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COA NO. 69423-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROY JACKSON JR.,

Appellant.

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

The Honorable Hollis R. Hill, Judge
The Honorable LeRoy McCullough, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. Appellant's guilty plea was not knowing, voluntary and intelligent, in violation of due process.

2. The court erred in denying appellant's motion to withdraw his guilty plea.

3. The court erred in entering the following "findings" in the order denying the defense motion to withdraw the guilty plea:

a. "That there is no evidence that mental competency is an issue in this hearing." CP 90.

b. "That there was no evidence presented by the defendant to show any manifest injustice in this case." CP 90.

c. "The Court further finds that there has not been a sufficient showing by the defendant that his guilty plea should be withdrawn." CP 90.

4. The court erred in refusing to order a competency evaluation, in violation of the procedure mandated by RCW 10.77.060 and due process.

5. The court erred in ordering no contact with the victim under count II for a period that exceeds the statutory maximum.

Issues Pertaining to Assignments of Error

1. Due process requires a guilty plea to be knowing, voluntary, and intelligent. The plea agreement and colloquy misinformed appellant that a mandatory minimum term of confinement would be imposed as part of his

sentence. Must appellant be allowed to withdraw his plea because he was misinformed of a consequence of his plea?

2. A competency valuation must be ordered whenever there is a "reason to doubt" competency. Did the court necessarily abuse its discretion in denying the defense request for a competency evaluation by requiring the defense to prove the evaluation was needed by a preponderance of the evidence?

3. Whether the court exceeded its authority in imposing a no contact order of life pertaining to the victim of the offense in count II where the statutory maximum for the offense is 10 years?

B. STATEMENT OF THE CASE

The State charged Roy Jackson Jr. with first degree assault against Antoine Greenhaigh (count I) and second degree assault against Margaret Caster (count II), with firearm enhancements on both counts. CP 1-2. The State alleged Jackson shot Greenhaigh, a passenger on a Metro bus, and then pointed the gun at Caster, the bus driver. CP 4.

1. Denial of Competency Evaluation

On November 23, 2011, defense counsel moved to have Jackson sent to Western State Hospital for a competency evaluation. 1RP[1] 3.

[1] The verbatim report of proceedings is referenced as follows: 1RP - one volume consisting of 11/23/11, 3/7/12, 8/2/12, 10/12/12 & 11/21/12; 2RP

Counsel informed the court that it became clear during the course of representation that Jackson had mental health issues. 1RP 3-4. Counsel pointed out a report produced by Dr. Muscatel on the issue of diminished capacity backed up counsel's observations in this regard. 1RP 4; see CP 48-57 (Dr. Muscatel's forensic report). In that report, Dr. Muscatel recognized the presence of chronic mental health problems and chronic use of "sherm." 1RP 7; see CP 54, 56-57. Jackson's family, meanwhile, had observed "lots of paranoia." 1RP 7-8.

Counsel further represented that conversations with Jackson since May had been "hit or miss. Sometimes he is with me, sometimes he is not me [sic]; sometimes we have nutty discussions, and sometimes they are kind of on point." 1RP 4-5. After Jackson was transported to the Seattle jail, counsel attempted to meet with him two times, but was unsuccessful because jail staff would not bring Jackson out, saying, "He is being very uncooperative." 1RP 5.

Counsel managed to visit Jackson in jail on November 14, 2011. 1RP 5, 6. At that time, Jackson was yelling and punching the glass, "pointing to a Band-Aid on the inside of his arm, saying that, They are doing things to him. Look at, they took my blood. They stabbed me with things. You can't believe what they are doing to me -- kind of yelling

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- 5/15/12.

around the room, and not the client that I can have any conversations substantively about how to handle his case." 1RP 5. Counsel tried to calm Jackson down to communicate with him, but the effort was "ineffective, completely." 1RP 6. Jackson recognized counsel as his defense attorney but was "completely off his rocker," which was "a lot different than what we see today." 1RP 6, 7.

The prosecutor opposed the motion for a competency evaluation, framing the issue as whether "Mr. Jackson, sitting before the Court today, is competent to be here." 1RP 8. The prosecutor played a jail call recording from November 7,[2] which she said showed Jackson talking "about acting like he is crazy to get a better deal." 1RP 10-18; Pre-Trial Ex. 1.

According to the verbatim report of proceedings, Jackson said it was "looking grim right now" and "I am going to tell you more when you come up here to visit me because I don't know, I might try to pump -- act like I am -- thinking I ought to win, and then just wait for a visit, you know what I'm saying?" 1RP 13. Played again, the verbatim report of proceeding reads as "You know me, because I don't know. I might try to act like I am [UNINTELLIGIBLE] -- and then just wait for a visit, you

[2] The prosecutor initially refers to December 7 as the date, but later refers to November 7. 1RP 10-11.

know what I'm saying?" 1RP 14. According to the prosecutor, Jackson said "'I am going to act like -- and he uses kind of lingo for crazy." 1RP 13. The prosecutor interpreted what Jackson said as "I am going to act like I am crazy and wait for a better offer." 1RP 13-14. The prosecutor also played a jail call recording from November 14, where Jackson had a lucid conversation with a woman. 1RP 18-20.

The prosecutor was suspicious that the motion for a competency evaluation and Jackson's behavior was due to Jackson's dislike of the State's plea offer and Dr. Muscatel's conclusion from his October 3rd report that Jackson did not have diminished capacity at the time of the offenses. 1RP 9, 20-22. The prosecutor said she had been listening to Jackson's jail calls and "there is nothing to support that he doesn't know who he is, who his lawyer is, who the parties are, or what is going on." 1RP 21. The prosecutor argued the motion for a competency evaluation should be denied because she did not "believe that that record has been met here." 1RP 23.

The court asked the prosecutor "What is the standard? What is the burden of proof?" 1RP 23. The prosecutor said she believed "it is by a preponderance at this point, but I wouldn't bet my bar card." 1RP 23. Defense counsel did not know what the standard was. 1RP 23-24.

The court asked defense counsel to address whether Jackson understood the charges against him and was able to assist in his defense. 1RP 25. Counsel responded "based on my review of his past mental health records, dating back 15 years, and the discussions with his family that he has had mental health treatment providers since he was in about fourth-grade and had behavioral issues that connect to mental health issues, and my personal dealings with him where he comes in and out and in and out, I believe that a competency evaluation would be helpful to this court and is necessary to determine his competency to stand trial and to assist me in the case." 1RP 25-26. Counsel believed Jackson understood the charges, but requested the court order a competency evaluation because he was unable to assist counsel. 1RP 26.

When the judge asked if taking a break and giving Jackson a moment to collect himself makes a difference in communication, counsel responded that he had not seen any pattern that a break makes a difference. 1RP 26. Counsel reiterated, "It is hit or miss. Sometimes in my dealings with him, he is with it, and sometimes he is not . . . Sometimes he is helpful to me and to analyzing the case and sometimes he is not." 1RP 26-27. When he is not helpful, he is "completely paranoid, and only talks about, 'I'm scared,' and, 'they are doing things to me' -- the paranoid aspects of it." 1RP 27. When Jackson was having a paranoid day, counsel

was usually unable to "break through" to talk about the parameters of the case and so forth. 1RP 27.

The prosecutor noted Dr. Muscatel's report on diminished capacity did not address competency. 1RP 28. The prosecutor did not believe "the record is clear that Mr. Jackson today suffers from any sort of diminished -- or competency in his ability to be here." 1RP 28.

The court noted Dr. Muscatel's report referred to Jackson as a "rather cagey individual" who initially avoided discussing any memory of the shooting until he realized that lack of memory would not help a mental defense claim. 1RP 28; CP 53. The report also suggested Jackson had a prior dealing with the person involved in the incident. 1RP 28. The court opined such observations did not support the notion that Jackson was unable to assist in his defense. 1RP 28.

The court denied the request for competency evaluation, stating:

> I certainly think that there are some issues here that are appropriately before the Court, in terms of what has been diagnosed as a polysubstance dependence -- some kind of paranoid features, and so forth -- but it sounds to me like the defendant is able to understand the nature of the charges against him, and it sounds to me like the defendant is reasonably able to assist in his -- in his defense -- by talking with counsel.
>
> The fact that he may be paranoid, at times, dos not suggest to me that he is unable to communicate with counsel; the fact that he had an episode on the 22nd -- no, that was November 14, two weeks ago, does not suggest to me that he would not be able to confer with counsel. It

> may in fact involve special meeting times and so forth and so on, and may be a truncated schedule, but I don't see anything that suggests, on this record, that he is unable to assist the defense.
>
> And again, really -- the forensic psychological evaluation from Dr. Muscatel suggests that there could be some convenient lapses in judgment in the part of the defendant, and that would not support the request to have him evaluated. 1RP 29-30.

The court specified "And for the record, I believe that the standard is a preponderance of the evidence, as well. And that is what I am looking at -- that standard; that low standard has not been met in this case." 1RP 34. The written order denying the motion states "While there are mental health issues before the court, there is an insufficient basis to believe the [defendant] is unable to understand the nature of the charges or assist in his own defense. The oral record is also incorporated." CP 12.

2. Plea Hearing, Motion To Withdraw Plea, And Sentencing

In May 2012, Jackson entered a plea of guilty to first degree assault with a firearm enhancement under count I and second degree assault with a firearm enhancement under count II. CP 14-38; 2RP 3-17.

The "Statement of Defendant on Plea of Guilty," lists a number of paragraphs under the heading "I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT . . ." CP 14-23. Paragraph (4)(i) of the plea form states:

> The crime of Assault 1 has a mandatory minimum sentence of at least 5 years of total confinement. The law does not allow any reduction of this sentence. For crimes committed on or after July 24, 2005, this does not apply to juveniles tried as adults pursuant to a transfer of jurisdiction under RCW 13.40.110 (see RCW 9.94A.540(3)). [If not applicable, this paragraph should be stricken and initialed by the defendant and judge RJ.]

CP 18.

This paragraph is crossed out and initialed by Jackson but not the judge. CP 18. In the margin of the plea form, a handwritten bracket encompasses the paragraph with the word "Applies." CP 18.

The plea form signed by Jackson states "My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this 'Statement of Defendant on Plea of Guilty.' I have no further questions to ask the judge." CP 24.

The prosecutor went through the plea form with Jackson at the plea colloquy hearing. 2RP[3] 5-13. At one point, the prosecutor asked Jackson "Do you understand that paragraph I -- and this is on page 5 -- applies? So that assault in the first degree does have a mandatory minimum sentence

[3] The verbatim report of proceedings is referenced as follows: 1RP - one volume consisting of 11/23/11, 3/7/12, 8/2/12, 10/12/12, & 11/21/12; 2RP - 5/15/12.

of five years. Do you understand this?" 2RP 9. Jackson answered, "Yes." 2RP 9.

The trial court subsequently confirmed Jackson had enough time to go over the statement on plea of guilty with his attorney and that his attorney had read the entire statement to him. 2RP 13-15. After concluding Jackson understood the nature of the charges and the consequences of the plea, the court accepted the plea as knowing, voluntary and intelligent. 2RP 16-17.

Before sentencing, Jackson moved to withdraw his plea. CP 65-75. Jackson argued (1) he did not understand the evidence against him and counsel did not conduct adequate investigation; (2) he pled guilty because he felt confused about the evidence, his attorney pressured him to take the plea, and his attorney applied pressure on his family to push him to take the plea; and (3) he has a long history of mental illness, including ADHD and possible mild mental retardation, which requires accommodation by those who need to convey important information to him, and his attorney did not provide proper accommodation. Id.

The court denied the motion to withdraw the plea. CP 89-91. The court sentenced Jackson to a total term of confinement of 258 months, consisting of a standard range sentence of 162 months and a 60 month firearm enhancement on count I, 43 months and a 36 months firearm

enhancement on count II, with the standard range terms to run concurrently and the firearm enhancement to run consecutive. CP 79.

Jackson was not sentenced to a minimum term of confinement on count I. CP 76-85. No one mentioned a term of minimum confinement at the sentencing hearing. 1RP 82-88, 110-14, 120-22. Neither the prosecutor nor the judge pointed out the plea agreement retained a minimum term of confinement provision and that Jackson had been advised of that consequence during the plea colloquy. Id. This timely appeal follows. CP 87-88.

C. ARGUMENT

1. THE GUILTY PLEA IS INVALID BECAUSE JACKSON WAS MISINFORMED ABOUT A SENTENCING CONSEQUENCE OF HIS PLEA.

Jackson's guilty plea is invalid because he was misinformed that a mandatory minimum sentence would be imposed for the first degree assault conviction under count I. Jackson is entitled to withdraw his plea in its entirety for this reason.

a. The Plea Form And Colloquy Wrongly Informed Jackson That He Would Be Sentenced To A Mandatory Minimum Term Of Five Years As A Consequence Of Pleading Guilty.

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." State v. Ross, 129

Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. A guilty plea is otherwise invalid. Boykin v. Alabama. 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228(1996). This standard is reflected in CrR 4.2(d), "which mandates that the trial 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 consequences of the plea.'" State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). "Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). "An involuntary plea produces a manifest injustice." Isadore, 151 Wn.2d at 298.

A guilty plea is not knowingly made when it is based on misinformation regarding a direct sentencing consequence. Mendoza, 157 Wn.2d at 584, 590-91. A guilty plea is also invalid if a defendant is affirmatively misadvised about a collateral consequence. State v. A.N.J., 168 Wn.2d 91, 114, 225 P.3d 956 (2010); see also In re Pers. Restraint of Quinn, 154 Wn. App. 816, 836-37, 226 P.3d 208 (2010) (in holding defendant entitled to withdraw plea because not informed of longer community custody term, finding no meaningful distinction between

characterizing the term of community custody as either a direct consequence or a collateral consequence of his guilty plea); Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1481-82, 1486, 176 L. Ed. 2d 284 (2010) (declining to reach question of whether deportation is direct or collateral consequence in holding counsel was constitutionally deficient in failing to inform client whether his plea made him subject to deportation).

A sentencing consequence is direct when "the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Ross, 129 Wn.2d at 284 (internal quotation marks omitted) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). A mandatory minimum term of confinement is a direct consequence of a plea. State v. Conley, 121 Wn. App. 280, 285, 87 P.3d 1221 (2004) (citing State v. McDermond, 112 Wn. App. 239, 244-45, 47 P.3d 600 (2002)); State v. Johnston, 17 Wn. App. 486, 490, 564 P.2d 1159 (1977) (citing Wood v. Morris, 87 Wn.2d 501, 513, 554 P.2d 1032, 1039 (1976)); see also State v. Miller, 110 Wn.2d 528, 528-29, 537, 756 P.2d 122 (1988) (mistake over mandatory minimum sentence entitled defendant to withdraw plea), overruled on other grounds by State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011).

RCW 9.94A.540(1)(b) provides in relevant part "the following minimum terms of total confinement are mandatory and shall not be

varied or modified under RCW 9.94A.535: . . . An offender convicted of the crime of assault in the first degree . . . where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years."

RCW 9.94A.540(2) states "During such minimum terms of total confinement, no offender subject to the provisions of this section is eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release[.]"

In Jackson's case, the plea form sets forth, in discrete paragraphs, a number of consequences flowing from the plea. The plea form states without qualification that "The crime of Assault 1 has a mandatory minimum sentence of at least 5 years of total confinement. The law does not allow any reduction of this sentence." CP 18. This understanding of the consequence of the plea was reinforced during the plea colloquy, where the prosecutor asked "Do you understand that paragraph I -- and this is on page 5 -- applies? So that assault in the first degree does have a mandatory minimum sentence of five years. Do you understand this?" 2RP 9. Jackson answered, "Yes." 2RP 9.

Jackson was misinformed about a direct consequence of his plea because he was informed he would receive a mandatory minimum

sentence but did not receive a mandatory minimum sentence. Indeed, before such a sentence could lawfully be imposed, there needed to be a specific factual finding that the offender used force or means likely to result in death or intended to kill the victim. State v. McChristian, 158 Wn. App. 392, 402-03, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011). Under recent United States Supreme Court precedent, that finding needed to be made by a jury to comply with the Sixth Amendment. See Alleyne v. United States, __U.S.__, 133 S. Ct. 2151, 2155, __L. Ed. 2d__ (2013) (following logic of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), any fact that increases the mandatory minimum must be submitted to the jury). Jackson did not stipulate to the fact necessary to support a mandatory minimum sentence under RCW 9.94A.540(1)(b) and the necessary fact was not otherwise found.

The fact that the trial court did not ultimately sentence Jackson to a minimum term confirms Jackson was misadvised about a direct consequence of his plea. A guilty plea is deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentence received was more or less onerous than anticipated. Mendoza, 157 Wn.2d at 590-91.

In Mendoza, for example, the Supreme Court held the defendant may withdraw a guilty plea based on involuntariness where the plea is based on misinformation regarding the direct consequences of the plea, including a miscalculated offender score resulting in a lower standard range than anticipated by the parties when negotiating the plea. Id. at 584. "Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." Id. at 591. Misinformation that purports to increase punishment invalidates a plea in the same manner as misinformation that purports to reduce punishment. Id. at 590-91

The same logic applies to Jackson's case. The plea form and colloquy show Jackson was affirmatively misinformed about a direct consequence in the form of the minimum term. A trial judge has an obligation not to accept a guilty plea without "first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." State v. Easterlin, 159 Wn.2d 203, 208, 149 P.3d 366 (2006) (quoting CrR 4.2(d)). The trial judge failed in this regard.

To prevail, Jackson need not show reliance on the incorrect minimum term provision set forth in the plea form and confirmed during the plea colloquy. "[A] defendant who is misinformed of a direct

consequence of pleading guilty is not required to show the information was material to his decision to plead guilty." Mendoza, 157 Wn.2d at 589; see also State v. Weyrich, 163 Wn.2d 556, 557, 182 P.3d 965 (2008) ("The defendant need not establish a causal link between the misinformation and his decision to plead guilty.").

The Mendoza Court specifically rejected an analysis that requires the appellate court to inquire into the materiality of the misinformation in the defendant's subjective decision to plead guilty because "[a] reviewing court cannot determine with certainty how a defendant arrived at his personal decision to plead guilty, nor discern what weight a defendant gave to each factor relating to the decision." Mendoza, 157 Wn.2d at 590 (quoting Isadore, 151 Wn.2d at 302).

Jackson ultimately received a standard range sentence that was above the five year mandatory minimum term he was informed he would receive. CP 79. The plea is still invalid because the misinformation need not have a practical effect on the sentence. In re Pers. Restraint of Bradley, 165 Wn.2d 934, 939-41, 205 P.3d 123 (2009) (even though the defendant's concurrent sentences meant he would never serve the lower standard range about which he was misinformed, the defendant was still not properly advised on the direct consequences of his plea).

The court therefore erred in finding that "there was no evidence presented by the defendant to show any manifest injustice in this case" and "there has not been a sufficient showing by the defendant that his guilty plea should be withdrawn." CP 90. As set forth above, an involuntary plea based on misinformation about a sentencing consequence results in a manifest injustice. Isadore, 151 Wn.2d at 298; Mendoza, 157 Wn.2d at 584, 590-91. The record shows Jackson was misinformed about the mandatory minimum term on count I, rendering his plea involuntary and entitling him to withdraw it.

Where a guilty plea is based on misinformation regarding the direct consequences of the plea, the defendant may withdraw the plea based on involuntariness. Mendoza, 157 Wn.2d at 584. Jackson is entitled to withdraw his plea as to both counts because the plea is indivisible. A plea agreement is indivisible when the defendant pleads guilty to multiple charges in a single proceeding and the pleas are described in the same agreement. State v. Turley, 149 Wn.2d 395, 400, 402, 69 P.3d 338 (2003). Such is the case here. CP 14-38; 2RP 3-17.

b. This Constitutional Error Is Preserved For Review And Was Not Waived.

Jackson may raise this error on appeal even though he did not raise this particular argument as a ground for withdrawing his plea at the trial

level. An invalid guilty plea based on misinformation of sentencing consequences may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). Mendoza, 157 Wn.2d at 589 (citing State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001)).

Jackson did not waive the error by failing to object at sentencing because no one brought the misinformation to his attention. The State may defeat an appellate challenge to the voluntariness of a plea only "by showing that the defendant *was in fact fully informed of the sentencing consequences of the plea* during the period in which a motion to withdraw it could be made." Mendoza, 157 Wn.2d at 591 (emphasis added). Thus, when a defendant "is informed of the less onerous standard range before he is sentenced and given the opportunity to withdraw the plea, the defendant may waive the right to challenge the validity of the plea." Id.

Mendoza waived the right to challenge the validity of his plea because he was "clearly informed before sentencing that the correctly calculated offender score rendered the actual standard range lower than had been anticipated at the time of the guilty plea, and the defendant d[id] not object or move to withdraw the plea on that basis before he [was] sentenced." Id. at 592. The Court distinguished Mendoza's situation from circumstances in which a defendant may not be deemed to have waived

the right to challenge a plea, such as where the defendant was not informed of the mistake until after sentencing. Id. at 591 (citing Walsh, 143 Wn.2d at 7).

Jackson was never informed before sentencing or at the sentencing hearing that, contrary to his guilty plea, a mandatory minimum term would not be imposed. Following the rule set forth in Mendoza, there is no waiver here and Jackson must be allowed to withdraw his indivisible plea as to both counts.

2. THE COURT VIOLATED DUE PROCESS AND STATUTORY MANDATE IN USING THE WRONG STANDARD OF PROOF TO DENY A COMPETENCY EVALUATION.

The court denied defense counsel's motion for a competency evaluation, ruling the defense had not met its burden of showing such evaluation was needed by a preponderance of the evidence. CP 12; 1RP 34. The court violated due process and statutory mandate in denying the motion for a competency evaluation because it used the wrong standard of proof. U.S. Const. Amend. XIV, Wash. Const. art. I, § 3; RCW 10.77.060. Preponderance of the evidence is not the standard of proof. Rather, "reason to doubt" is the standard. RCW 10.77.060(1)(a). A court necessarily abuses its discretion when it applies the wrong legal standard.

The remedy is withdrawal of the guilty of the guilty plea or, at minimum, remand for further proceedings.

a. Reason To Doubt, Not Preponderance Of The Evidence, Is The Standard For Triggering A Mandatory Competency Evaluation.

The test for competency is whether the defendant (1) understands the nature of the charges, and (2) is capable of assisting in his defense. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P .3d 610 (2001). The level of competency required to stand trial and to plead guilty is the same. Godinez v. Moran, 509 U.S. 389, 391, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).

[T]he Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." Medina v. California, 505 U.S. 437, 439, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). "The failure to observe procedures adequate to protect this right is a denial of due process." State v. O'Neal, 23 Wn. App. 899, 901, 600 P.2d 570 (1979) (citing (citing Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)).

"Chapter 10.77 RCW provides such a procedure." State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). "[S]o long as a defendant maintains a challenge to competency, the chapter 10.77 RCW

procedures are mandatory to satisfy due process." Heddrick, 166 Wn2d at 909.

RCW 10.77.060(1)(a) requires a competency hearing whenever there is "reason to doubt" a defendant's competency. "'A reason to doubt' is not definitive, but vests a large measure of discretion in the trial judge." City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985). "There are no fixed signs which invariably require a hearing, but the factors to be considered include evidence of a defendant's irrational behavior, his demeanor, medical opinions on competence and the opinion of defense counsel." O'Neal, 23 Wn. App. at 902. "In exercising its discretion in determining the threshold question, the court should give considerable weight to the attorney's opinion regarding a client's competency and ability to assist in the defense." Gordon, 39 Wn. App. at 442.

Significantly for the purpose of this appeal, the determination of a reason to doubt competency is different from an actual determination of competency. Id. at 441. Whether there is a reason to doubt competency is a threshold determination. Id. Once the trial court makes a threshold determination that there is "reason to doubt" the defendant's competency pursuant to RCW 10.77.060, the court must order an evaluation and conduct an evidentiary hearing to determine competency before

proceeding to trial. Heddrick, 166 Wn2d at 904; State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991); State v. Israel, 19 Wn. App. 773, 776, 577 P.2d 631 (1978). At the post-evaluation hearing stage, the defendant bears the burden of proving incompetency by a preponderance of the evidence. State v. P.E.T., __Wn. App.__, 300 P.3d 456, 459-60 (2013) (citing 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice & Procedure § 907 (3d ed. 2012)).

The trial court here, in denying the motion to have Jackson evaluated for competency, concluded Jackson did not prove by a preponderance of the evidence that an evaluation should be ordered. 1RP 34; CP 12. The trial court relied on the wrong standard of proof. In making the threshold determination of whether to order a competency evaluation, the standard is not preponderance of the evidence. The standard is simply "reason to doubt." RCW 10.77.060(1)(a).

The preponderance standard of proof is reserved for the actual competency determination made after a competency evaluation has been performed and reviewed pursuant to RCW 10.77.060(1)(a). P.E.T., 300 P.3d at 459-60. "The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true." Mohr v. Grant, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).

The trial court thus required defense counsel to prove Jackson was more likely than not incompetent as the prerequisite to ordering a competency evaluation. That standard is harder to satisfy than a mere "reason to doubt," which is based on any number of factors but certainly may exist despite not reaching the level of demonstrating incompetency is more likely true than not.

The trial court's decision to deny a competency evaluation is reviewed for abuse of discretion. Lord, 117 Wn.2d at 903. A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law or application of an incorrect legal standard. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007); State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). A court also "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

The trial court necessarily abused its discretion in both ways here. It abused its discretion in applying the wrong standard of proof. Further, "chapter 10.77 RCW procedures are mandatory to satisfy due process." Heddrick, 166 Wn.2d at 909. Application of the incorrect higher standard of proof, in derogation of the more forgiving standard of proof mandated by RCW 10.77.060, resulted in a denial of Jackson's right to due process.

The court therefore erred in denying Jackson's motion for a competency evaluation.

b. The Plea Should Be Vacated Or, In The Alternative, The Case Remanded For Further Proceedings.

"*Appellate review cannot cure an inadequate standard of proof.*" Mansour v. King County, 131 Wn. App. 255, 267, 128 P.3d 1241 (2006) (quoting Nguyen v. Dep't of Health Medical Quality Assurance Comm., 144 Wn.2d 516, 530, 29 P.3d 689 (2001) (citing Santosky v. Kramer, 455 U.S. 745, 757 n.7, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). The trial court's findings and conclusions regarding whether to order a competency evaluation cannot be reviewed when tainted by the wrong standard of proof. See Mansour, 131 Wn. App. at 267 (in dangerous dog proceeding, "We cannot review the Board's findings and conclusions when it may have used a fundamentally wrong standard in making those findings and reaching those conclusions. We do not know whether the Board would have weighed the evidence differently had it applied the proper standard.").

Jackson challenges the trial court's finding in the order denying withdrawal of the plea that "there is no evidence that mental competency is an issue in this hearing." CP 90. The trial court's earlier failure to employ the correct standard of proof on whether to order a competency evaluation

under RCW 10.77.060 made competency an issue in the plea withdrawal hearing.

The trial court's order denying a competency evaluation cannot simply be affirmed. The issue is remedy.

Division Three has held misallocation of the burden of proof at a competency hearing is structural error requiring reversal of the convictions because it taints the entire proceeding. State v. Coley, 171 Wn. App. 177, 190-92, 286 P.3d 712 (2012), review granted, 176 Wn.2d 1024, 301 P.3d 1047 (2013). Following this view, Jackson should be allowed to withdraw his guilty plea without further proceedings. An improper competency determination based on the wrong standard of proof taints a guilty plea just as much as it taints conviction following a trial. See Godinez, 509 U.S. at 398 ("A defendant who stands trial is likely to be presented with choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty.").

An incompetent person may not enter into any plea agreement. Fleming, 142 Wn.2d at 864 (citing RCW 10.77.050). The threshold determination of whether there is a reason to doubt competency is a critical stage of the proceedings. Heddrick, 166 Wn.2d at 910-11. An order for evaluation under RCW 10.77.060(1)(a) automatically stays the criminal proceedings until the court determines that the defendant is

competent to stand trial because neither side can go forward with trial preparation until the defendant is found competent to proceed. State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004).

A plea must be vacated when there is a reason to doubt competency but the mandatory procedures under RCW 10.77.060 are not followed. See Fleming, 142 Wn.2d at 857 (plea vacated due to ineffective assistance of counsel where there was reason to doubt competency but counsel failed to apprise trial court). Here we have a situation where the trial court relied on an improper standard of proof in making the critical determination of whether to order a competency evaluation under RCW 10.77.060. The plea should be vacated because the failure to employ the correct standard of proof on whether to order a competency evaluation tainted the subsequent proceedings.

In P.E.T., Division One declined to answer the question of whether misallocation of the burden of proof at a competency hearing is structural error. P.E.T., 300 P.3d at 462-63. Instead, it remanded with directions that the trial court first determine whether a retrospective competency determination is feasible. Id. at 464 (citing Nissen v. Obde, 55 Wn.2d 527, 529-30, 348 P.2d 421 (1960), which held the proper remedy when a trial court placed the burden of proof on the wrong party was to remand the case back to the trial court). Courts have recognized remand is the proper

remedy when a competency hearing was warranted but did not take place. P.E.T., 300 P.3d at 463-64 (citing State v. Wright, 19 Wn. App. 381, 391, 575 P.2d 740 (1978); Young v. Smith, 8 Wn. App. 276, 278, 505 P.2d 824 (1973)).

According to Division One, if the trial court concludes that a retrospective competency determination is not feasible, the conviction must be vacated and a new trial may be granted. P.E.T., 300 P.3d at 464. If the court holds a retrospective competency hearing and determines that the State proved competence, then the judgment and sentence would be affirmed. Id. But if the court determines that the State did not prove competence, the judgment and sentence would be reversed. Id.

In the event this Court declines to vacate Jackson's plea without further proceedings, the remedy for the trial court's error should be remand for further proceedings consistent with P.E.T. If the trial court concludes a retrospective determination of whether there was reason to doubt competency cannot be made, the plea should be vacated. If the trial court concludes there was a reason to doubt competency, then the plea should be vacated.

3. THE COURT EXCEEDED ITS AUTHORITY IN ORDERING NO CONTACT WITH THE VICTIM UNDER COUNT II FOR A PERIOD OF TIME THAT EXCEEDS THE STATUTORY MAXIMUM FOR THE OFFENSE.

As part of the judgment and sentence on the second degree assault conviction under count II, the court ordered Jackson to have no contact with Caster, the victim in count II, for "the maximum term of life." CP 79. This was error. The statutory maximum for second degree assault, a class B felony, is 10 years. RCW 9A.36.021(2)(a); RCW 9A.20.021(1)(b). The length of a no contact order imposed as part of a criminal sentence may not extend beyond the statutory maximum for the crime. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007).

Defense counsel did not raise this challenge below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Remand for entry of a no contact term not to exceed 10 years is the appropriate remedy.

D. CONCLUSION

For the reasons set forth, Jackson respectfully requests that this Court vacate the guilty plea and correct the error related to the duration of the no contact order.

DATED this 26th day of July 2013

Respectfully Submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69423-5-I
	)	
ROY JACKOSN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF JULY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROY JACKOSN
DOC NO. 334536
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JULY 2013.

X Patrick Mayovsky