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**Division III**
**State of Washington**
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

NO. 36660-0-III

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STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

PAULA MACHELE GARDNER,
Defendant/Appellant

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# BRIEF OF RESPONDENT

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APPEAL FROM THE SUPERIOR COURT OF
LINCOLN COUNTY, No 18-1-00012-1

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## TABLE OF CONTENTS

I. STATEMENT OF THE FACTS

II. ARGUMENT AND AUTHORITY

III. CONCLUSION

## TABLE OF AUTHORITIES

**WASHINGTON CASES**

Havens v C&D Plastics, Inc, 124 Wn.2d 158 (1994) 11

In re James, 96 Wn.2d 847 (1982) 9,11

State v Barbarosh, 10 Wn.App 2d 408 (2019) 16

State v Blanks, 139 Wn.App 543 (2007) 11

State v Clark-El, 196 Wn.App 614 (2106) 15

State v Gonzales, 2 Wn.App 2d 96 (2018) 16

State v Hall, 32 Wn.App 108 (1982) 10

State v Hentz, 32 Wn.App 186 (1982) 12

State v Marino, 100 Wn.2d 719 (1984) 11

State v Perrett, 86 Wn.App 312 (1997) 11

State v Rivera-Zamora, 7 Wn.App 2d 824 (2019) 16

State v Thomas, 79 Wn.App 32 (1995) 9

State v Townsend, 2 Wn.App 2d 434 (2017) 9,11

State v Tourtellotte, 88 Wn.2d 579 (1977) 9

State v Williams, 137 Wn.App 736 (2007) 12

**WASHINGTON CONSTITUTION, STATUTES AND COURT RULES**

RCW 69.50.4013 17, 18

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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| STATE OF WASHINGTON,<br><br>Plaintiff/Respondent,<br><br>v.<br><br>PAULA GARDNER,<br><br>Defendant/Appellant. | Court of Appeals # 36660-0-III<br>Lincoln County # 18-1-00012-1<br>**RESPONDENT'S BRIEF** |

COMES NOW, the Respondent, State of Washington, by and through Adam Walser, Special Deputy Prosecuting Attorney for Lincoln County, and respectfully submits this brief.

## I. STATEMENT OF THE FACTS

On the evening of February 10, 2018, Deputy Jared McLagan of the Lincoln County Sherriff was dispatched to investigate a suspected residential burglary. (RP 69). Upon his arrival, Deputy McLagan identified a suspicious vehicle, registered to Appellant, parked in front of the residence. (RP 69). Upon further investigation, Deputy McLagan

found Appellant inside the residence, which appeared to have been recently ransacked. (RP 69). Appellant stated that she was "hiding out" from her boyfriend. (RP 70). Appellant denied that anyone else was in the house with her. (RP 71). On Appellant's person, Deputy McLagan found several items he later determined belonged to the owner of the home. (RP 75). Deputy McLagan later found another individual, Michael Jackson, in the home in close proximity to a firearm. (RP 467-468). This individual turned out to be the same boyfriend Appellant previously indicated she was "hiding out" from. (RP 76).

As a result of Deputy McLagan's investigation, Appellant was charged with one count of First Degree Burglary and one count of Possession of a Controlled Substance. (CP 86-87). On May 2, 2018, Appellant conducted a "free talk" with the State. (CP 49). In this free talk, Appellant claimed that she was "deathly afraid" of Mr. Michael Jackson, the mane with whom she had been arrested, and that he had engaged in a pattern of threatening and abusive behavior in order to coerce her into signing an affidavit regarding the firearm found during the burglary. (CP 50). On May 8, 2018, as a result of this free talk, the State and Appellant entered into an agreement in which Appellant agreed to cooperate with the

state in the prosecution of Michael Jackson and the State agreed to allow Appellant to plead guilty to First Degree Criminal Trespass, dismissing all other charges pending against Appellant. (CP 37-38). The terms of this agreement also required that Appellant be totally honest with the State, should her statements to law enforcement or at trial be proven false, the State would have the right to withdraw her plea of guilty. (CP 37-38).

After Appellant's entry of a guilty plea, the State uncovered significant evidence that much of what she had stated in her plea agreement was false. (RP 39). As a result of these falsehoods, the State filed a motion to withdraw Appellant's guilty plea and, on 5 June, 2018, a hearing was held regarding that motion. (RP 30-59).

At the 5 June hearing, the State called Deputy Jared McLagan, who testified Appellant had repeatedly expressed that she was in fear for her life at the hands of Mr. Jackson and his brother Robert Brown. (RP 39). Appellant had claimed that Mr. Brown had tried to intimidate her into signing an affidavit, which was false, and that she was actively hiding from Mr. Jackson and his family. (RP 39).

Deputy McLagan went on to testify that he later determined Appellant had continued to have telephone conversations with both Mr.

Jackson and his brother, that she had stayed the night with Mr. Jackson on a regular basis, including both the night before and the night after the free talk, all while she claimed to be deathly afraid of them both. (RP 39). These conversations and over-night visits, Deputy McLagan testified, were corroborated by telephone records and photographs from Appellant's cell phone, as well as interviews he conducted with Mr. Jackson's neighbors, who had observed Appellant spending the night at his house. (RP 40). A review of Appellant's cell phone by Deputy McLagan uncovered Appellant and Mr. Jackson discussing his neighbors observing her at Mr. Jackson's residence, and that they planned for her to arrive later at night in the future, in order to avoid being seen at his home. (RP 41). Additionally, Deputy McLagan testified that Appellant had voluntarily given Robert Brown the address at her residence and came to visit with him at his place of employment in Spokane, despite allegedly being in fear of him for her life. (RP 40, 45).

Deputy McLagan went on to testify Appellant had begun communicating with her friends, through jail house phone calls, that she had "a plan" to get her residential burglary charges reduced to trespass. (RP 41). Deputy McLagan inferred that Appellant's "plan" was to pin her

crime on Mr. Jackson by feigning fear and thereby receive a reduced charge. (RP 41-42). While in the free-talk Appellant communicated to the State the Mr. Jackson was a member of the "Palmer Block Crip Gang." (RP 42). However, despite investigation of that claim with the Spokane Gang Unit, as well as a unique familiarity with the habits of this gang's members, Deputy McLagan was unable to find any evidence this alleged association was true. (RP 42). In fact, Deputy McLagan was able to find several photographs of Mr. Jackson on his social media accounts in which he was wearing red, the colors of a rival gang. (RP 42).

Deputy McLagan stated in his testimony that he had interviewed an ex-girlfriend of Mr. Jackson who received several threatening Facebook messages which appeared to come from Mr. Jackson's Facebook account. (RP 43). However, this ex-girlfriend later discovered that these messages were in fact sent by Appellant, who had access to Mr. Jackson's Facebook account and would use this access to send messages and attribute them to Mr. Jackson. (RP 43). Appellant's access to his Facebook account, and her willingness to impersonate him was corroborated by Mr. Jackson himself. (RP 43). Based upon this, Deputy McLagan testified that he concluded that social media threats Appellant

claimed were sent by Mr. Jackson were likely sent by her as a ruse. (RP 44).

Appellant was given an opportunity to cross-examined Deputy McLagan, as well as call her own witnesses and present evidence on her behalf. (RP 49-54). As a result of this hearing, the court ruled that the State could revoke the plea agreement. (RP 55).

In February of 2019, Appellant's new counsel filed a motion to reconsider the courts order to withdraw her plea of guilty. (RP 96-97). Over the State's objection, on the basis of timeliness, the trial court ordered a new evidentiary hearing. (RP 97-113). At this second hearing Deputy McLagan was again called, this time by Appellant's counsel, and was questioned regarding virtually all testimony he had provided at the initial hearing. (RP 145-201). During Appellant's cross-examination, very little of the claims made by Deputy McLagan were denied or rebutted, but instead the cross-examination sought mostly to explain or rationalize Appellant's behavior as a consequence of an abusive relationship. (RP 145-173, 196-201).

Subsequent to Deputy McLagan's testimony, Appellant testified on her own behalf. (RP 204-246). On cross-examination, Appellant claimed

that Mr. Brown had come to her home in an attempt to intimidate her into signing a false affidavit. (RP 217). Despite being deathly afraid of Mr. Brown, she was able to refuse his intimidations, explaining she would not do so until she showed it to her attorney. (RP 217). Appellant went on to state that she did not actually know why she was in fear for her life at the hands of Mr. Brown, as he had never hit her, or even talked to her since her free talk with the State, but simply stated she "didn't know what he was capable of." (RP 217). When pressed by the State as to why she stayed with Mr. Jackson the night before and after the free talk, Appellant no longer claimed it was to avoid detection, but instead claimed that what she *meant* by being "in hiding" from Mr. Jackson was simply that she didn't want to be in court at the same time as him. (RP 226).

Subsequent to the second hearing, the court issued a written ruling affirming its prior decision to withdraw Appellant's guilty plea.

Within the instructions read and presented to the jury, instruction 13, the "to-convict" instruction regarding the charge of "Possession of a Controlled Substance" was as follows:

> "To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about February 10, 2018, the defendant possessed a

controlled substance; and
(2) That this act occurred in the State of Washington."
(CP 286).

The Jury Verdict form presented to the jury included the following language:

> "We, the jury, find the defendant Paula M. Gardner "Guilty" of the crime of Possession of a Controlled Substance – other than Marijuana in Count II."

(CP 292).

Appellant was found guilty of Count I, first degree burglary, and Count II possession of a controlled substance other than marijuana. (CP 291-92; RP 452). Appellant was sentenced to 116 months on Count I and 24 months on Count II. (CP 309).

## II. ARGUMENT.

### A. THE TRIAL COURT'S DECISION TO WITHDRAW THE DEFENDANT'S GUILT PLEA AFFORDED THE DEFENDANT REQUISITE DUE PROCESS AND WAS NOT AN ABUSE OF DISCRETION

"A plea agreement is a contract with constitutional implications"

*State v. Townsend*, 2 Wn.App. 2d 434, 438 (2018). "An agreement between the parties which is approved by the trial judge cannot be turned aside simply because of the exigencies of the moment." *State v Tourtellotte*, 88 Wn.2d 579 at 584 (1977). "[M]erely accusing the defendant of misconduct does not relieve the state of its bargained-for duty." *In re James*, 96 Wn.2d 847 at 848 (1982). However, "[i]f a defendant breaches a plea agreement, the State may rescind it." *Townsend*, 2 Wn.App 2d at 438. (citing *State v. Thomas*, 79 Wn. App. 32, 36-37 (1995)).

**1. The hearings conducted by the trial court, prior to withdrawing Appellant's guilty plea, were sufficient to satisfy due process**

It is "required, before relieving the State of its promises, that an evidentiary hearing be held and that the defendant be given an opportunity to call witnesses and have other due process rights, including the requirement that the State prove, by a preponderance of the evidence, that the defendant has failed to perform his or her part of the agreement." *James*, 96 Wn.2d at 850. (See also *Townsend*, 2

Wn.App 2d at 439; *State v.Hall*, 32 Wn.App 108, 110).

On May 22, 2018, after a State's motion to withdraw Appellant's guilty plea, the court held a hearing on that matter. At that hearing, the court considered in person testimony of Deputy McLagan concerning whether Appellant had breached the terms of her plea agreement with the State. Appellant's attorney was given a full opportunity to cross examine Deputy McLagan. Despite having the opportunity, Appellant did not present any evidence, call any witnesses, or testify on her own behalf.

By February 2019, Appellant had been assigned new counsel. On February 12, 2019, despite being almost nine months after the original hearing, and over objections on the basis of timeliness, the court agreed to reconsider its prior order withdrawing Appellant's guilty plea. At this second hearing, the court heard a second round of testimony from Deputy McLagan, testimony from the Appellant herself, and considered evidence from both Appellant and the State.

Prior to the court issuing its final order to withdraw the Appellant's guilty plea, Appellant was given not one, but two hearings on the matter. At both hearings, Appellant had an opportunity to cross-

examine the State's witness, call her own witnesses, and present evidence on her behalf. Additionally, her counsel was given almost nine full months to prepare for the second hearing. The due process requirements prior to withdrawing a defendant's guilty plea, that a defendant be given the chance to submit evidence and challenge the State's evidence, have been clearly met.

**2. The Trial Court did not abuse its discretion by withdrawing Appellant's guilty plea**

At the evidentiary hearing, "the State must prove breach by a preponderance of the evidence." *Townsend*, 2 Wn. App. 2d at 438. (Citing *James* 96 Wn.2d at 850-51.) A "trial court needs to clearly state the evidence upon which the court relied. The statement may be made orally or in writing." *State v. Marino*, 100 Wn.2d 719, 727 (1984). On appeal, a court will "review trial court's decision on a motion to withdraw a guilty plea for abuse of discretion." *State v. Blanks*, 139 Wn.App 543, 548 (2007). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *State v. Perrett*, 86 Wn. App. 312, 319 (1997)

(quoting *Havens v. C&D Plastics, Inc*, 124 Wn.2d 158, 168 (1994)). "The burden is on the appellant to prove an abuse of discretion." *State v. Williams*, 137 Wn.App. 736, 743 (2007) (citing *State v. Hentz*, 32 Wn. App. 186, 190 (1982)).

In the first hearing, held in May of 2018, Deputy McLagan testified Appellant had claimed that she was deathly afraid of Mr. Jackson. (RP 39). The Deputy then testified regarding multiple and repeated instances of Appellant's conduct which directly contradicted that fear being legitimate. (RP 39-40). Appellant's conduct included repeated instances of Appellant spending the night at Mr. Jackson's house, staying in continuous contact with Mr. Jackson and his family, voluntarily giving her address to Mr. Jackson's brother as well as inviting him to her home. (RP 39-40). Deputy McLagan also testified that Appellant's jail call records indicated that she had repeatedly discussed a "plan" to get her charges reduced; which is precisely what ended up occurring as a result of Appellant's misrepresentations during the free talk. (RP 42). This conduct was corroborated by statements by Mr. Jackson, Mr. Jackson's neighbors, Appellant's jail call records, as well as photos, call logs and pictures on Appellant's

phone. (RP 39-47).

The second hearing regarding the court's decision to withdraw Appellant's guilty plea took place in February 2019, nine months after the first hearing. (RP 141). At that hearing, with the benefit of nine months to prepare, Appellant's attorney cross-examined Deputy McLagan on every aspect of his testimony at the first hearing. (RP 145-173). Also at the second hearing, Appellant herself testified. (RP 204-246). In her testimony, Appellant attempted to explain all of her actions, the evidence that had previously been presented against her. (RP 204-246).

Ultimately, the Trial Court had two opportunities to hear the allegations made against Appellant, as well as a complete rebuttal of those allegations, by a well prepared defense counsel, and finally heard Appellant's own explanation for her actions. It bears pointing out that very few of the facts relating to Appellant's conduct have ever been denied in either hearing or in Appellant's brief; they have merely rationalized.

Appellant's brief, understandably, seeks to present the Trial Court's decision as baseless. However, this is plainly not the case.

Many of the "errors" alleged in Appellant's brief, are entirely incidental and have little to do with the matter at issue. An example would be Appellant making issue of whether or not she was charged with crimes of false statement, or whether those crimes were merely alleged. (App. Br 27). Whether Appellant was in fact charged with making a false statement or not has no bearing on whether she lied to the State during a free talk.

The vast majority of the alleged errors of the trial court simply accept Appellant's testimony as gospel truth, while dismissing testimony of Deputy McLagan as either lies or mistakes. Appellant's brief supports her alleged fear of Mr. Jackson by merely accepting Appellant's version of events as truth, and thereby claiming it was not supported by substantial evidence. (App. Br 22-23). However, the trial court's order makes it clear that it compared the veracity of both Appellant's and the State's claims, and that the States claims were corroborated and supported by evidence, whereas Appellant's claims were neither substantiated by evidence nor supported by basic common sense. (CP 262-263). Credibility determinations are certainly best left to the finder of fact. While the trial court's ruling may have

had a few minor discrepancies, the fundamental basis for its determination on this matter was soundly and rationally based in the facts and evidence presented.

Appellant's brief claims that the trial court's decision was baseless and lacked evidentiary support. (App. Br. 26). However, a careful reading of the record, as well as the trial court's opinion, clearly demonstrates that the trial courts order was based upon a sound factual basis, supported by substantial corroboration and evidence. The findings of the trial court should be affirmed.

**B. THE VERDICT OF THE JURY SUPPORTS THE SENTENCE, ANY DEFECT IN THE JURY INSTRUCTIONS WERE CURED BY THE JURY VERDICT FORM**

The to-convict instruction in the jury instructions did not contain specify which controlled substance was possessed; however, the jury verdict form itself specified that the controlled substance was a substance – "other than Marijuana" which cures that defect. (CP 292).

Appellant's brief is correct in its interpretation that "a to-convict instruction must include all essential elements of the crime charged"

State v. Clark-El, 196 Wn. App 614, 618 (2016). Similarly, Appellant's brief is correct that a failure to specify the controlled substance cannot be cured by merely including "as charged in Count III." State v. Gonzales, 2 Wn. App. 2d 96, 104 (2018).

Appellant's brief is incorrect when it asserts that "Including the 'Possession of a Controlled Substance – other than Marijuana in Count II' language in the verdict form does not remedy the error in the to-convict instruction." (App. Br. 31). In State v. Rivera-Zamora, the Defendant was charged with "possession of a controlled substance, methamphetamine." 7 Wn. App 2d 824, 826 (2019). As in this case, the court in Rivera-Zamora omitted the identity of the controlled substance in the to-convict instruction. Id at 828. However, Division Three of this court distinguished that case from Clark-El, as "the jury's *verdict* included the identity of the controlled substance, even if the elements instruction omitted it." Id at 847. The court in Rivera-Zamora held that "the verdict form stated unequivocally that it found Rivera-Zamora guilty of possession of a controlled substance … methamphetamine" and that the error was thus harmless. Id 829-30.

The holding in Rivera-Zamora has been reaffirmed by Division

Three of this court in State v. Barbarosh, 10 Wn. App. 2d 408. In Barbarosh this court found that the jury verdict form did not include any specific language identifying the controlled substance as one other than marijuana. Id at 418. However the court in Barbarosh concluded that "it it had, there would have been an express finding that the controlled substance possessed by Barbarosh was methamphetamine." Id.

While the verdict form in the present case did not expressly state the controlled substance was methamphetamine, it did expressly state that the controlled substance was a substance "other than marijuana." (CP 292). RCW 69.50.4013 (2), (3) and (5) have three different maximum sentences. Of those three provisions, (3) and (5) apply solely to marijuana. Provision (2) applies to all controlled substances other than marijuana. By expressly finding that the controlled substance possessed by Appellant was "other than marijuana", the jury expressly found that provisions (3) and (5) of RCW 69.50.4013 do not apply, and that provisions (2) of that RCW does. As stated in RCW 69/50.4013 "any person who violates this section is guilty of a class C felony …"

To grant Appellant's requested relief, and remand for resentencing as a misdemeanor sentence would be to remand for a sentencing scheme that the jury expressly rejected. Even if the trial court's failure to specify the controlled substance in the to-convict instruction, that error was harmless, as the jury's verdict expressly stated that the controlled substance was one other than marijuana. Therefore, the only sentence available to the court under RCW 69.50.4013 was as a class C felony, and the trial courts sentence should be affirmed.

### C. THE TRIAL COURT ERRED WHEN IT IMPOSED A CONDITION OF COMMUNITY CUSTODY AND REQUIRED APPELLANT TO PAY SUPERVISION FEES

The state concedes that the trial court assessed community custody fees erroneously. Appellant's requested relief that supervision fees be stricken should be granted.

## III. CONCLUSION

For the reasons above, the State respectfully requests that the court deny Appellant's request to reinstate the original plea and remand for

resentencing as a misdemeanor. However, the State agrees that the community custody provision requiring her to pay supervision fees should be stricken.

RESPECTFULLY SUBMITTED this 5th day of February, 2020.

ADAM WALSER
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Certificate of Mailing

I, Tami Odenrider, do hereby certify and declare that I am the administrative assistant to the Deputy Prosecuting Attorney for Lincoln County, and that I deposited in the United States Post office in the City of Davenport, Lincoln County, Washington, on the date below, a properly stamped and addressed envelope(s) directed to the appellant Ms. Jill S. Reuter, at the address of PO Box 8302, Spokane, WA 99203 containing a true and correct copy of: Brief of Respondent.

Dated: _____ _____

## LINCOLN COUNTY PROSECUTOR'S

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