69423-5

69423-5

NO. 69423-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROY JACKSON, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH AND
THE HONORABLE HOLLIS R. HILL

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JENNIFER P. JOSEPH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

A. ISSUES PRESENTED

1. A guilty plea is involuntary if the defendant is not advised of all direct consequences of that plea. Prior to entering a plea of guilty to one count of assault in the first degree and one count of assault in the second degree, Roy Jackson, Jr. was accurately informed of the applicable statutory maximums, standard sentencing ranges, and firearm enhancements, as well the fact that these factors would result in a sentence of at least 258 months in prison. He was also erroneously informed that a statutory 60-month minimum term of confinement would apply to his first-degree assault conviction. Where the misinformation had no effect on the punishment Jackson anticipated or received for that conviction, has he failed to establish that his plea was involuntary? If this Court concludes that Jackson's plea was involuntary, is the appropriate remedy remand for a hearing to determine whether allowing him to withdraw his plea would be unjust?

2. A trial court must order a competency evaluation if it makes a threshold determination that there is "reason to doubt" the defendant's competency. At a hearing on Jackson's motion for a competency evaluation, both parties correctly advised the court that it must determine whether there was "reason to doubt" the

defendant's competency. Did the court act within its discretion by making this determination using the lowest legal standard of proof? Has Jackson waived the claim of error by failing to object? If the court erred, is any error harmless where the record establishes no reason to doubt Jackson's competency, the issue was never raised again, and there is no indication that Jackson was incompetent at the time of his guilty plea three months later? If prejudicial error occurred, is Jackson's proffered remedy of "vacating" his guilty plea without further proceedings unwarranted?

3. The trial court had authority to impose a no contact order as a crime-related prohibition for a term of life as to the first-degree assault conviction. Margaret Caster was a witness to that crime as well as the victim of the closely-related second-degree assault. Did the trial court act within its discretion in imposing a no contact order for Caster for life as a crime-related prohibition on the first-degree assault conviction?

B. STATEMENT OF THE CASE

On April 20, 2011, Roy Jackson, Jr. shot Metro bus passenger Antoine Greenhaigh twice in the stomach without

provocation. CP 26.[1] Jackson then pointed the gun at the bus driver, Margaret Caster, and told her to open the door. CP 26. Caster complied, and Jackson fled on foot. CP 26. The State charged Jackson with first degree assault against Greenhaigh (Count I) and second degree assault against Caster (Count II), with firearm enhancements on both counts. CP 1-2.

Jackson was arraigned on May 23 and represented by attorney Kris Jensen. 1RP 38. Aware of Jackson's history of mental health issues, Jensen had him evaluated by Dr. Kenneth Muscatel to explore a diminished capacity defense. 1RP 4.[2] In his October 3 report, Dr. Muscatel described Jackson as "a rather cagey individual" who initially claimed no memory of the shooting on the "misplaced belief that not remembering what occurred was sufficient for a mental defense." CP 53. Dr. Muscatel concluded that Jackson did not meet the criteria for diminished capacity, but opined that Jackson's conduct was influenced by mental health

---

[1] These facts are taken primarily from the Certification for Determination of Probable Cause. Jackson stipulated to these facts as part of the plea agreement. CP 33.

[2] The State adopts appellant's citation convention for the verbatim report of proceedings: 1RP – one volume consisting of 11/23/11, 3/7/12, 8/2/12, 10/12/12 & 11/21/12; 2RP – 5/15/12.

issues and substance abuse, and that these factors could be considered for mitigation purposes at sentencing. 1RP 4, 28.

On November 23, Jensen requested that Jackson be sent to Western State Hospital for a competency evaluation. 1RP 3. Jensen represented that his conversations with Jackson had been "hit or miss. Sometimes he is with me, sometimes he is not [with] me; sometimes we have nutty discussions, and sometimes they are kind of on point." 1RP 4-5. Jensen described two occasions in which Jackson's behavior prevented productive discussion of his case. On one occasion, Jensen was unable to visit Jackson because he was "being very uncooperative" and jail personnel could not bring him out. 1RP 5. On another occasion, on November 14, Jensen visited Jackson while Jackson was having "an episode," which consisted of yelling, punching the glass, and claiming that he was being mistreated in jail. 1RP 5-6. Jackson's family had told Jensen that Jackson was dealing with "lots of paranoia." 1RP 8. Despite this, Jensen acknowledged that Jackson recognized him and his role, understood the charges against him, and was sometimes helpful in analyzing the case. 1RP 6, 26, 27.

The State opposed sending Jackson for a competency evaluation. The prosecutor played some of Jackson's recorded jail phone calls to show that Jackson was lucid and that his erratic behavior was likely feigned. Ex. 1; 1RP 10-20. In a November 7 call, Jackson tells someone that he "might be leaving here in a little bit," says that his situation "is looking kind of grim," and talks about acting like he is crazy so that he can get a better plea offer. Ex. 1; 1RP 10, 13-14.[3] On November 14 – the same day that Jensen witnessed Jackson's violent "episode" at the jail – Jackson had someone else place a call on his behalf. Ex. 1; 1RP 18. Among other things, the individual relayed Jackson's message that "[h]e is hoping to go to Western." Ex. 1; 1RP 20. Throughout the calls, Jackson appears lucid and requests money and visits. Ex. 1; 1RP 10-20.

The trial court, Judge LeRoy McCullough, clarified with Jensen that the basis of the motion "is that [Jackson] is inconsistent in his communicating" with defense counsel. 1RP 26. The court then reviewed Dr. Muscatel's report, surmising that "[t]his certainly would not be supportive of the notion that the defendant was

[3] The transcriptionist notes that the call was difficult to hear and understand and suggests referring to the admitted audio exhibit for a clearer understanding of the recording. 1RP 11, 34. Exhibit 1 has been designated for this Court's review.

unable to assist in his defense. What am I missing?" 1RP 28. Jensen responded, "I don't think you are missing anything." 1RP 29.

The trial court found that despite Jackson's paranoia and polysubstance dependence, "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 ... defense ... by talking with counsel." 1RP 29. The court further explained, "the fact that he had an episode on ... November 14, two weeks ago, does not suggest to me that he would not be able to confer with counsel." 1RP 29. The court noted that Jensen may need to accommodate Jackson's issues by setting "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." 1RP 29. Accordingly, the court denied the motion. 1RP 30; CP 12.

Nearly six months later, at a May 15, 2012 hearing before Judge Michael Heavey, Jackson entered a guilty plea pursuant to a plea agreement with the State. 2RP 4. The guilty plea form, which Jackson signed, provided that Jackson had been informed of and fully understood several points. CP 14-22. These points included

the maximum terms and standard ranges on both counts, the application of firearm enhancements to both counts, the applicable term of community custody, and the State's sentencing recommendation of 258 months of confinement. CP 15-18. Paragraph (6)(i) had been crossed out and initialed by Jackson, but a bracket and handwritten note in the margin indicated that it "Applies." CP 18. That paragraph stated, in pertinent part, "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.

At that hearing, the prosecutor confirmed that Jackson had reviewed the plea form with counsel and was aware of and understood its provisions, including that paragraph (6)(i) applied in his case. 2RP 9. The prosecutor also asked whether Jackson adopted the following statement as his own:

> On April 20th, 2011, in King County, Washington, I was riding on a Metro bus when I intentionally assaulted Antoine Greenhaigh by shooting him with a pistol with intent to cause great bodily harm, and I did cause great bodily harm to Antoine Greenhaigh. I then assaulted the bus driver by intentionally pointing my pistol at the bus driver and telling her to open the bus doors. I knew the pistol, a firearm, was operable.

2RP 11; CP 23. When Jackson hesitated, the prosecutor and trial court both confirmed with Jackson that the statement was true. 2RP 12-13. Jackson explained that his initial hesitation was because "I'm about to go to prison for a very long time." 2RP 13.

After confirming that Jackson had had enough time to review the form with his attorney, and that his attorney had read him the form and answered all of his questions, the court found the plea to be knowing, intelligent, and voluntary and accepted Jackson's plea. 2RP 15-17.

Before sentencing, Jackson moved to withdraw his plea on the basis of ineffective assistance of counsel. 1RP 38-39. At an initial hearing before Judge Hollis Hill, Jackson explained why he wanted to withdraw his plea:

> Well, I feel like I was really manipulated into taking this plea agreement or whatever, and basically a while back, Kris Jensen, he stated that if I showed the prosecutor this thing that I did with this doctor named Muscatel ... that I could get 15 years, you know what I'm saying? And basically that didn't happen, it was said 15 years to 21, and I feel like that is against my rights, and I would like to be able to stand trial, and I asked Kris Jensen to file motions for me – to get into Western State, and things of that nature, because I really have mental problems, and he wouldn't do any of those motions. ...

1RP 43. The court agreed to appoint additional counsel to investigate the basis for the motion and explain Jackson's options to him. 1RP 49-50. Jensen continued to represent Jackson as well. 1RP 50.

Through the second defense attorney, Lisa Mulligan, Jackson argued that Jensen had done an inadequate investigation and had spent insufficient time reviewing discovery with him. CP 65-75. Jackson claimed that he only pleaded guilty because he felt confused about the evidence and because he was pressured by his attorney and his family to take the State's plea offer. CP 67, 71. He also argued that his history of mental illness, including attention deficit hyperactivity disorder (ADHD) and possible mild mental retardation, required accommodation that Jensen failed to provide. CP 67, 71. Jackson did not argue that he was not competent to plead guilty.

At the next hearing, Jackson declined to present any evidence to support his motion, which left the court "a little bit blindsided." 1RP 59. Mulligan argued that Jackson "has been provided with some discovery, but not all of it; he had a couple witnesses interviewed, but not all of them; and the defense position is that because not all of the important witnesses were interviewed

in this case, Mr. Jackson was not able to make a valid waiver of his rights at the time that he did the guilty plea." 1RP 67.

The trial court found no indication that Jensen had been ineffective or that Jackson would have done anything differently had Jensen done a more thorough investigation. 1RP 79-80. "Mr. Jackson has admitted to committing these heinous crimes, he has waived his trial rights, and stated that he voluntarily was making his plea of guilty, so the motion to withdraw the guilty plea is denied." 1RP 81.

At sentencing, Jackson requested an exceptional sentence of 15 years. 1RP 121. The court found no basis for an exceptional downward departure from the standard range and imposed a total term of confinement of 258 months: 162 months on Count I, 43 months on Count II to run concurrent, and firearm enhancements on both counts of 60 and 36 months, respectively. 1RP 121; CP 79. The judgment and sentence also prohibited contact with both victims for life. CP 79.

C. ARGUMENT

1. JACKSON IS NOT ENTITLED TO WITHDRAW HIS VOLUNTARY GUILTY PLEA.

Jackson contends that his guilty plea was invalid because he was informed that a 60-month mandatory minimum sentence would be imposed for the first degree assault, when no mandatory minimum actually applied. He argues that he is entitled to withdraw his plea in its entirety for this reason. This Court should reject Jackson's claim because Jackson was accurately informed of the sentencing consequences of his guilty plea.

a. Jackson Was Correctly Advised Of The Sentencing Consequences Of His Guilty Plea.

Due process requires that a defendant's guilty plea be entered into knowingly, voluntarily, and intelligently. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). While there is a strong public interest in enforcement of plea agreements that are voluntarily and intelligently made, a defendant may withdraw his guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591

(2001); CrR 4.2(f). Circumstances amounting to manifest injustice include the denial of effective counsel, the defendant's failure to ratify the plea, an involuntary plea, and the prosecution's breach of the plea agreement. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006) (citing State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996)). The defendant bears the burden of showing that a manifest injustice exists. State v. Ross, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996). A defendant may challenge the voluntariness of guilty plea for the first time on appeal. Walsh, 143 Wn.2d at 7-8.

A plea is considered involuntary when a defendant is not apprised of a direct consequence of his plea. Ross, 129 Wn.2d at 284. A direct consequence is one that has a "definite, immediate and largely automatic effect on the range of the defendant's punishment." Id. Defendants have been allowed to withdraw guilty pleas when they were not informed or were misinformed as to the length of their sentence, whether they were subject to mandatory community placement, and whether they were subject to a mandatory minimum sentence. See, e.g., State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) (misinformed as to standard range); Isadore, 151 Wn.2d 294 (not informed of mandatory community placement); State v. Miller, 110 Wn.2d 528, 756 P.2d

122 (1988) (not informed of 20-year mandatory minimum) (overruled on other grounds by State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011)). Where guilty pleas are based upon misinformation, our supreme court has held them involuntary regardless of whether the misinformation was material to the defendant's decision to plead guilty, and regardless of whether the correct information results in greater or lesser punishment than anticipated in the plea agreement. In re Pers. Restraint of Bradley, 165 Wn.2d 934, 940, 205 P.3d 123 (2009) (citing Mendoza, 157 Wn.2d at 591; Isadore, 151 Wn.2d at 302).

Jackson argues that his guilty plea was involuntary because he was advised that he was subject to a five-year mandatory minimum sentence on his first degree assault conviction, while no mandatory minimum was actually imposed in his case.[4] Although the application of a mandatory minimum term is ordinarily considered a direct consequence of a guilty plea, in this case, it

---

[4] RCW 9.94A.540(1)(b) provides that "[a]n offender convicted of the crime of assault in the first degree or assault of a child 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." Factual findings that the defendant meets the requirements of the statute must be made before the trial court may impose a mandatory minimum sentence. State v. McChristian, 158 Wn. App. 392, 402-03, 241 P.3d 468 (2010). No such findings were made in this case, although logic dictates that evidence would certainly support such a finding where the defendant shot Greenhaigh twice in the abdomen, precipitating at least three surgeries and a 35-day hospital stay. 1RP 89-90.

was not a direct consequence because it had no "definite, immediate, and largely automatic effect" on Jackson's anticipated or actual sentence. With an offender score of six, Jackson's standard sentencing range for assault in the first degree was 162 to 216 months. CP 36. The firearm enhancement added an additional consecutive 60 months. CP 36. The firearm enhancement on the second-degree assault added yet another consecutive 36 months. CP 35. Thus, the actual minimum standard range sentence to which Jackson was subject was no less than 258 months, or 198 months more than the five-year "mandatory" minimum that he was told applied. Since Jackson's actual minimum sentence was far in excess of the cited statutory minimum, whether or not the statutory minimum applied made no difference to the length of Jackson's sentence.

Jackson points out that RCW 9.94A.540(2) precludes offenders from earning good time while serving a mandatory minimum. In some cases, that fact would be a "direct consequence" of a guilty plea of which the defendant must be accurately informed. See State v. Conley, 121 Wn. App. 280, 285, 87 P.3d 1221 (2004) (defendant who decided to plead guilty based on misinformation that he would earn early release credit was

entitled to withdraw plea when he actually would not). But in these unique circumstances, that is not so. Here, Jackson was correctly informed, before entering his plea, that he would earn no good time while he served the 96-month firearm enhancements, but that he would earn good time on the remainder of his sentence:[5]

> COURT: What's your understanding of how many months you'll be doing in prison?
>
> JACKSON: I'm understanding that we're asking for 15 years, but the prosecutor is asking for 21.
>
> COURT: ... I think that they're asking for more – well, yeah, 21 plus.
>
> ATTORNEY JENSEN: 21.5.
>
> COURT: And how much of that time is eligible for good time? We know?
>
> JACKSON: No, I don't know, Your Honor.
>
> COURT: So if you got 21 years, 9 of it for certain, 8 of it for certain, the enhancements, would not be eligible for good time. Presumably the remainder would be eligible for good time.

2RP 14-15. That is exactly what Jackson's judgment and sentence provides. Thus, despite being misinformed that the mandatory

---

[5] It is worth noting that neither the language of, nor citation to RCW 9.94A.540 appears on the plea form, which simply states, "The law does not allow any reduction of this sentence." CP 18. Nothing in the record indicates that Jackson was specifically informed that he would not earn good time during the mandatory minimum sentence.

minimum for assault in the first degree would apply, Jackson was correctly informed about the sentence he would actually receive.

Because Jackson's sentence was functionally identical to the one anticipated in the plea agreement, this case is distinguishable from those in which the defendant was told of sentencing consequences that were either more or less onerous than the sentence actually imposed. See, e.g., Mendoza, 157 Wn.2d at 585 (defendant told before entering plea that he was subject to longer standard range than actually applied); Walsh, 143 Wn.2d at 4-5 (defendant told before entering plea that he was subject to shorter standard range than actually applied); Miller, 110 Wn.2d at 529 (defendant told before entering plea that he might receive a sentence of less than 20 years, when 20-year mandatory minimum actually applied). Also distinguishable, then, are those cases that hold a guilty plea involuntary regardless of whether the actual consequences of the guilty plea were more or less onerous than anticipated. In Isadore, for example, our supreme court rejected a materiality test that required a defendant to show that he relied on misinformation in deciding to plead guilty, reasoning that "[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." 151 Wn.2d at 302. And in Mendoza, the court noted that the same concerns arise whether the defendant is misinformed that the standard range is lower or higher than anticipated in the plea agreement. 157 Wn.2d at 590. "A defendant may evaluate risks of trial versus guilty plea far differently if faced with a 12-month plus one day bottom of the standard range, rather than a 120-month bottom of the standard range." Id. (quoting State v. Moon, 108 Wn. App. 59, 64, 29 P.3d 734 (2001) (Brown, J., concurring)). But since Jackson's minimum sentence was no different than the one he anticipated when he pleaded guilty, there is no need to engage in a subjective inquiry into his risk calculation and reasons underlying his decision to accept the plea bargain in order to determine that his plea was voluntary.

Because Jackson was correctly informed of all the direct consequences of his guilty plea, he can show no manifest injustice and may not withdraw the plea. This Court should affirm.

b. Even If Jackson's Guilty Plea Was Involuntary, He May Not Withdraw His Plea If Doing So Would Be Unjust.

If this Court concludes that Jackson's plea was involuntary, it must determine the appropriate remedy. Withdrawal of an involuntary guilty plea is not automatic. "The defendant's choice of remedy does not control ... if there are compelling reasons not to allow that remedy." Walsh, 143 Wn.2d at 9. Here, Jackson received the sentence he bargained for and suffers no prejudice from allowing the guilty plea to stand. The State, in contrast, may be prejudiced in presenting its case by the passage of time. See Miller, 110 Wn.2d at 535 ("[T]he choice of plea withdrawal may be unfair if the prosecutor has detrimentally relied on the bargain and has lost essential witnesses or evidence").[6] Because it is impossible to determine on this record whether the State would be unfairly prejudiced by allowing Jackson to withdraw his plea, this Court should remand for a hearing on the question of remedy if it concludes that Jackson's guilty plea was involuntary.

[6] To the extent that Miller allows specific performance of a plea agreement based upon a mutual mistake that purports to bind the court to enforce an illegal sentence, it has been overruled by State v. Barber, 170 Wn.2d 854, 872-73, 248 P.3d 494 (2011) (holding that withdrawal of a guilty plea is the only remedy where the parties' mutual mistake resulted in an agreement to a sentence that is contrary to law).

2. THE TRIAL COURT EMPLOYED THE CORRECT STANDARD IN DENYING JACKSON'S MOTION FOR A COMPETENCY EVALUATION.

For the first time on appeal, Jackson contends that the trial court abused its discretion and violated due process by improperly using the preponderance of the evidence standard to determine whether Jackson needed a competency evaluation. If this Court considers this unpreserved claim of error, it should conclude that the trial court employed the correct standard.

An accused in a criminal case has a fundamental right not to be tried while incompetent. Drope v. Missouri, 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). In Washington, an incompetent person may not be tried, convicted, or sentenced for an offense so long as the incapacity continues. RCW 10.77.050. A defendant is incompetent if he or she "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15); State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).

The existence of a mental disorder does not establish incompetency. State v. Smith, 74 Wn. App. 844, 850, 875 P.2d 1249 (1994), rev. denied, 125 Wn.2d 1017 (1995). That a

defendant is suffering delusions does not prevent him from being competent to understand the proceedings and assist with his defense. State v. Benn, 120 Wn.2d 631, 661-62, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993); State v. Hahn, 106 Wn.2d 885, 887-88, 726 P.2d 25 (1986). Having the ability to assist with his defense does not mean that a defendant must be able to suggest or choose trial strategy. Benn, 120 Wn.2d 662; State v. Ortiz, 104 Wn.2d 479, 483, 706 P.2d 1069 (1985).

The trial court must have the defendant evaluated by professionals who will report on the defendant's mental condition if it finds there is "reason to doubt [a defendant's] competency." Former RCW 10.77.060(1)(a).[7] "'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 (1985). A court's conclusion regarding the existence of reason to doubt a defendant's competency is reviewed for an abuse of

---

[7] At the time of Jackson's motion for a competency evaluation, former RCW 10.77.060(1)(a) provided:

> Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

The statute was amended by Laws of 2012, ch. 256, § 3 (effective May 1, 2012). The changes are irrelevant to the arguments on this appeal.

discretion. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

In considering Jackson's motion for a competency evaluation, the trial court asked both parties to state the applicable standard and burden of proof. The prosecutor informed the court that "the Court has [to] find that the defendant is in need of a competency evaluation if the Court finds that there is reason to doubt his competency," and believed the determination must be made by a preponderance of the evidence. 1RP 23. Defense counsel said he did not know the standard, but read from Gordon: "It says that before a determination of competency is required, the Court must make a threshold determination that there is reason to doubt his competency." 1RP 24. The court ultimately denied the motion, noting "for the record, I believe that the standard is 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. Jackson made no objection.

a. Jackson Waived Any Error In The Court's Threshold Determination.

By failing to object to the trial court's use of the preponderance of evidence standard in determining whether there was reason to doubt his competency, Jackson failed to preserve the issue for review. A claim of error may not be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

While Jackson frames the issue as one affecting due process, not every constitutional error is reviewable under RAP 2.5(a)(3). To trigger the exception, the defendant must show both that the error occurred and that it caused actual prejudice to his rights. McFarland, 127 Wn.2d at 333. It is the showing of actual prejudice that makes the error manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Jackson does not argue that the court's use of the preponderance standard caused him actual prejudice, and there is no indication that the trial court would have ordered a competency evaluation but for its reliance on the preponderance standard.[8]

[8] For the same reason, any error was harmless. See Kirkman, 159 Wn.2d at 927 (even manifest constitutional errors may be subject to harmless error analysis).

Because Jackson demonstrates no actual prejudice from the alleged error, this Court should decline to consider his claim.

b. The Trial Court Employed The Correct Legal Standard.

Jackson asserts that the trial court used a "preponderance of the evidence" standard to determine whether he needed a competency evaluation. He is mistaken. Rather, the record indicates that the trial court applied a preponderance standard to determine whether there was "reason to doubt" Jackson's competency. Both the prosecutor and defense counsel articulated the "reason to doubt" standard for the court. See 1RP 23, 24. Understanding the question to be answered, the trial court asked both parties what standard of proof applied to that question. 1RP 23. The prosecutor suggested the preponderance standard; defense counsel had no proposal. 1RP 23-24.

A preponderance of the evidence is the "lowest legal standard of proof." Mansour v. King County, 131 Wn. App. 255, 266, 128 P.3d 1241 (2006). It means "that considering all the evidence, the proposition asserted must be more probably true than not true." State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613

(2009). Applying that standard to the question at hand, Jackson had to show that it was more probable than not that there was reason to doubt his competency. The trial court did not require Jackson to satisfy a higher burden of proof because there is no appreciable difference between a showing of a "reason to doubt" and a "probable reason to doubt." Because the record indicates that the court applied the correct standard to Jackson's motion for a competency evaluation, there was no error.

c. Any Error Was Harmless Because There Was No Reason To Doubt Jackson's Competency.

Even if the court erred by applying the preponderance standard, any such error was harmless because the record establishes no reason to doubt Jackson's competency under any standard.

A motion to determine competency is not sufficient to create a doubt as to competency. Lord, 117 Wn.2d at 901. The motion must be supported by a factual basis; the trial court will then inquire to verify the facts. Id. The factors that a trial judge may consider in determining whether there is reason to doubt the defendant's competency include the defendant's appearance, demeanor,

conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel. Fleming, 142 Wn.2d at 863. Considerable weight should be given to counsel's opinion regarding his client's competency and ability to assist the defense. Lord, 117 Wn.2d at 901.

Jensen requested a competency evaluation "immediately after" an attempt to visit Jackson while Jackson was having "an episode" during which his paranoid and violent behavior precluded a productive discussion.[9] The basis of the motion was that Jackson was "inconsistent" in his communication with counsel. 1RP 26. But Jensen acknowledged that he and Jackson could sometimes converse about the case, that Jackson understood the charges against him, and that Jackson was "[s]ometimes ... helpful to me and to analyzing the case." 1RP 27.

As support for his motion, Jensen also provided the court Dr. Muscatel's report. 1RP 4. But Dr. Muscatel did not opine that Jackson was incompetent. Rather, he noted that Jackson was "a rather cagey individual" who claimed to have no memory of the shooting until he was told that a memory lapse would not support a

[9] On a different occasion, Jackson was too "uncooperative" to be brought by jail personnel for a visit. 1RP 5.

mental defense. 1RP 9, 28; CP 53. The recorded jail calls offered by the State also suggested Jackson's duplicity. These calls established that Jackson was lucid, understood that his situation was "grim," and was trying to appear incompetent to get a better plea offer. 1RP 10, 13-14. There is nothing in the record about Jackson's appearance, demeanor, or conduct during the proceedings that would suggest incompetence.

Since the evidence demonstrates no reason to doubt Jackson's competency, any conceivable error in applying the preponderance standard had no effect on the outcome and was harmless. The court did not abuse its discretion in refusing to order a competency evaluation.

d. If There Was Prejudicial Error, The Remedy Should Be Limited.

If this Court reaches this issue and concludes that the trial court committed prejudicial error, it must consider the appropriate remedy. Jackson argues that the proper remedy is to "vacate" his guilty plea, or in the alternative, to remand for a determination of whether a retrospective competency evaluation is feasible. Relying on this Court's decision in State v. P.E.T., 174 Wn. App. 590, 300

P.3d 456 (2013),[10] Jackson suggests that a retrospective competency evaluation be conducted if feasible, and if not, the convictions must be vacated. But given the nature of the alleged error, any remand should be more limited.

In this case, the motion for a competency evaluation came nearly six months before Jackson pleaded guilty. In the interim, the issue of Jackson's competency or mental health was never again raised. And there is no indication that Jackson was incompetent when he entered his guilty plea. Indeed, Jackson did not raise mental health or competency issues as reasons to withdraw his guilty plea except insofar as his "ADHD and possibl[e] mild mental retardation" required accommodation that his trial counsel was allegedly ineffective for failing to provide. CP 65-75.

Under these circumstances, "vacating" Jackson's voluntary guilty plea and granting him a new trial is surely unwarranted. Jackson's alternative remedy of remanding for a determination of

---

[10] In P.E.T., this Court held that the proper remedy when a juvenile court misallocated the burden of proof on a motion for a competency evaluation is "to remand this case with directions that the juvenile court first determine whether a retrospective competency determination is feasible." 174 Wn. App. at 607. If not, the adjudication must be vacated and a new trial granted when the defendant is competent. Id. If a retrospective determination is feasible, and the court determines that the defendant was competent, the adjudication and disposition would be affirmed. Id. But see State v. Coley, 171 Wn. App. 177, 286 P.3d 712 (2012) (holding that misallocation of the burden of proof to already incompetent defendant in motion for competency evaluation was structural error requiring reversal).

whether a retrospective evaluation is feasible is also inappropriate because it begs the question whether Jackson was ever in need of a competency evaluation – a question Jackson contends was never properly answered. Since the nature of the error is the court's alleged use of the wrong legal standard, the logical remedy would be a remand for the court to determine whether there was reason to doubt Jackson's competency using the appropriate standard. If the court again finds no reason to doubt Jackson's competency, his convictions should stand. If the court cannot make the determination using the proper standard or determines that a reason to doubt Jackson's competency existed, then it could decide whether a retrospective competency determination is feasible, and if so, conduct one. Jackson should be awarded a new trial only if a retrospective competency determination is either infeasible or indicates that Jackson was incompetent. Otherwise, his convictions should be affirmed.

3. THE NO CONTACT ORDER WAS A PROPER CRIME-RELATED PROHIBITION.

Jackson contends that the trial court erred by imposing a lifetime no contact order as to Margaret Caster, the victim of assault

in the second degree. Because the statutory maximum for second degree assault is 10 years, Jackson argues the no contact order for Caster should be limited to that term. This Court should conclude that the trial court did not abuse its discretion in ordering, "For the maximum term of Life years [sic], defendant shall have no contact with Antoine Greenhaigh, Margaret Caster." CP 79.

"As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions[.]" RCW 9.94A.505(8). A "crime-related prohibition" must "directly relate[] to the circumstances of the crime." RCW 9.94A.030(10). Crime-related prohibitions can include no contact orders. State v. Armendariz, 160 Wn.2d 106, 118, 156 P.3d 201 (2007). No contact orders need not be limited to the direct victims of the crime. State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009). The trial court's imposition of a crime-related prohibition is reviewed for abuse of discretion. Id.

The primary concern in reviewing crime-related prohibitions is the prevention of coerced rehabilitation. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). Otherwise, crime-related prohibitions are within the sentencing judge's discretion and will be

reversed only if manifestly unreasonable, such that no reasonable person would take the view of the trial court. Id. at 37.

Both convictions in this case arose from Jackson's unprovoked attack on a Metro bus passenger and his immediate flight therefrom. Margaret Caster was a witness to Jackson's first-degree assault on Greenhaigh, as well as a victim of the closely-related second-degree assault. It was reasonable, therefore, to impose an order prohibiting contact with Caster, effective for life, as a crime-related prohibition on the first-degree assault conviction. The court did not abuse its discretion.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Jackson's convictions for first degree assault with a firearm and second degree assault with a firearm.

DATED this 7th day of November, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
JENNIFER P. JOSEPH, WSBA #35042
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. ROY JACKSON, JR., Cause No. 69423-5 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of November, 2013

U Brame

Name
Done in Seattle, Washington