Supreme Court No. 93113-5

(Court of Appeals No. 72854-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

SANGTACHAN FONG,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Sangtachan Fong, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Fong appealed from his King County Superior Court conviction. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

1. A criminal defendant has a Sixth Amendment right to present a defense, including to confront witnesses and to be present at one's own trial. The Fourteenth Amendment guarantees a defendant's right to due process and fair proceedings. These rights entitle a non-English-speaking defendant to a competent interpreter. In Washington, the right to competent interpretation is also secured by statute under RCW 2.43. Where the trial court did not appoint an interpreter in Mr. Fong's native language, and where Mr. Fong testified that he failed to understand the nature or substance of his plea agreement, was the guilty plea entered in violation of Mr. Fong's constitutional rights, and should review thus be granted pursuant to RAP 13.4(b)(1) and (2)?

2. A defendant is denied his constitutional right to the effective assistance of counsel when his attorney fails to inform him that he is pleading guilty to a crime which is a deportable offense. Mr. Fong pled

guilty to an offense which may render him deportable to the country of his birth, Laos, and he later moved to withdraw his plea. Mr. Fong's attorney never informed him he would be deported; indeed, he had no understanding of Mr. Fong's particular immigration status as a refugee. Instead, his attorney testified that he was focused on avoiding the firearm enhancement and did not research the immigration consequences. Did the trial court abuse its discretion in denying Mr. Fong's motion to withdraw his guilty plea based on ineffective assistance of counsel, and should review be granted? RAP 13.4(b)(1) and (2).

D. STATEMENT OF THE CASE

Sangtachan Fong was born in Laos and spent several years of his childhood in a refugee camp in Thailand. 12/5/14 RP 8-9 (testimony of Mr. Fong's brother). He and his siblings moved to the United States when he was 16. Id. Mr. Fong's family was from a hillside farming village and he had no formal education in Laos. Id. Other than the spoken Thai and Laotian that he picked up in the refugee camp, he does not read or write. Id. at 8-10. Mr. Fong and his siblings took a six-month English course at the Thai refugee camp, which included basic concepts to assist refugees

with the resettlement process. Id. Mr. Fong also speaks Mien, a regional language spoken by the Hmong community.[1]

After moving to Seattle, Mr. Fong attended some high school, dropping out when it became too difficult to follow the English instruction. Id. at 12-13. He cannot read or write in English. Id.; 12/9/14 RP 22-23. When he dropped out of high school, he began working with his father in a Mien-speaking furniture assembly plant in Tukwila. 12/5/14 RP 13.

In 2012, due to allegations made by his stepdaughter, Mr. Fong was charged with one count of rape in the first degree. CP 1-7.

Mr. Fong's family hired a private attorney to defend him, and this attorney went to see Mr. Fong several times. 12/5/14 RP 20-23. The attorney advised Mr. Fong to plead guilty, which Mr. Fong did. CP 8-36. On March 27, 2013, Mr. Fong pled guilty. 3/27/13 RP 4-20. He received a sentence of 120 months incarceration. CP 37-47; 8/2/13 RP 10-14.

At some point after his conviction, Mr. Fong learned of the immigration consequences of his plea. Mr. Fong then moved to withdraw his guilty plea, and new counsel was appointed. Mr. Fong explained that he had not understood the terms of his plea, largely because he had not been provided with a Mien interpreter. He also stated that his trial counsel

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[1] The language has been transcribed in the record as "Mian." However, the correct English spelling is actually "Mien." Further reading can be found here: https://en.wikipedia.org/wiki/Hmong%E2%80%93Mien_languages (last accessed April 20, 2016).

had failed to advise him of the immigration consequences of his guilty plea. 12/5/14 RP 39-41; 12/9/14 RP 30. Following an evidentiary hearing at which Mr. Fong's former trial counsel and Mr. Fong both testified, among other witnesses, the trial court denied Mr. Fong's motion to withdraw his guilty plea. CP 127; 12/9/14 RP 31-34.

Mr. Fong appealed, arguing the court's failure to provide a Mien interpreter was a violation of due process, and that his original attorney had not advised him of the consequences of his plea. On March 21, 2016, the Court of Appeals affirmed his conviction.

He seeks review in this Court. RAP 13.4(b)(1), (2).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND WITH OTHER DECISIONS OF THE COURT OF APPEALS. RAP 13.4(b)(1), (2).

1. It violates due process to accept a guilty plea without providing an interpreter in a defendant's native language.

a. Under the Sixth Amendment and the Due Process Clause, Mr. Fong had a constitutional right to an interpreter in the courtroom.

A non-English-speaking defendant has a constitutional right to a competent interpreter. State v. Ramirez-Dominguez, 140 Wn. App. 233, 243, 165 P.3d 391 (2007). A defendant's right to an interpreter is based on "the Sixth Amendment constitutional right to confront witnesses and the

right inherent in a fair trial to be present at one's own trial." State v. Teshome, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004) (quoting State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999)) (internal quotation omitted), review denied, 153 Wn.2d 1028, 110 P.3d 213 (2005). Due process requires that a person who is not fluent in English be provided a qualified interpreter during all legal proceedings. U.S. Const. amend. XIV; Const. art. 1, § 3; Gonzales-Morales, 138 Wn.2d at 379; Negron v. New York, 434 F.2d 386, 389 (2nd Cir. 1970). The right to competent interpretation is grounded in "considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice." Negron, 434 F.2d at 389.

Similarly, the Washington Legislature has endorsed this task of the courts: "to secure the rights, constitutional or otherwise, of persons who, because of a non-English speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them." RCW 2.43.010.[2]

[2] The right in Washington to an interpreter is broader than in federal court; however, both federal and state courts note that the foundation of the right rests on the belief that: "no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment." United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973), cert. denied, 416 U.S. 907, 94 S.Ct. 1613, 40 L.Ed.2d 112 (1974).

b. The failure of the trial court to appoint a Mien interpreter for Mr. Fong at his guilty plea proceeding resulted in a plea that violated due process.

At Mr. Fong's plea hearing on March 27, 2013, the trial court failed to conduct a sufficient inquiry under RCW 2.43.030 that Mr. Fong understood the proceedings without an interpreter. Although the court had access to Mr. Fong's background and his limited abilities in English, the court asked Mr. Fong only one question at the hearing concerning his English language skills: "Do you have any problems understanding the English language at all?" 3/27/13 RP 5. Mr. Fong replied, "No, no." Id. Mr. Fong explained he was not able to read the Statement of Defendant on Plea of Guilty, but that his trial attorney had read it to him. Id. The court informed Mr. Fong that she, too, would read it to Mr. Fong in the courtroom. Id. The court never asked Mr. Fong if he wanted a Mien interpreter present in the courtroom.

The resulting record reflects several indications that Mr. Fong failed to understand or comprehend the significance of the plea proceedings. Throughout the proceedings, Mr. Fong never said more than one or two-word sentences, generally: "Yes," "No," or "I understand." 3/27/13 RP 5-21. The only time Mr. Fong spoke English for longer than a two-word sentence were the following: He said: "He read it to me," when the court asked whether Mr. Fong's attorney had read the plea agreement to him. Id.

at 5. Mr. Fong also once said, "Can you repeat, please?" when he did not understand the prosecutor. Id. at 12. And lastly, Mr. Fong once said, "I don't remember." Id. at 15; 3/27/13 RP 14.[3]

Most important, when examining the record to determine Mr. Fong's comprehension of the guilty plea, the court failed to consider whether he was tracking the allocution and the waiver of constitutional rights. It is more than concerning that when the court and the prosecutor asked Mr. Fong whether he had fully considered the ramifications of the waiver of his rights, he was clearly confused. 3/27/13 RP 14 ("Do you remember what any of those [rights] are?" ... "Guilty.").

Mr. Fong's guilty plea was not knowing, voluntary and intelligent, because the record shows that he did not understand the nature and terms of the agreement or the court proceedings in the English language. Id. at 5-14.

c. In the alternative, review should be granted because the trial court abused its discretion.

Even if this Court does not find a due process violation, this Court should grant review because Mr. Fong's motion to withdraw his plea was denied on untenable grounds, and because the trial court's factual findings are unsupported by the record.

[3] Mr. Fong also mistakenly wrote the wrong initials throughout the plea form, writing "ST," rather than "SF," his actual initials. 3/27/13 RP 11; 12/5/14 RP 9.

A trial court's order on a motion to withdraw a guilty plea or vacate a judgment may be reviewed for an abuse of discretion. In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2005). A court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (internal citations omitted).

The trial court found "no credible evidence to support the defendant's claim that his plea was not knowing, voluntary and intelligently made." CP 127. This finding is not supported by the record, and is inconsistent with the evidence adduced at the evidentiary hearing, which revealed that Mr. Fong was not able to fully participate in the hearing without the aid of a Mien interpreter. 12/5/14 RP 72-76. The court's finding that Mr. Fong's plea was knowing, voluntary and intelligent is therefore untenable, in light of the testimony of trial counsel, as well as that of Mr. Fong and his brother. Quismundo, 164 Wn.2d at 504.

Accordingly, the Court of Appeals decision affirming the conviction is in conflict with decisions of this Court, as well as other decisions of the Court of Appeals. Review should be granted. RAP 13.4(b)(1), (2).

2. Mr. Fong's attorney did not accurately advise him of the immigration consequences of his plea.

a. A criminal defendant is deprived of his constitutional right to counsel where his attorney fails to inform him that he is pleading guilty to a crime which will result in his deportation.

Pursuant to CrR 4.2(f), a defendant may withdraw a plea of guilty "whenever it appears that the withdrawal is necessary to correct a manifest injustice."[4] A manifest injustice may be established in four non-exclusive ways under CrR 4.2(f): 1) denial of the effective assistance of counsel; 2) a plea not ratified by the defendant; 3) a plea that was involuntary; or 4) a breach of the plea agreement by the prosecutor. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996) (citing State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)) (internal citation omitted).

Here, Mr. Fong moved to withdraw his guilty plea in order to correct a manifest injustice, based upon both the ineffective assistance of counsel, and the involuntariness of his plea. On appeal, he asserts both that trial counsel's ineffectiveness created a manifest injustice, requiring relief, and that his plea was involuntary. CrR 4.2(f); Padilla v. Kentucky, 559 U.S. 356, 373-74, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 173-74, 249 P.3d 1015 (2011).

[4] A "manifest injustice" must be "obvious, directly observable, overt [and] not obscure." State v. Pugh, 153 Wn. App. 569, 577, 222 P.3d 821 (2009).

It is well settled that a criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const. amend VI; Const. art. I, § 22; United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In the context of a plea agreement, an attorney's performance may be deficient if he or she fails to inform a client whether a guilty plea carries a risk of deportation. Padilla, 559 U.S. at 373-74. Where the deportation consequence of a plea is clear, counsel has a duty to inform the client that State is offering a plea to a deportable offense. Id. at 368-69. Where the immigration consequences are less than clear, counsel must at least advise a noncitizen client the charge may carry a risk of adverse immigration consequences. Id. That the standard plea form carries boilerplate warnings does not satisfy an attorney's obligations. Sandoval, 171 Wn.2d. at 173-74; State v. Martinez, 161 Wn. App. 436, 441-42, 253 P.3d 445 (2012).

The Court of Appeals recently recognized the importance of assessing a defendant's full understanding of the immigration consequences of a conviction in State v. Chetty, 184 Wn. App. 607, 615-16, 338 P.3d 298, 303 (2014) (granting motion to extend time to file notice of appeal due to ineffective assistance of counsel).[5] In Chetty, the Court observed that a conviction for an aggravated felony would result in almost certain deportation, and that this was "one of the simplest most elementary questions that any criminal defense attorney should know the answer to." Id. at 612 (quoting immigration attorney, who stated it would be deficient performance for a criminal defense attorney to refer client to immigration attorney rather than to know this information).

In order to withdraw a guilty plea, a criminal defendant must show prejudice. "A defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." In re Personal Restraint of Riley, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993) (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). If a decision to reject the plea bargain "would have been rational under the

[5] Interestingly, Chetty involved immigration advice given by the same trial attorneys as Mr. Fong's original attorney, as well as one other. 184 Wn. App. at 611.

circumstances," prejudice is established. Sandoval, 171 Wn.2d at 175 (citing Padilla, 559 U.S. at 372).

Here, Mr. Fong was deprived of his constitutional right to the effective assistance of counsel because he was not adequately advised of the adverse immigration consequences of his guilty plea. The trial court erred when it denied Mr. Fong's motion to withdraw his plea. Padilla, 559 U.S. at 373-74; Sandoval, 171 Wn.2d at 175-76; Martinez, 161 Wn. App. at 441-42.

b. The trial court erred when it found that Mr. Fong was adequately advised of the immigration consequences of his guilty plea and when it denied his motion to withdraw the plea for ineffective assistance of counsel.

Mr. Fong was deprived of the effective assistance of counsel because his attorney's advice concerning the immigration consequences of his plea was inadequate. Mr. Fong would not have taken a guilty plea and risked deportation, had he understood the risks to his refugee immigration status.

Although Mr. Fong's prior defense counsel testified he had told Mr. Fong he might face consequences that were "very adverse," the attorney also testified he did not know Mr. Fong's precise immigration status. 12/5/14 RP 37-38. This attorney stated that although he had represented Mr. Fong on this serious matter, and he had visited him several times to interview him about the case, he had taken less than one page of notes throughout his handling of the case. Id. at 24.

The attorney's testimony was ambiguous as to what he had advised Mr. Fong concerning immigration consequences, other than that the consequences would likely be "negative." Id. at 40. In fact, the attorney testified he did not even know, when advising Mr. Fong, that he had refugee status. Id. at 38, 40.

In addition, the testimony from the DOC employee who completed the Pre-Sentence Investigation (PSI) suggested that Mr. Fong had not been advised about deportation. 12/5/14 RP 18-19. Mr. Fong reported to the DOC officer that after his release, he planned to live with either his parents in Washington or his brother in Texas; Mr. Fong had not been advised about the likelihood of deportation after serving his sentence. Id.

Like the defendant in Chetty, Mr. Fong's conviction for first degree rape, an aggravated felony, rendered him clearly and obviously deportable – and in jeopardy of losing his treasured status as a political refugee. Because Mr. Fong's attorney merely told him that he could discuss the immigration consequences with an immigration lawyer -- and indeed, did not even know what Mr. Fong's precise immigration status was -- this case resembles Chetty, and should have been reversed due to the ineffective assistance of counsel. 184 Wn. App. at 615-16; Padilla, 559 U.S. at 373-74; Sandoval, 171 Wn.2d at 175-76; Martinez, 161 Wn. App. at 441-42.

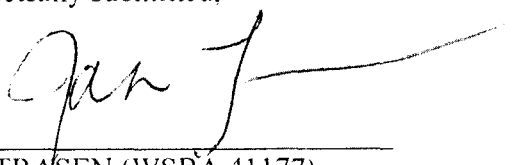
Accordingly, the Court of Appeals decision affirming the conviction is in conflict with other decisions of the Court of Appeals, as well as with decisions of this Court. Review should be granted. RAP 13.4(b)(1), (2).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court, and with other decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

DATED this 20th day of April, 2016.

Respectfully submitted,



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APPENDIX

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

STATE OF WASHINGTON, Respondent,	)	No. 72854-7-I
v.	)	UNPUBLISHED OPINION
SANGTACHAN FONG, Appellant.	)	FILED: March 21, 2016

SCHINDLER, J. — Sangtachan Fong filed a motion to withdraw his guilty plea to one count of rape in the first degree. Fong claimed his guilty plea was involuntary because he did not have an interpreter during the plea proceedings. Following an evidentiary hearing, the trial court rejected Fong's testimony as not credible and denied the motion. Because Fong failed to demonstrate withdrawal of the guilty plea was necessary to correct a manifest injustice, we affirm.

FACTS

On November 28, 2012, the State of Washington charged Sangtachan Fong with one count of rape in the first degree domestic violence and one count of attempted rape of a child in the third degree domestic violence. The State alleged Fong entered the bedroom of his 17-year-old stepdaughter, placed a handgun on the pillow next to her

head, and forcibly raped her. The State also alleged Fong attempted to rape the stepdaughter when she was 14 years old.

After the charges were filed, Fong fled. Fong was arrested in Texas and waived extradition. After Fong returned to King County, his family hired attorney David Gehrke to represent Fong.

On March 27, 2013, Fong entered a guilty plea to one count of rape in the first degree domestic violence. Under the terms of the plea agreement, the State dismissed the count of attempted rape of a child in the third degree domestic violence.

At the beginning of the lengthy plea colloquy, the deputy prosecutor questioned Fong about his ability to review the "Statement of Defendant on Plea of Guilty to Felony Sex Offense" with his attorney.

> [PROSECUTOR]: Is it also accurate that you have an eleventh-grade education?
> DEFENDANT FONG: Yes.
> [PROSECUTOR]: I have in front of me, and you're welcome to share with me, a document that is called "Statement of Defendant on Plea of Guilty." Have you had the opportunity to go over this document in depth with your attorney, Mr. Gehrke?
> DEFENDANT FONG: Yes. He did last week.
> [PROSECUTOR]: Okay. And did you read the document yourself, or did he read it to you, or a combination of the two?
> DEFENDANT FONG: He read it to me.
> [PROSECUTOR]: Did you have any problems understanding him when he read this document to you?
> DEFENDANT FONG: No, no.
> [PROSECUTOR]: Do you have any problems understanding the English language at all?
> DEFENDANT FONG: No, no.

The deputy prosecutor then described the nature of the charge, the standard range and maximum sentences, the State's recommended sentence, the fact that the trial court was not bound by the parties' recommendations when imposing sentence, the

nature of the indeterminate sentence, legal financial obligations, and numerous other conditions of sentence and consequences of entering into a guilty plea, including the requirement to register as a sex offender. Fong repeatedly acknowledged he understood the conditions of sentence and the consequences of pleading guilty.

During the course of the colloquy, Fong initialed various portions of the Statement of Defendant on Plea of Guilty. At one point, Fong identified his initials on the plea statement. When advised the guilty plea "can be grounds for deportation or exclusion from admission to the United States" if he was not a United States citizen, Fong responded, "I understand." Finally, Fong acknowledged no one had threatened him or made any other promises to persuade him to sign the plea agreement. Fong affirmed he had no further questions.

Fong's attorney David Gehrke informed the court he had reviewed discovery with Fong and Fong's family and Fong had discussed the plea with his family. Gehrke told the court he was confident Fong was making a knowing, voluntary, and intelligent decision to plead guilty. The trial court confirmed with Fong the decision to plead guilty was his own and he had all the time he needed to talk with Gehrke.

When the deputy prosecutor asked Fong whether he remembered the specific rights he was giving up when pleading guilty, Fong responded, "Guilty." At this point, the trial court intervened. Fong acknowledged his attorney told him he was waiving the right to a speedy and public trial by an impartial jury. But Fong replied, "I don't remember" when asked if he recalled the other specific rights he was waiving. The court emphasized to Fong how important it was that he understand the rights he was giving up. Gehrke then reviewed with Fong on the record the specific rights he was

waiving, including the right to remain silent, right to testify and present witnesses, and the right to cross-examine witnesses. Fong acknowledged he understood the rights.

After confirming Fong understood his rights and had no further questions, the trial court accepted Fong's guilty plea as knowing, intelligent, and voluntary. On August 2, 2013, the court sentenced Fong to an indeterminate standard-range sentence of 123 months to life imprisonment.

On August 1, 2014, the attorney who was representing Fong in a subsequent prosecution for child molestation filed a motion to withdraw Fong's guilty plea to the November 28, 2012 charge of rape. Fong did not submit a declaration in support of the motion. His attorney alleged Fong's first language was Mien and he had trouble understanding English. The attorney claimed that because Fong did not have a Mien interpreter during plea negotiations, he "did not understand the ramifications of his guilty plea, the rights that he was waiving, or, even, the fact that he was pleading guilty."

The trial court conducted an evidentiary hearing on the motion to withdraw the guilty plea in December 2014. Fong's attorney for the 2012 charges, David Gehrke, testified he spent 10 to 12 hours discussing the case with Fong before entry of the guilty plea. Gehrke said that during their discussions, Fong spoke in full sentences, asked clarifying and appropriate questions, and seemed to comprehend the answers. During the course of the discussions, Gehrke never thought Fong needed an interpreter. Nor did Fong or any family member ever suggest Fong needed an interpreter. Gehrke testified that he would have arranged for an interpreter if he ever thought Fong needed one.

Gehrke stated Fong never said he wanted to go to trial. Rather, he indicated he wanted to plead guilty because of the strength of the State's evidence and to avoid a five-year firearm enhancement. Because Fong was not a citizen, Gehrke told him the rape charges "would be an aggravated felony . . . and that I didn't see any way to make this immigration-safe and that it could be very adverse in terms of citizenship and could affect his ability to stay here." When asked if Fong understood he would be deported, Gehrke explained:

> I made it clear to him, and I'm confident he understood, that a plea to this would have negative consequences.
>
> I'm not sure that I told him he would definitely be deported. I told him that he had serious issues there, and I also told him that if he had further questions, he could talk to an immigration attorney.

Community Corrections Officer (CCO) John Pioli spent nearly two hours interviewing Fong in April 2013 for the court-ordered presentence investigation (PSI). CCO Pioli testified that Fong did not ask for an interpreter and CCO Pioli did not think Fong needed one.

> It was a very pleasant interview. [Fong] was very cooperative. He answered every question I asked of him. He gave me a lot of detail regarding his early life before he came to the United States. He gave me a lot of information about when he was here in the United States. He talked to me about his past relationships, a little bit about his children, his work history and education history.
>
> He was very cooperative. It was a very good interview.

Fong spoke in English to CCO Pioli, spoke in complete sentences, gave appropriate answers, and asked for clarification if he did not understand the question. CCO Pioli testified Fong provided all of the information attributed to him in CCO Pioli's lengthy PSI report in English.

Fong's younger brother Naichiew Saechao testified he and Fong were born in Laos and came to the United States in 1990. Fong's native language is Mien and he had only a minimal introduction to the English language before arriving in the United States. After arriving in the United States, Fong enrolled in high school but dropped out after about a year and a half. After leaving school, Fong worked at a series of jobs where many of his coworkers spoke Mien.

According to Saechao, Fong speaks "some" English and "reads a little bit" of English. Saechao never expressed any concern to Fong's attorney about Fong's ability to understand English. Saechao believed Fong would have asked for help if he needed it.

Fong testified through an interpreter. Fong described his ability to read and write English as minimal at best. He identified "eat," "water," and "shower" as the only English words he knew.

Fong explained he wanted to withdraw his guilty plea because he did not understand "anything written" on the Statement of Defendant on Plea of Guilty. Fong claimed he met with Gehrke for no more than three hours before entering the plea, "didn't understand a word" his attorney explained about the plea statement, and repeatedly told Gehrke he did not understand. Fong also asserted he twice asked Gehrke for an interpreter and Gehrke never provided one.

Fong was unable to recall any significant details about what he said during the plea colloquy or during the interview with CCO Pioli. Fong insisted he did not know he could tell the judge he did not understand the plea statement. Fong said he eventually

signed the plea documents only because his attorney told him to do so. Fong claimed he did not even know he had pleaded guilty until he went to jail after the plea hearing.

The trial court denied the motion to withdraw the guilty plea, finding "[t]here was no credible evidence to support [Fong]'s claim that his plea was not knowing, voluntary and intelligently made." The court noted Fong's statements during the plea colloquy, the extensive details Fong provided to CCO Pioli during the PSI interview, and the credible testimony of Fong's attorney Gehrke all flatly contradicted Fong's claim that he understands only a few words of English.

Fong appeals.

ANALYSIS

Fong contends the trial court erred in denying his motion to withdraw his guilty plea. He argues the evidence was insufficient to establish a knowing, intelligent, and voluntary guilty plea. Fong also argues that his attorney provided constitutionally deficient assistance of counsel during the plea process. Fong separately contends the trial court's failure to appoint a Mien interpreter during the guilty plea proceedings violated his right to due process. Fong's due process argument rests on the factual claim that he needed an interpreter to understand the plea process. Because the court necessarily considered and rejected this claim following the evidentiary hearing, our review is limited to the order denying Fong's motion to withdraw his guilty plea.

Under CrR 4.2(f), the court must permit the defendant to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." This is a "demanding standard" and requires the defendant to demonstrate " 'an injustice that is obvious, directly observable, overt, not obscure.' " State v. Branch, 129

Wn.2d 635, 641, 919 P.2d 1228 (1996) (quoting State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)). An involuntary guilty plea and denial of effective assistance of counsel during the plea process may constitute a manifest injustice. State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). We review the trial court's denial of Fong's motion to withdraw his guilty plea for an abuse of discretion. State v. Olmsted, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). To prevail on appeal, Fong must demonstrate the trial court exercised its discretion "upon grounds clearly untenable or manifestly unreasonable." Olmsted, 70 Wn.2d at 119.

Fong asserts his guilty plea was not knowing, intelligent, and voluntary because he was unable to understand the plea proceedings without a Mien interpreter. The record does not support his assertion.

Fong's signature on the written Statement of Defendant on Plea of Guilty in compliance with CrR 4.2(g), and the acknowledgment that his attorney read the statement to him and he understands it, provides " 'prima facie verification of the plea's voluntariness.' " Branch, 129 Wn.2d at 642 n.2 (quoting State v. Perez, 33 Wn. App. 258, 261, 654 P.2d 708 (1982)). Where, as here, the trial court then conducts an extensive colloquy establishing "the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable." Perez, 33 Wn. App. at 262.

Fong's responses during the plea colloquy strongly support the determination of voluntariness. The record shows Fong was able to respond in complete sentences, ask questions, and seek clarification when necessary. Contrary to Fong's assertion on appeal, Fong did not claim during the plea colloquy that he was unable to read the Statement of Defendant on Plea of Guilty. Rather, Fong told the court his attorney read

the plea statement to him. As the trial court noted, Fong provided an answer in a complete sentence in response to the deputy prosecutor's compound question.

The trial court also considered extensive testimony from Gehrke, the attorney who represented Fong, and CCO Pioli, who interviewed Fong for the PSI shortly after the plea hearing. Gehrke spent 10 to 12 hours with Fong and never believed Fong needed the assistance of an interpreter. Gehrke testified that Fong answered his questions appropriately and in complete sentences, and neither Fong nor his family ever indicated Fong needed an interpreter.

CCO Pioli interviewed Fong for nearly two hours. Fong provided CCO Pioli with extensive and detailed information about his life, education, relationships, and work history. Fong gave appropriate answers to questions, spoke in complete English sentences, and never indicated the need for an interpreter.

Fong insisted he knew only approximately three words in English. Fong claimed he did not understand anything on the written plea statement, did not understand any of his attorney's explanations, did not understand anything at the plea hearing, and did not even understand he was pleading guilty. Fong also claimed Gehrke ignored his requests for an interpreter. The trial court rejected Fong's conclusory allegations as not credible. We defer to the trial court on credibility. See State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (appellate court defers to trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence).

Substantial evidence supports the trial court's finding that Fong failed to present any credible evidence that his guilty plea was not knowing, intelligent, and voluntary.

Because Fong failed to demonstrate a manifest injustice, the trial court did not abuse its discretion in denying Fong's motion to withdraw his guilty plea.

Fong also contends he should be permitted to withdraw his guilty plea because he was denied effective assistance of counsel. Fong argues Gehrke's advice about the immigration consequences of his guilty plea was inadequate.

We review claims of ineffective assistance of counsel de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Fong bears the burden of demonstrating both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The scope of counsel's duty to advise a client about the immigration consequences of a guilty plea depends on the immigration law applicable to the specific circumstances of the case. See State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011); Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Gehrke testified he advised Fong the offense was an aggravated felony, there was no way to make the plea "immigration-safe," and the plea could have "very adverse" consequences. On appeal, Fong asserts that he learned of the "immigration consequences" of his plea "[a]t some point after his conviction." But Fong does not provide a citation to the record to support his assertion or otherwise explain the specific immigration consequences. Nor does Fong provide any support for the allegation that he "would not have taken a guilty plea and risked deportation, had he understood the risks to his refugee immigration status."

Fong did not raise his claim of ineffective assistance in the motion to withdraw his guilty plea or allege counsel's immigration advice was constitutionally deficient under

the circumstances. Fong did not mention the immigration advice or consequences in his testimony. Rather, he flatly denied understanding anything during the plea proceeding, a claim the trial court rejected as not credible.

Based on the record before us, Fong fails to demonstrate that counsel's performance was constitutionally deficient or that Fong was prejudiced by inadequate advice on immigration consequences.

Affirmed.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72854-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: April 20, 2016