidence, from any reliable source, for the jury to find guilt.” *Zhao*, 157 Wn.2d at 198.

In the present case, per the probable cause statement, Mr. Kyle told officers that the defendant lunged at him with two or three “hard punches” with a bar or a knife, believing the defendant was “out to kill” and he was in danger. Mr. Campbell told officers that the defendant charged him with a black, metal weapon in his hand, causing Mr. Campbell to place his hand on his firearm. Mr. Campbell felt threatened and afraid, and that the defendant was going to hurt him. Regarding the original fourth degree assault, certainly spitting on Mr. Hall’s pants would have constituted “harmful” or “offensive” touching. As relevant to this case, a touching is an assault if it is intentional, offensive, and the victim does not consent. *See State v. Shelby*, 85 Wn. App. 24, 28-29, 929 P.2d 489 (1997). Washington

courts have recognized that spitting can constitute an assault. *State v. Jackson*, 145 Wn. App. 814, 821, 187 P.3d 321 (2008); *State v. Humphries*, 21 Wn. App. 405, 409, 586 P.2d 130 (1978). Lastly, the defendant knowingly and maliciously caused damage to a glass door associated with a business.

The above facts establish a sufficient direct and circumstantial case to allow a jury to find the defendant guilty on the original charges. In addition, there was a factual basis for the charged crimes contained within the original information.

The trial court did not err when it found a factual basis for the pleas to the amended charges. In addition, the record clearly shows the defendant knowingly and intelligently pleaded guilty to the reduced charges to gain the benefit of the plea agreement and to avoid a potentially greater sentence should he be found guilty of the original charges. Certainly, if the matter proceeded to trial, and the defendant was convicted, the State could have requested a longer sentence and it may have resulted in an increased offender score, rather than the joint request for a low-end sentence to the trial court. In addition, defense counsel tacitly acknowledged several of the facts contained within the probable cause affidavit did not support the charges as contained within the amended information. For instance, counsel

asserted the defendant did not use a knife, but rather a “T” bar during commission of the assaults. RP 12-13.

Accordingly, the record amply supports the trial court’s decision to accept the defendant’s knowing and voluntary plea to the amended information.

**C. UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HER APPEAL.**

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual’s current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be

required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis added.)

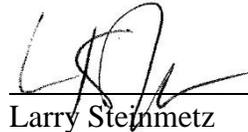
In the present case, the trial court made a finding of indigency. CP 218-19. Should the defendant’s appeal be unsuccessful, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

#### IV. CONCLUSION

For the reasons stated herein, the Court should affirm the judgment and sentence.

Dated this 6 day of April, 2018.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Larry Steinmetz #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD R. HEVEWAH,

Appellant.

NO. 35313-3-III

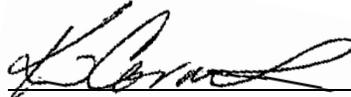
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 6, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jill S. Reuter  
admin@ewalaw.com

4/6/2018  
(Date)

Spokane, WA  
(Place)

  
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# SPOKANE COUNTY PROSECUTOR

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**Appellate Court Case Title:** State of Washington v. Ronald Roscoe Hevewah  
**Superior Court Case Number:** 15-1-04595-5

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