NO. 93371-5

(COA NO. 75035-6)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HOKESHINA LEE TOLBERT,

Appellant.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Defendant/appellant Hokeshina Tolbert seeks review of the appellate court's decision affirming his conviction and sentence.

II. COURT OF APPEALS DECISION

The Court of Appeals affirmed Mr. Tolbert's conviction and sentence; its decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Should a juvenile defendant's age be considered when determining whether his guilty plea in adult court was knowing, voluntary, and intelligent?
2. Should a juvenile defendant's literacy and lack of education be considered when determining whether his guilty plea in adult court was knowing, voluntary, and intelligent?

STATEMENT OF THE CASE

This case arose out of a drive-by shooting which resulted in the tragic death of 32-year-old Tracy Steele. Hokeshina Tolbert was not an occupant of the car from which the shooting took place – instead, the act which gave rise to his criminal liability was his compliance with his older cousin's request to retrieve a gun from the garage of the house where they were both residing.

I. The Facts of the Crime

At age 16, Hokeshina Tolbert was living in the detached garage at the residence of his cousin, Camille Bluehorse. Camille's younger brother, Dan Bluehorse, age 20, was also living at the residence.

On the night of the murder, Mr. Tolbert and Mr. Bluehorse were drinking beer and liquor at the Bluehorse residence with Marjorie Morales, and brothers Jose and Jesus Cota Ancheta. *See State v. Mee*, 168 Wn. App. 144, 275 P.3d 1192 (2012).

Meanwhile, Michael Mee was at a party at a different location and became involved in a fight. He was upset because one of his fellow gang members, Charles Pitts, was also present at that party, but did not come to his aid during the altercation. CP:18-19. Mee got the worst of the fight and was knocked to the ground. CP:19. He left the scene in a car driven by Tanya Satack along with three female passengers. *Id.* Mee was angry that he had been jumped and that Pitts had not come to his aid. CP:19-20.

Mee directed Satack to drive to the Bluehorse residence; once there Mee exited the car and approached the residence alone. CP:20. Mee did not go inside the Bluehorse residence, but while standing at the door, stated that he had been "jumped" and needed their help. *Id.* He was primarily speaking to Dan Bluehorse, and specifically asked Bluehorse for the "thing," meaning the rifle. *Id.* Bluehorse turned to Tolbert and told

him to go get the "thing" from the garage. *Id.* Tolbert complied, retrieving the gun where it had been hidden in the rafters of the garage, and returned to the house. *Id.*

Mee, Bluehorse, Morales, and both Cota Ancheta brothers got in Ms. Morales' car and headed back towards the party; Jesus was driving and Mee was in the front passenger seat with the rifle. CP:20. Meanwhile, Tolbert got into Ms. Satack's car, still containing three other passengers, and Satack followed Mee's vehicle. CP:21.

While riding by the house where he'd been "jumped," Mee fired two shots from the rifle. CP:21. At least one shot struck Tracy Steele, and he died a short time later from this wound. CP:21.

Satack had lost sight of the Mee vehicle before it arrived at the crime scene; after hearing gun shots nearby, she turned her car around and drove away. *Mee,* 168 Wn.2d at 150. Moments later, Satack caught sight of the Mee vehicle and followed it back to the Bluehorse residence. *Id.* The two vehicles returned to the Bluehorse residence, and everyone dispersed. CP:21.

II. The Charges and Plea Hearing

Mr. Tolbert was charged as an adult under the automatic decline statute, RCW 13.04.030(1)(e)(v)(A). He was initially charged by an Information filed on July 2, 2008, with one count of first-degree murder

and one count of second-degree unlawful possession of a firearm. CP:1-2. The state offered to reduce the charges to one count of second-degree murder in exchange for a guilty plea and Tolbert's testimony at his co-defendants' trials. *See* Plea Agreement, CP:41-44.

Tolbert accepted the deal and pled guilty to the amended information on January 28, 2009. The Statement of Defendant on Plea of Guilty reads:

> On May 10, 2008, in Pierce Co Washington Michael Mee came to my cousin's house and asked for a gun. I went and got a 30-30 rifle from the garage. Michael Mee took the gun, and went to the residence where Tracy Steele was at. I was in a car following another car Michael Mee was riding in. I watched Michael Mee fire two shots at the house. Tracy Steele was hit by the bullets and died.
>
> Jesus Cota Ancheta was driving the car Michael Mee fired the shots from. I knew Michael Mee was going to use the gun to shoot someone.

Statement of Defendant on Plea of Guilty, CP:39.

The first paragraph of the statement is signed with Tolbert's full name. The second paragraph appears to be added later, and is initialed "HLT." CP:39.

A plea hearing was held on January 28, 2009. Defense counsel began the hearing by explaining that he had reviewed the Statement on Plea of Guilty and the Plea Agreement with Mr. Tolbert the night before at the jail. 1/28/09 TR:3-4. The court confirmed with Tolbert that he had

reviewed the forms with his lawyer, and that they had had enough time to talk about them. *Id.* at 5. Throughout the hearing, Tolbert responded to all of the court's questions with a "yes" or "no" answer. 1/28/09 TR:3-11.

Regarding the factual basis of the plea, the court made the following inquiry:

> THE COURT: And in the 11th paragraph, it's written what you did that supports this plea. Did you go over and read what was written in paragraph 11? It starts out, "On May 10th, 2008, in Pierce County," and then talks about what happened.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is that a true statement?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Basically, it says that your role in this was providing the rifle that became the murder weapon; is that right?
>
> THE DEFENDANT: Yes, sir.

1/28/09 TR:8-9.

Sentencing was set for April 3, 2009. Tolbert was held without bail, and the proceedings concluded. 1/28/09 TR:10-11.

III. Mr. Tolbert's Attempts to Withdraw His Plea Prior to Sentencing

Although the sentencing hearing had been set for April 3, at the state's request the sentencing was held over seven times, and Tolbert was

not sentenced until March 12, 2010, well over a year after the plea hearing. During that lengthy interval, Tolbert attempted to withdraw his plea twice, complaining that he could not contact his lawyer, he had been coerced into taking the plea, and his lawyer had mislead him about his possible sentencing exposure.

Tolbert filed a "Declaration ... Regarding Plea Bargain" on March 18, 2009, CP:45-46. This Declaration states:

> 1. My lawyer Dana Ryan mislead me into taking a 10 year max deal when I signed I found out it was 18 year max if I knew that I wouldve never signed.
>
> 2. I feel my lawyer is trying to force me to take this deal by not communicating with me.
>
> 3. I believe I was coerced into making statements on July, first, 2008.

There is no response in the record to Tolbert's pro se declaration.

Mr. Tolbert also filed a request for a new attorney styled as an "Order of dismissal and quashing of service of process – insufficent service" on October 7, 2009, CP:47.

That Motion/Order stated:

> I Hokeshina Tolbert ... order dissmissal and quashing of service of process, INSUFFICENT SERVICE. My Basis for insufficent counsel is my attorney Dana Ryan has Performed inadequately. I have asked him to schduele a incomatency hearing he has not. I've asked him to do numerous things to no avail. He has not informed me of my case's status and Refuse's to answer my and my mothers

> calls. I Believe he is not doing his Job as well as he could be. he has not helped me in my case. I Request to be appointed a new attorney.

The record does not reflect any action being taken on this second pro se filing, either.

IV. Sentencing

At the sentencing hearing held March 12, 2010, the state explained that they originally agreed to recommend a sentence at the high end of the range, 220 months. But after speaking to the detectives on the case, considering the amount of help that Tolbert provided, and the fact that Tolbert was going against the "gang code" by testifying at risk of harm to himself, the state reduced their recommendation to 150 months. 3/12/10 TR:4.

The state also reviewed Tolbert's actual actions:

> [T]he defendant wasn't in the car that the shooting occurred from. He did at the direction of Mr. Bluehorse, an older gang member, go to that garage and get the gun, bring it out, put it in the grass and the defendant [Mee] picked it up and went and committed the murder.

3/12/10 TR:4-5.

Tolbert's mother spoke at sentencing, and described the difficulties her son had experienced:

> He's been diagnosed with ADHD and PTSD, a couple more things, so – and he was court ordered to take meds and he wouldn't take his meds. I know that that had

> a lot to play – part to play in what happened because he's a really good – he's got a very good heart and he's a good baby. That's my baby, that's my last baby.
>
> I sent him to Montana for a while with my brother but I brought him back because my brother was, I thought, too strict, abusive – to the point of abuse. ... I also suffer from addiction and I kind of got caught up in addiction. ... I know that what happened really – that it really got him, you know, it got to him because he told me, I've never seen – you don't know what I've seen, mom.
>
> ... I did a lot of praying for my son because right after that had happened, he got shot twice down on Portland Avenue and I really felt like that summer that I was going to bury my son before the summer was over ...
>
> ...I didn't approve of what he did but he's very hot headed and then not taking his meds that probably – you know, he did a lot of drinking and drugging too so, you know.

3/12/10 TR:6-7.

Tolbert also spoke and expressed his remorse for his actions. He stated that "even if I do get time, it'll give me time to rethink my ways and rethink what I was doing and be able to get my education and get back on track, start walking the right road instead of doing what I was doing out there, drinking, smoking, doing all that. And it's time to change." 3/12/10 TR:8.

The court recognized that Mr. Tolbert's testimony at Mee's trial had been "very credible and forthright," and that he had been "critical to

the conviction in that case." 3/12/10 TR:8. Judge Serko adopted the lower state recommendation and sentenced Tolbert to 150 months in prison. *Id.,* at 8-9. She stated that this was an appropriate sentence because "your actions played a huge role in the death of a human being." *Id.*, at 9.

IV. Appeal

Mr. Tolbert brought an appeal arguing that his plea was not valid because it was not voluntary, intelligent and knowing. The Court of Appeals affirmed in an unpublished opinion issued June 13, 2016.

ARGUMENT IN FAVOR OF REVIEW

I. This Court Should Grant Review to Determine if a Juvenile Defendant's Age Should Be Taken into Consideration when Determining if a Guilty Plea is Knowing, Voluntary and Intelligent

The appellate court declined to consider these Mr. Tolbert's age as a factor in its analysis of the voluntariness of his guilty plea, stating that "... he cites no authority requiring this court to give weight to these factors in this context without demonstrating some further incompetency." Unpublished Opinion, p. 8. The decision to not even consider these factors in the context of the guilty plea hearing is inconsistent with caselaw in this state and the federal courts. Even where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children

are not adults. *J.D.B. v. North Carolina,* 564 U.S. 261, 274, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). "The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *Id.,* at 273.

A child's age is far "more than a chronological fact." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *accord, J.D.B. v. North Carolina,* 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (holding that age is relevant when determining police custody for Miranda purposes); *Gall v. United States*, 552 U.S. 38, 58, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); *Roper* v. *Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). It is a fact that "generates commonsense conclusions about behavior and perception." *J.D.B.,* 131 S.Ct. at 2403 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 654, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) (Breyer, J., dissenting)).

The U.S. Supreme Court made the following observations on the impact youth and immaturity can have on an adolescent's interaction with the legal system:

> ...the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less

> likely than adults to work effectively with their lawyers to aid in their defense. ... Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. ... These factors are likely to impair the quality of a juvenile defendant's representation.

Graham v. Florida, 560 U.S. 48, 78, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

Thus, youth not only affects culpability, it also affects how a child interacts within the legal system. As this Court noted in *State v. O'Dell*, 183 Wn.2d 680, 692, 358 P.3d 359 (2015), there are fundamental differences between adult and juvenile brains, and these differences include the areas of risk and consequence assessment, and the ability to make reasoned decisions in times of significant stress.

Findings of the MacArthur Foundation show that a significant percentage of youth are unable to participate competently in their own trials due to their developmental immaturity.[1] Younger individuals were more likely to endorse decisions that comply with what an authority seemed to want as measured by their willingness to confess and plea bargain. *Id.* In addition, younger teens were significantly less

[1] MacArthur Foundation Research on Adolescent Development and Juvenile Justice, Issue Brief 1: *"Adolescent Legal Competence in Court."*

likely to recognize the risks in various decisions, and they were less likely to comprehend the long-term consequences of their decisions.

Adolescents – like Mr. Tolbert – who are victims of emotional or physical trauma may suffer from a delay in brain maturation because of the disruption in brain development. *See* RCW 70.305.010.[2] This delay renders them less mature relative to their same-age peers.

Tolbert had reached the age of 18 by the time sentence was finally imposed; however it is likely that the emotional and physical traumas he had endured throughout his childhood and his mental and neurological difficulties rendered him less mature than his same age peers and less able to exhibit mature cognitive and reasoning functions. These factors should weigh against finding a voluntary, knowing, and intelligent plea.

II. This Court Should Grant Review to Determine if a Juvenile Defendant's Literacy Should Be Taken into Consideration when Determining if a Guilty Plea is Knowing, Voluntary and Intelligent

A defendant's language skills and lack of education can impact his ability to enter a knowing, voluntary, and intelligent guilty plea.

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[2] *See also* National Juvenile Justice Network, *Using Adolescent Brain Research to Inform Policy: A Guide for Juvenile Justice Advocates,* 2012. (citing Rebecca L. McNamee, *"An Overview of the Science of Brain Development,"* University of Pittsburgh, May 2006.)

In this case, Tolbert's language skills and lack of education likely impacted his ability to understand the requirements of the law in relation to the facts. "The juvenile and criminal justice systems operate on an implicit assumption that, barring a severe mental defect or other extraordinary obvious condition, most human beings understand most of what they are told ..."[3] Yet the very people overrepresented in the criminal and juvenile justice systems – individuals with ADHD and learning disabilities, individuals labeled as "behavior problems," and individuals who grew up in extreme poverty – have been found to exhibit an unusually high rate of communication and language impairments. *Id.*, p. 3. Tolbert falls into all three of those categories of individuals exhibiting a high rate of impairments. Further, at the time of his sentencing, he had not completed eighth grade. His pro se filings (CP:45-47) also demonstrate extremely poor language skills.

This high likelihood of language impairment is significant because of the immense negative impact that communication deficits can have when navigating the legal system. Competency to stand trial requires sufficient present ability to consult with counsel "with a reasonable degree of rational understanding" and possession of a

[3] Michele LaVigne and Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters.* 15 UC Davis J. Juv. L. & Pol'y 37 (Winter, 2011).

"rational as well as factual understanding of the proceedings." *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). By its very terms, the *Dusky* standard links language competence and competency to stand trial. In *Cooper v. Oklahoma,* the Supreme Court reinforced the connection by further defining the ability to consult with counsel standard as the ability to "communicate effectively with counsel." *Cooper v. Oklahoma,* 517 U.S. 348, 351-52, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996).

Similarly, meeting the "knowing, intelligent and voluntary" standard requires certain language and communication skills. In the context of a guilty plea, this means that defendants understand their right to a trial, how a trial operates, what is being lost and what is being gained by pleading guilty, the elements of the offense and how their conduct meets those elements, any potential defenses, the role of the judge in the plea process, the potential sentence, and the collateral consequences of the conviction.

A recent study in Massachusetts tested adolescents who pled guilty in juvenile court in order to determine how well the juveniles understood the rights they had just waived and the consequences of their pleas. Seventeen-year-olds were likely to be confused and mistaken as to key legal words and concepts, and were only slightly more likely to

understand than thirteen-year-olds – even after the words and concepts had been explained, and even among those who had previous juvenile court experience.[4] The authors of the study conclude that all parties, including the juvenile defendants themselves, believe the juveniles understand more than they actually do about court proceedings and the rights they are waiving:

> Although the study indicates that experience and instruction improve performance, the instructed group provided only 5 correct definitions out of a possible 36. This dismal lack of comprehension should be a wake-up call for attorneys, judges, and other court personnel who interact with court-involved children. They cannot rely on the child's affirmative response to the question "Do you understand?" when discussing rights the child is waiving or the disposition he or she is accepting.[5]

At the plea hearing in this case, the court never asked Tolbert to "state in your own words," or engaged in any sort of back and forth questioning. Tolbert responded "Yes, Sir" a total of nineteen times; and "No, Sir" four times. 1/28/09 TR:3-11. Tolbert agreed with the judge's summation that he "provided" the gun used in the shooting, although his

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[4] Barbara Kaban & Judith Quinlan, *TRENDS & DEVELOPMENTS IN THE JUVENILE COURT: Rethinking a "Knowing, Intelligent, and Voluntary Waiver" in Massachusetts' Juvenile Courts,* 5 J. CENTER FOR FAM. CHILD. & CTS. 35 (2004).

[5] *Id.*, p. 48. The authors include a suggested colloquy for a judge to more accurately gauge an adolescent's comprehension.

actual role was limited to following his older cousin's direction to fetch the gun from its hiding place in the rafters of his cousin's garage.

A defendant's guilty plea must be voluntary, knowing, and intelligent. *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *In re Pers. Restraint of Isadore,* 151 Wn.2d 294, 297, 88 P.3d 390 (2004). The defendant must not only demonstrate an understanding of the elements of the charges, but also an understanding of the law in relation to the facts for the crime of which he was charged. *State v. Rigsby,* 49 Wn. App. 912, 916, 747 P.2d 472 (1987). *See Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (plea invalid when defendant unaware his conduct failed to satisfy element of offense); *In re Personal Restraint of Hews*, 99 Wn.2d 80, 660 P.2d 263 (1983) (defendant must understand that his alleged criminal conduct satisfies the elements of the offense); *State v. Chervenell*, 99 Wn.2d 309, 318-19, 662 P.2d 836 (1983) (plea involuntary if defendant lacks understanding of law in relation to facts).

The factual basis requirement helps guarantee a truly knowledgeable and voluntary plea by "project[ing] the admitted misconduct against the backdrop of the violated statute, allowing a thorough and final check on the understanding of the defendant." *In re Taylor,* 31 Wn. App. 254, 258, 640 P.2d 737 (1982). That guarantee of a

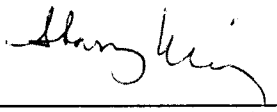
truly knowledgeable and voluntary plea is not met when the defendant's maturity and literacy level is not taken into consideration at the trial court or appellate level.

CONCLUSION

This Court should accept review to clarify these important issues of statewide import.

DATED: July 13, 2016.

Respectfully submitted,



Stacy Kinzer, WSBA No. 31268
Attorney for Hokeshina Tolbert

CERTIFICATE OF SERVICE

I certify that on the 13 day of July, 2016, a true and correct copy of the foregoing PETITION FOR REVIEW was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HOKESHINA LEE TOLBERT, Appellant.	No. 75035-6-I DIVISION ONE UNPUBLISHED OPINION FILED: June 13, 2016

LEACH, J. — Hokeshina Lee Tolbert appeals his conviction of murder in the second degree after the trial court denied his request to withdraw his guilty plea. Tolbert challenges the voluntariness of his plea. He claims that he did not have adequate knowledge about how his actions related to accomplice liability. He also claims that the trial court should have ordered a competency hearing. Finally, he argues that the trial court should not have accepted his guilty plea because sufficient facts did not support that a jury could find him guilty of the crime charged. Because the record shows that he entered into his guilty plea voluntarily, knowingly, and intelligently, because Tolbert failed to provide substantial evidence of incompetency, and because sufficient facts support the trial court's acceptance of his guilty plea based on his accomplice liability, we affirm.

Background

On May 10, 2008, Michael Mee was involved in a fight at a barbeque at a residence in Tacoma. Mee left the scene in a car with several people and drove to another residence.

When Mee arrived, he went into the house and came out with several people including Tolbert, who was carrying a rifle. Tolbert gave the rifle to Mee. Mee got into in the front passenger seat of a vehicle parked in front of the residence. Tolbert got into the car Mee had arrived in. Both vehicles went back to the barbeque. Mee fired two rounds from the rifle at people standing in the yard of the residence. One struck Tracy Steele in the torso, killing him.

Tolbert told police that "they" had given Mee the rifle, that he knew the rifle would be used to shoot someone, that he followed Mee to the shooting, and that he retrieved the rifle from Mee after the shooting.

The State charged Tolbert, then 16 years old, as an adult,[1] with one count of first degree murder under accomplice liability and one count of unlawful possession of a firearm in the second degree. On the order for omnibus hearing, the box stating "Defendant needs a competency examination" is checked. The trial court discussed this with Tolbert's counsel at the omnibus hearing. Counsel stated that he did not know why the box was checked. Tolbert entered into a plea agreement for one count of murder in the second degree in exchange for testifying against others involved in the crime. Tolbert pleaded guilty to the

[1] See RCW 13.04.030(1)(e)(v)(A).

amended information on January 29, 2009. Paragraph 11 of his plea agreement read,

> On May 10, 2008 in Pierce Co. Washington Michael Mee came to my cousin's house and asked for a gun. I went and got a 30-30 rifle from the garage. Michael Mee took the gun and went to the residence where Tracy Steele was at. I was in a car following another car Michael Mee was riding in. I watched Michael Mee fire two shots at the house. Tracy Steele was hit by the bullets and died. Jesus Cota Ancheta was driving the car Michael Mee fired the shots from. I knew Michael Mee was going to use the gun to shoot someone.

During the plea hearing on January 28, 2009, the trial court conducted a colloquy with Tolbert. Among other things, the court described the consequences of pleading guilty. Tolbert told the trial court that he had reviewed the statement on plea of guilty and the plea agreement with his attorney and that he understood the consequences listed in it, including his waiver of his rights to jury trial and to testify in his own defense. The trial court informed him of the maximum sentence possible for conviction of second degree murder. Tolbert acknowledged the terms of his plea agreement. The trial court specifically questioned Tolbert about paragraph 11 of his plea statement, and Tolbert confirmed the accuracy of his statement about the events constituting the crime. Tolbert agreed that the trial court had no reason to hesitate to accept his plea.

On March 18, 2009, Tolbert, acting pro se, filed a declaration stating, "I've been trying to get ahold of my lawyer to tell him I want to withdraw my plea bargain but he don't return or answer my calls." He wrote that his lawyer had misled him about the number of years he would be sentenced, that his lawyer

forced him to take the deal by not communicating with him, and that he was coerced into making statements on July 1, 2008. He also requested a new attorney in a declaration filed on October 7, 2009, saying that his attorney had failed to schedule him an incompetency hearing. The trial court did not act on these declarations.

At sentencing on March 12, 2010, the State reduced its sentencing recommendation from 220 months of incarceration to 150 months because Tolbert fulfilled his plea agreement by testifying in the other trials. Tolbert's mother testified to some of the difficulties Tolbert experienced, including attention deficit hyperactivity disorder and posttraumatic stress disorder. The trial court recognized that Tolbert's "credible and forthright" testimony helped the State convict Mee. The trial court imposed a 150-month sentence. Tolbert did not ask to withdraw his plea during the hearing.

Tolbert filed a notice of appeal on November 10, 2014. On November 12, Tolbert filed a motion to extend time to file notice of appeal. On February 23, 2015, Division Two of this court granted the motion because "the Plea Agreement and Statement on Plea of Guilty did not waive all of Tolbert's appeal rights and because the trial court did not advise him of any remaining appeal rights during the sentencing hearing."

Analysis

Tolbert asks this court to allow him to withdraw his guilty plea. We review a trial court's denial of a motion to withdraw a guilty plea for abuse of discretion.[2]

CrR 4.2(f) requires that a court "allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." A manifest injustice occurs when a defendant's plea was involuntary.[3] "It is reversible error for a trial court to accept a guilty plea without an affirmative showing in the record that the plea was made intelligently and voluntarily."[4]

Tolbert argues that his guilty plea is invalid because it was not voluntary, knowing, or intelligent. Primarily, Tolbert claims that his plea was not knowing. Due process requires that the defendant pleading guilty understand the elements of the crime charged and how those elements relate to the facts alleged.[5] To meet the minimum requirements for constitutional due process, a "'defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime.'"[6]

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[2] State v. Williams, 117 Wn. App. 390, 398, 71 P.3d 686 (2003).

[3] State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183, aff'd, 130 Wn.2d 464, 925 P.2d 183 (1996).

[4] State v. King, 130 Wn.2d 517, 530, 925 P.2d 606 (1996).

[5] In re Pers. Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983) (Hews I) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)).

[6] State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (quoting In re Pers. Restraint of Keene, 95 Wn.2d 203, 207, 622 P.2d 360 (1980)).

Tolbert contends that he did not understand the nature of the charge against him because the statement of defendant on plea of guilty did not explain the legal meaning of accomplice, nor did it state that Tolbert knew at the time he got the gun that Mee would use it to kill Steele. He argues that his statement does not make clear what he heard Mee say, whom he got the gun for, or when he first learned that Mee planned to use the gun to shoot someone. He argues that because the timing of this knowledge matters to his accomplice liability,[7] failure to communicate this to him constituted error. Tolbert also argues that the circumstances of his age and background should weigh against the validity of the plea.

To establish accomplice liability, the State had to prove that Tolbert aided or agreed to aid a person in planning or committing a crime with knowledge that it would promote or facilitate the commission of the crime.[8] The State had to prove Tolbert's knowledge of the specific crime charged rather than knowledge of a different crime or generalized knowledge of criminal activity.[9]

Here, the trial court confirmed at Tolbert's plea hearing that he understood his "role in this was providing the rifle that became the murder weapon." Tolbert

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[7] See Rosemond v. United States, ___ U.S. ___, 134 S. Ct. 1240, 1251, 188 L. Ed. 2d 248 (2014) (A defendant charged with aiding and abetting an armed drug sale who learns of a gun only after he may reasonably walk away does not have the requisite intent to bring about an armed drug sale.).

[8] RCW 9A.08.020(3)(a)(ii) provides, "A person is an accomplice of another person in the commission of a crime if: (a) With knowledge that it will promote or facilitate the commission of the crime, he or she . . . (ii) Aids or agrees to aid such other person in planning or committing it."

[9] State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000).

signed the plea agreement with the State outlining his obligations and the benefits he received because he pleaded guilty. He signed the statement on plea of guilty, which also incorporated a declaration for a determination on probable cause, establishing the factual basis for his plea. That document showed that Tolbert had received a copy of the amended information reflecting the reduction in charges. The amended information included the prosecutor's statement, "The defendant is an accomplice to the murder. The defendant provided the firearm used to kill the victim (Tracy Steele) with knowledge that the firearm would be used in a drive-by scenario." When the State provides the defendant with an information notifying him of the nature of the crime, this creates a presumption that the defendant entered into the plea knowingly.[10] And Tolbert's attorney stated at the hearing that he had reviewed the plea agreement and the statement on plea of guilty with Tolbert. The record shows that Tolbert was aware of the charges against him, how his actions related to those charges, and the benefits he gained by taking the plea agreement. We conclude Tolbert knowingly pleaded guilty.

Tolbert also argues that "youth and lack of education make it even more likely that he did not understand the legal requirements as they related to the facts." He faults the trial court for not engaging in a more specific colloquy with him to ensure his understanding of the rights he relinquished by pleading guilty.

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[10] In re Pers. Restraint of Hews, 108 Wn.2d 579, 595-96, 741 P.2d 983 (1987) (Hews II).

But he cites no authority requiring this court to give weight to these factors in this context without demonstrating some further incompetency. We thus decline to do so.

We also conclude that Tolbert voluntarily and intelligently entered into his guilty plea. A plea is voluntary when a defendant understands the "nature and extent of the constitutional protections waived by pleading guilty."[11] A strong presumption exists that a plea is voluntary when a defendant reads, understands, and signs a plea statement.[12] And where a trial court inquires about a specific matter of the plea statement, the presumption that the plea is voluntary is "well nigh irrefutable."[13] Here, the trial court engaged in a colloquy with Tolbert at his plea hearing and confirmed that he was aware that by pleading guilty he would give up his right to trial, to question witnesses, to a presumption of innocence, and to appeal a resulting conviction. The record supports that Tolbert was aware of the rights he relinquished and that the guilty plea was voluntary.

And a guilty plea is intelligent where the defendant is informed of all of the direct consequences of pleading guilty.[14] The plea agreement and statement on plea of guilty both outlined the sentencing consequences of Tolbert's plea and stated that his sentencing range would be from 123 to 220 months.[15] Tolbert's attorney stated at the hearing that Tolbert "understands the State is going to, in

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[11] Hews I, 99 Wn.2d at 87.
[12] State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998).
[13] State v. Perez, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).
[14] In re Pers. Restraint of Isadore, 151 Wn.2d 294, 300, 88 P.3d 390 (2004).
[15] See Isadore, 151 Wn.2d at 297-98.

exchange for a reduction to Murder 2, recommend 220 months," that he is pleading to a strike offense, and that if Tolbert breaks the agreement then he will be charged with first degree murder. The trial court confirmed that Tolbert understood the maximum penalty for the crime, the standard sentencing range, community custody consequences, and that a strike offense means that if he were convicted of three of these kinds of offenses he would be subject to life in prison without parole. The record supports that Tolbert's guilty plea was intelligent.

Because the record affirmatively shows that Tolbert made a voluntary, knowing, and intelligent plea, the trial court did not err in concluding the same and accepting his guilty plea.

Tolbert next argues that his plea is invalid because the trial court accepted it before resolving the issue of his competency. He argues the order on omnibus hearing, with a box checked that the "[d]efendant needs a competency hearing," required the court to inquire into his competency, and it erred when it failed to do so at his plea hearing. He also claims that the trial court should have considered Tolbert's competency after he entered into a guilty plea when his mother told the court about Tolbert's struggles with mental health issues. He also claims that his two pro se declarations called his competency into question.

A defendant must be competent in order to enter into a valid guilty plea.[16] In reviewing Tolbert's competency hearing challenge, we look to see if "'the plea

[16] RCW 10.77.050.

represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'"[17] A trial court has broad discretion to judge the mental competency of a defendant to plead guilty.[18] A trial court may consider several factors to determine if it needs to inquire formally into a defendant's competency, including the "'defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.'"[19]

A defendant must present substantial evidence to raise adequately a legitimate question of competency, requiring the court to order a competency hearing.[20] When a defendant fails to do this, a trial court need not hold a competency hearing.[21] The State argues that Tolbert never raised a legitimate question of his competence because he did not produce substantial evidence to raise a legitimate question of incompetency. We agree.

First, during the omnibus hearing, the trial court addressed the checked box on the omnibus hearing form and determined that no request had been made.

> [DEFENSE COUNSEL]: Your honor, in the Omnibus Order that's been prepared by [another defense counsel], it indicates that

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[17] Osborne, 102 Wn.2d at 98 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)).

[18] Osborne, 102 Wn.2d at 98 (quoting State v. Loux, 24 Wn. App. 545, 548, 604 P.2d 177 (1979)).

[19] In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001) (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)).

[20] State v. DeClue, 157 Wn. App. 787, 792, 239 P.3d 377 (2010).

[21] DeClue, 157 Wn. App. at 793.

> there may be a competency examination, and I don't know what he means by that.
>
> THE COURT: Well, that's kind of an unusual situation to have floating around, I would think. Do you have knowledge about this Mr. [Prosecutor]?
>
> [PROSECUTOR]: No, sir.
>
> THE COURT: Okay. I am going to assume that [another defense attorney] is just covering his bases. At the moment, you have no indication that there's a request for a competency evaluation at this point?
>
> [DEFENSE COUNSEL]: No, I do not.

At the hearing, Tolbert's counsel thus expressly withdrew any request otherwise indicated by the checked box. Tolbert did not raise the issue of competency at any other point before he entered into his plea.

Nor did Tolbert present substantial evidence of his incompetency after he pleaded guilty. Neither his declaration claiming he had been coerced into making the plea nor his request for new counsel stating that he had asked counsel to schedule him a competency hearing requires that the trial court find incompetence when the trial court had also been able to observe his competent testimony elsewhere.

We conclude that the trial court acted well within its discretion to determine that Tolbert was competent to enter into a voluntary, knowing, and intelligent plea.

Finally, Tolbert argues that an insufficient factual basis existed for the trial court to accept his guilty plea because Tolbert pleaded to second degree murder

requiring specific intent when the State charged Mee, the principal actor, with a general intent crime of first degree murder by extreme indifference.

To accept a guilty plea there must be evidence sufficient for a jury to find guilt, but the trial court does not need to conclude beyond a reasonable doubt that the defendant is guilty.[22] Thus, in this case, for the trial court to accept the plea, the record had to demonstrate sufficient evidence to show that a jury could find that Tolbert had knowledge that he was aiding in the commission of the crime for which Mee was charged.[23]

Tolbert argues that a jury could not find him guilty of accomplice liability because that would require it to find that he had knowledge of Mee's crime. Tolbert argues that because the State charged Mee with first degree murder by extreme indifference, a crime that does not require proof of "specific intent to murder Mr. Steele, it is logically impossible for Tolbert to have had the knowledge that producing the gun from the garage would facilitate that murder, as required for accomplice liability."[24] Tolbert cites State v. Dunbar[25] in support of this argument. There, the Washington Supreme Court held that because the crime of attempt requires that a defendant act with the intent to accomplish a specific criminal result, "in order to serve as a basis for the crime of attempt, a crime

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[22] State v. Bao Sheng Zhao, 157 Wn.2d 188, 198, 137 P.3d 835 (2006).

[23] See RCW 9A.08.020(3)(a)(ii); see also Cronin, 142 Wn.2d at 578-79.

[24] RCW 9A.32.030(1)(b) provides, "(1) A person is guilty of murder in the first degree when: . . . (b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person."

[25] 117 Wn.2d 587, 817 P.2d 1360 (1991).

defined by a particular result must include the intent to accomplish that criminal result as an element."[26]

But in State v. Guzman,[27] Division Three of this court distinguished the intent required for attempted murder in Dunbar from that required for accomplice liability. The Guzman court concluded that facts need only show that an accomplice to first degree murder by extreme indifference knew that his actions, along with those of the principal, were extremely dangerous and yet he was indifferent to the consequences.[28] Thus, the State need only prove that Mee "'(1) acted with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person.'"[29]

Tolbert attempts to distinguish Guzman, arguing that here Tolbert pleaded guilty to the different, specific intent crime of second degree murder rather than to first degree murder by extreme indifference. But his argument asks this court to overlook that the State originally charged Tolbert with accomplice liability to Mee's crime of first degree murder by extreme indifference. Because the factual basis requirement is intended to ensure voluntariness, where a factual basis exists for an original charge, "a defendant can plead guilty to amended charges for which there is no factual basis, but only if the record establishes that the

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[26] Dunbar, 117 Wn.2d at 589-90.

[27] 98 Wn. App. 638, 645-46, 990 P.2d 464 (1999).

[28] Guzman, 98 Wn. App. at 646.

[29] State v. Henderson, 180 Wn. App. 138, 145, 321 P.3d 298 (2014) (quoting State v. Yarbrough, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009)), aff'd, 182 Wn.2d 734, 344 P.3d 1207 (2015).

defendant did so knowingly and voluntarily."[30] Thus, under Guzman, acceptance of Tolbert's guilty plea required the trial court to conclude by sufficient evidence that a jury could find that Tolbert knew that his actions and those of Mee were extremely dangerous but that Tolbert was indifferent to the consequences.

Here, Tolbert admitted that he handed Mee the rifle, knowing Mee would use it to shoot someone. He accompanied Mee to the barbeque where he witnessed Mee shoot into a crowd and hit Steele with a bullet. Tolbert then left with Mee and accepted the gun back after the event. Because a jury could rely on this evidence to find that Tolbert had knowledge that when he provided Mee the gun that Mee would use it to shoot another person, the trial court did not err when it entered judgment and sentence on Tolbert's guilty plea.

Conclusion

The record establishes that Tolbert entered into his guilty plea voluntarily, knowingly, and intelligently. The trial court did not abuse its discretion when it found that Tolbert was competent to plead guilty. Finally, the record includes sufficient facts to show that a jury could have convicted Tolbert of accomplice

[30] Bao Sheng Zhao, 157 Wn.2d at 200.

liability for murder. Thus, the trial court did not err when it accepted Tolbert's guilty plea, and no manifest injustice warrants its withdrawal. We affirm.

Leach, J.

WE CONCUR:

Tiddy, ACJ

Cox, J.

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