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State of Washington
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DESTINY LOUISE AHENAKEW, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brett Pearce
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court violated Ahenakew's Fifth and Fourteenth Amendment and Const. art. I, § 3m rights to Due Process when it accepted Ahenakew's guilty plea to first degree burglary.

II. ISSUE PRESENTED

1. Did the trial court err where the record irrefutably reflects Ms. Ahenakew voluntarily entered her plea because she was informed of the elements of first degree burglary, and the consequences that arose from her conviction?

III. STATEMENT OF THE CASE

Destiny Louise Ahenakew appeals from her guilty plea to the crime of first degree burglary. CP 23.

Rebecca Sewell resided at an apartment complex in Spokane. CP 3. One night in December 2018, she heard noises in the hallway and opened her front door. CP 3. She saw Ms. Ahenakew outside, who had broken into a storage closet assigned to Ms. Sewell. CP 3. Ms. Sewell confronted Ms. Ahenakew; Ms. Ahenakew claimed Ms. Sewell's closet belonged to her, and she began to leave with Ms. Sewell's suitcase and black bag taken from Ms. Sewell's closet. CP 3. Ms. Sewell stopped Ms. Ahenakew and attempted to recover her black bag. CP 3. Ms. Ahenakew began assaulting Ms. Sewell by pulling her hair, punching her in the face, and kicking her several times. CP 3. Another neighbor heard the commotion, stepped outside, and witnessed the end of the robbery. CP 4. Ms. Ahenakew then

fled the scene with Ms. Sewell's black bag, but dropped her own personal cellular phone. CP 3.

Law enforcement arrived shortly after. CP 4-5. One officer located Ms. Ahenakew, who still possessed Ms. Sewell's black bag. CP 4. Ms. Ahenakew admitted the items she had been going through did not belong to her. CP 6.

The State charged Ms. Ahenakew with first degree robbery and first degree burglary. CP 1. The information identified the facts and elements of the crimes:

COUNT I: FIRST DEGREE BURGLARY, committed as follows: That the defendant, DESTINY L. AHENAKEW, in the State of Washington, on or about December 06, 2018, with intent to commit a crime against a person or property therein, did enter and remain unlawfully in the building of REBECCA SEWELL, located at 1725 W. 9TH AVE, APT. 6., SPOKANE, WASHINGTON, and in entering and while in such building and in immediate flight therefrom, the defendant or another participant in the crime, did assault REBECCA SEWELL, a person therein,

COUNT II: FIRST DEGREE ROBBERY, committed as follows: That the defendant, DESTINY L. AHENAKEW, in the State of Washington, on or about December 06, 2018, with the intent to commit theft, did unlawfully take and retain personal property, that the person from whom the property was taken had an ownership, representative, or possessory interest in, and that the defendant did not own, from the person and in the presence of REBECCA SEWELL, against such person's will, by use or threatened use of immediate force, violence or fear of injury to said person or the property of said person or the person or property of another, and in the commission of and immediate

flight therefrom, the defendant inflicted bodily injury upon
REBECCA SEWELL,

CP 1.

The parties reached a plea agreement; Ms. Ahenakew agreed to plead guilty to first degree burglary in exchange for the State's agreement to dismiss the charge of first degree robbery and recommend the low end of the standard range. CP 9, 13. As part of Ms. Ahenakew's statement on plea of guilty, she agreed that the elements of first degree burglary were contained in the information. CP 13. She agreed her offender score was "6," with a sentencing range of 57-75 months confinement. CP 13.

One of the advisements in the statement on plea of guilty specifically states:

This is a most serious offense or 'strike' as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.

CP 14. This advisement bears a checkmark to indicate it applies to Ms. Ahenakew, Ms. Ahenakew's initials, indicating it applies to her, and the trial court's initials, which also indicate it applies to her. CP 14.

The document also contains a stipulation that the trial court could review any police reports to establish a factual basis for the plea. CP 19. Ms. Ahenakew acknowledged that her lawyer had previously read the entire

guilty plea statement to her, and that she agreed to it in full. CP 19. Ms. Ahenakew, her counsel, the State, and the trial court all signed the agreement. CP 19. The parties also agreed to an understanding of Ms. Ahenakew's criminal history, which included a 2018 conviction for attempted second degree burglary. CP 21.

The trial court held a hearing to address the plea. RP 2. Ms. Ahenakew verified to the trial court that she had read through her statement on plea of guilty with her attorney and had no questions about it. RP 3-4. The court orally advised Ms. Ahenakew of her constitutional rights. RP 4-5. The court informed Ms. Ahenakew of the maximum penalty permitted under the law. RP 5-6. The court informed Ms. Ahenakew that first degree burglary was a strike offense. RP 7. The court asked the attorneys, "and is this a first strike in her case?" RP 7. Before either attorney could reply, Ms. Ahenakew herself said, "No." RP 7. The court asked her if she understood the consequences of a strike offense; she answered, "Yes." RP 7.

Ms. Ahenakew agreed that the court could review the statement of facts to determine if a factual basis existed. RP 9. The court, after clarifying that the statement on plea of guilty bore Ms. Ahenakew's signature in several locations, read the statements of facts and determined a factual basis for the plea existed. RP 9-10. The court then asked Ms. Ahenakew for her

plea; she pleaded guilty. RP 10. The court accepted the plea as knowingly, intelligently, and voluntarily made. RP 10.

The court dismissed the count of first degree robbery pursuant to the agreement and asked the parties for sentencing recommendations. RP 10. The State noted, “Ms. Sewell was the victim in this case, has been very involved in the prosecution. She does support this resolution, though. She believes it’s a fair resolution, given what Ms. Ahenakew is facing both prison time and what she will be leaving prison with, with a second strike.” RP 10. Counsel for Ms. Ahenakew agreed, “It’s a strike. And she knows that she better not get another one.” RP 11. Ms. Ahenakew used her allocution to say, “I’d just like to apologize, especially for the victim, for my—for my actions. I think the consequences are pretty firm enough for my future so I don’t come back and try and make poor choices again.” RP 12.

The court followed the joint recommendation of 57 months confinement, followed by 18 months of community custody. CP 28-29.

Ms. Ahenakew timely appealed. CP 41. After Ms. Ahenakew filed her notice of appeal—but prior to Ms. Ahenakew filing her appellate brief—she filed a CrR 4.2 motion to withdraw her guilty plea, which the

trial court transferred to this Court pursuant to CrR 7.8. *See* CP 46.¹ The basis for Ms. Ahenakew’s argument in that motion is her sole claim that she “did not know this was a strike” offense; she never asserts that she did not know the elements of her crime or the law in relation to the facts of her case. Supplemental CP 49-60.²

IV. ARGUMENT

MS. AHENAKEW ENTERED HER PLEA KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY.

Ms. Ahenakew contends this Court must permit her to withdraw her plea. In her direct appeal, she argues that the statement of facts submitted to demonstrate a factual basis for the plea creates an ambiguity in her understanding of the law in relation to the facts of her case. In the CrR 4.2 motion—transferred to this Court as a personal restraint petition (PRP) pursuant to CrR 4.2(f)—she argues only that she did not understand first degree burglary qualified as a strike offense. This Court should reject both claims.

¹ Respondent has filed a supplemental designation of clerk’s papers contemporaneously herewith and is estimated to be designated as CP 46-66.

² The State anticipates this Court will consolidate that motion with this appeal as a personal restraint petition, so the State is responding to this issue. Even if no consolidation occurs, Ms. Ahenakew’s declaration is silent on the issue she now claims requires reversal, which is relevant to the appeal.

Before accepting a guilty plea, CrR 4.2(d) first requires a court to “determin[e] that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” This requirement derives from due process, which requires an affirmative showing that a defendant’s guilty plea be knowing, intelligent, and voluntary. *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). Defendants must also understand that they necessarily waive important constitutional rights. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). A guilty plea is not truly voluntary “unless the defendant possesses an understanding of the law in relation to the facts.” *In re Matter of Keene*, 95 Wn.2d 203, 209, 622 P.2d 360 (1980). The judge must determine “that the conduct which the defendant admits constitutes the offense charged in the indictment or information.” *Id.* Requiring this examination protects 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.” *Id.*

A court determines whether a plea is made knowingly, intelligently, and voluntarily based on the totality of the circumstances. *Branch*, 129 Wn.2d at 642. On appellate review of a guilty plea, the State bears the burden of proving the plea’s validity. *State v. Knotek*, 136 Wn. App. 412, 423, 149 P.3d 676 (2006). Apprising the defendant of the nature of the

offense does not require a description of every element of the offense. *State v. Holsworth*, 93 Wn.2d 148, 153 n.3, 607 P.2d 845 (1980).

When a defendant completes a written plea statement and admits to reading, understanding, and signing it, a strong presumption arises that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). Likewise, an information that notifies the defendant of the nature of the crimes to which he or she is pleading creates a presumption that the plea was knowing, intelligent, and voluntary. *Matter of Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993). There is a strong public interest in enforcement of plea agreements that are voluntarily and intelligently made. *In re Breedlove*, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). When a judge goes on to inquire orally of the defendant and is satisfied on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is “well-nigh irrefutable.” *Branch*, 129 Wn.2d at 642 n.2.

1. Analysis of direct appeal

Ms. Ahenakew relies heavily on *State v. S.M.*, 100 Wn. App. 401, 996 P.2d 1111 (2000), for the proposition that an “ambiguity” in a statement of facts permits a defendant to successfully challenge a guilty plea on appeal. The case did not create a new concept of “ambiguity” in the analysis. It looked at the totality of the circumstances and determined that under those circumstances S.M.’s plea was not voluntary.

In that case, the State charged S.M. with three counts of rape of a child in the first degree. *Id.* at 403. S.M. was fourteen at the time, but twelve at the time of the criminal conduct. *Id.* Five days after being charged, S.M. went with his mother and a counsellor to his appointed counsel's office. *Id.* Once there, S.M. only met his counsel's wife—a legal assistant and not an attorney—who was the only person from the office to go over the plea paperwork with S.M. *Id.* at 404. The legal assistant:

misinformed S.M. as to the burden of proof, clearly describing a preponderance of the evidence standard instead of proof beyond a reasonable doubt; she did not inform S.M. that a refusal to testify could not be held against him; she did not read the plea form to S.M. or, apparently, make sure that he read it himself, stating only that he “passed through it,” filled it out, and signed it; and she did not discuss other options with S.M., such as negotiating a plea to a lesser offense.

Id. at 411. Eight days later, S.M. appeared before the juvenile court to enter a guilty plea. *Id.* at 403. Appointed counsel finally met with S.M. immediately before the hearing and did not go over the plea. *Id.* at 404.

At the guilty plea hearing, S.M. only admitted that he “had sexual contact” three times with the victim, whereas the charged crime required penetration. *Id.* at 415. The trial court only asked if S.M. knew what sexual intercourse was. *Id.* The trial court accepted S.M.'s plea. *Id.* at 404. After S.M. later obtained alternate counsel and filed a CrR 4.2 motion to withdraw

the plea prior to judgment, the court denied his motion. *Id.* at 408. S.M. appealed. *Id.*

The appellate court agreed that the circumstances amounted to a violation of S.M.'s right to effective representation, particularly where S.M. did not even enjoy the services of a person authorized to practice law to assist him in his decision whether or not to plead guilty. *Id.* at 410. The appellate court reversed, holding that defect constituted a manifest injustice, and the trial court erred in denying S.M.'s motion to withdraw his plea. *Id.* at 412.

Having resolved the appeal on those grounds, the court further noted that the plea was not knowing and voluntary under the totality of circumstances. *Id.* at 413. The court determined the record did not support a conclusion that S.M. understood the law in relation to the facts in his case. *Id.* at 415. As noted, S.M.'s written statement only admitted to sexual contact and the trial court only asked about sexual intercourse, but there was no indication that S.M. understood the crime of rape of a child required penetration. *Id.* The plea statement and trial court colloquy were particularly deficient "under the circumstances here where the record shows that S.M. did not have full assistance of counsel before entering his plea." *Id.*

That case is easily distinguishable from Ms. Ahenakew's case. The most disturbing circumstance in that case is that S.M. never received legal advice about his plea agreement from appointed counsel. The legal assistant who reviewed the plea paperwork with S.M. gave limited and incorrect information. S.M. was only 14-years-old, so it is not clear he understood the differences between lay use of the words "contact," "intercourse," and "penetration" and any applicable legal definitions. At the hearing, S.M. only admitted to sexual contact with the victim, when the statute specifically required penetration. The trial court did not inquire further. The procedural posture was different as well; the trial court in that case was considering a timely CrR 4.2 motion under the manifest injustice standard, whereas here Ms. Ahenakew is challenging her plea on direct appeal.

Here, the totality of the circumstances and several presumptions support the voluntariness of the plea. Licensed legal counsel advised Ms. Ahenakew throughout her case, including the plea and sentencing. The charging document appropriately notified Ms. Ahenakew of all the elements of the crime, her conduct, and she acknowledged that she had received a copy of it. The State, Ms. Ahenakew, her counsel, and the trial court all independently signed the relevant documents containing the information relevant to this appeal, including that Ms. Ahenakew was giving up the ability to defend against the charge. The trial court engaged

in a colloquy with Ms. Ahenakew about her plea. Ms. Ahenakew herself answered a question about strike offenses, before her counsel could answer for her. Ms. Ahenakew was an adult at the time, not a teenager, and had a prior conviction for burglary. Ms. Ahenakew—the person in the best position to answer this question—never expressed confusion about the facts of the case in relation to the law, or asked any question when given the opportunity. This is true both of her statements in the record in support of the plea agreement and her declaration in support of her motion to withdraw her plea, which *only* asserts that she did not realize first degree burglary was a strike offense.

Ms. Ahenakew's argument relies entirely on the notion that she exclaimed a self-serving exculpatory statement when caught red-handed by the victim. This is not proof that she did not know the facts of the case in relation to the elements of the crime the State charged her with. That is a weak defense to the charged crimes; it does not evince confusion about the law and facts of her case. This is particularly poignant because Ms. Ahenakew expressly made inculpatory statements moments later. Additionally, she acknowledged that the true property owner was the victim of her crime at sentencing, so she was clearly not confused about who owned the property or storage closet.

First degree robbery is two seriousness levels higher than first degree burglary; Ms. Ahenakew would have faced a sentencing range of 77-102 months on that charge. RCW 9.94A.515; RCW 9.94A.510. Ms. Ahenakew knowingly and voluntarily pleaded guilty to the lesser of the two charged crimes in order to secure the favorable terms of the plea agreement. The record repeatedly demonstrates Ms. Ahenakew's consent to the plea agreement, which the trial court verified such during the hearing. It is "well-nigh irrefutable" that she entered this plea voluntarily. This Court should affirm.

2. *Analysis of CrR 7.8 motion to withdraw guilty plea*

"Relief by way of a collateral challenge to a conviction is extraordinary, and the petitioner must meet a high standard before [the] court will disturb an otherwise settled judgment." *In re Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011). Relief will only be granted in a PRP if there is constitutional error that caused actual and substantial prejudice or if a non-constitutional error resulted in a fundamental defect constituting a complete miscarriage of justice. *In re of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). It is the petitioner's burden to establish this "threshold requirement." *Id.* To do so, a petition must present competent evidence in support of its claims. *In re Rice*, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992).

A petitioner may not rely on conclusory allegations, but must show with a preponderance of competent, admissible evidence that the error caused him prejudice. *In re Ruiz-Sanabria*, 184 Wn.2d 632, 636, 362 P.3d 758 (2015). This Court can disregard a defendant's self-serving assertions included in a PRP. *See In re Yates*, 180 Wn.2d 33, 43, 321 P.3d 1195 (2014) (Stephens, J., concurring) (“[W]e need not accept at face value Yates's self-serving statement, made years after the fact”). The petitioner's allegations of prejudice must present specific evidentiary support. *In re Rice*, 118 Wn.2d at 886. Such support may come from the trial court record. “If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief,” which may include affidavits or other corroborative evidence. *Id.* Bald assertions and conclusory allegations are insufficient support. *Id.*

Due process requires that a defendant must be informed of the direct consequences of pleading guilty, in order that the plea be knowing, voluntary and intelligent. *In re Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004).

Ms. Ahenakew's unsupported evidence in support of her PRP is that she did not know this offense was a strike offense. This is the type of self-serving assertion that this Court is free to ignore. *In re Yates*, 180 Wn.2d at

43. Ms. Ahenakew did not provide evidence from either her attorney, the prosecutor, or the trial court to support her claim that no one informed her of this consequence. The record directly contradicts this claim in several instances.

Ms. Ahenakew initialed the section of the plea agreement that informed her that this was a strike offense, as did the trial court. The trial court in open court asked Ms. Ahenakew if she had read the agreement and if her attorney had gone over the agreement with her. She answered affirmatively. The court asked the attorneys if this was a first strike in “her” case; *Ms. Ahenakew* was the first person to quickly respond and state that it was not (the correct response to the court’s inquiry). The trial court then directly asked her counsel if he had discussed strike offenses with her, and he agreed that he had. The court asked Ms. Ahenakew directly if she understood the meaning of strike offense, and she answered affirmatively. Only after all of these warnings did Ms. Ahenakew enter her guilty plea. Both parties reiterated the fact that this crime constituted a strike offense during their oral sentencing recommendations, demonstrating it was a consideration during the bargaining process. RP 10-12. All signs in the record point to Ms. Ahenakew understanding her plea resulted in a second strike. This Court should dismiss this claim.

V. CONCLUSION

The record reflects that Ms. Ahenakew entered her guilty plea knowingly, intelligently, and voluntarily. She alleges nothing other than buyer's remorse of a strategy she accepted to resolve the charged crime for a substantially reduced term of incarceration. This Court should affirm her conviction and dismiss her petition.

Dated this 22 day of November, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brett Pearce, WSBA #51819
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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DESTINY AHENAKEW,

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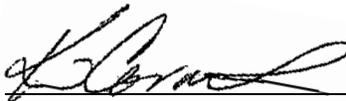
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Lise Ellner
liseellnerlaw@comcast.net

Erin Sperger
erin@legalwellspring.com

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SPOKANE COUNTY PROSECUTOR

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