

62419-9

62419-9

NO. 62419-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KERO GIIR,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
3

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE NICOLE MACINNES
THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. There is a presumption that counsel is effective. Giir claims the attorney who handled his motion to withdraw his guilty plea failed to investigate the possibility that he was incompetent when he entered that plea. The record does not reveal the nature of the investigation conducted. There is no evidence to support a claim that Giir was incompetent to enter the plea and Giir does not assert that he was incompetent. Has Giir failed to overcome the presumption of effective assistance of counsel?

2. No appeal was taken from the judgment and sentence in this case. Is a challenge to a condition of that sentence beyond the scope of this appeal from the denial of a motion to withdraw his guilty pleas?

3. Under RCW 9.94A.505(9), mental health treatment may be ordered as a condition of sentence if the court finds that reasonable grounds exist to believe that the defendant is a mentally ill person under RCW 71.24.025 and that is likely to have influenced the offense. Giir claimed that mental illness was a significant factor affecting his mental state at the time of these crimes. The sentencing judge ordered mental health treatment as a condition of sentence. There was no objection to the treatment

condition at the time of sentencing. Any error in failing to articulate the finding was invited and cannot now be challenged.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On June 2, 2005, Kero Giir was charged with one count of murder in the first degree—domestic violence, with a deadly weapon enhancement, for the killing of R.B. on May 28, 2005.

CP 1. On September 7, 2005, the State, by amended information, added a second count, assault in the second degree with a deadly weapon enhancement, for Giir's assault on Veronica Abbas during the same incident. CP 8-9.

After extensive investigation of the case and plea negotiations, on August 15, 2007, Giir was charged by second amended information with one count of murder in the first degree and one count of assault in the third degree, with no weapon enhancements. CP 13-14. On that same day, Giir pled guilty to murder in the first degree and assault in the third degree, before the Honorable Nicole MacInnes. CP 105-17; 1RP 1, 12, 17.¹

¹ The verbatim report of proceedings is referenced as follows: 1RP – 8/15/07; 2RP – 11/9/07; 3RP – 6/26/08; 4RP – 9/5/08.

On November 9, 2007, Giir was sentenced to standard range sentences of 300 months for murder in the first degree and 8 months for assault in the third degree, to run concurrently. CP 19-26. The judge also imposed 24 to 48 months of community custody and, as a condition of community custody, Giir was ordered to obtain a mental health evaluation and follow treatment recommendations. CP 22, 26. The Judgment and Sentence was filed on November 15, 2007. CP 19.

On March 10, 2008, Giir moved to withdraw his guilty pleas, alleging that the plea colloquy was inadequate and the pleas were coerced. CP 29. A new attorney represented Giir for purposes of that motion. CP 33. An evidentiary hearing on the motion was held before the Honorable Nicole MacInnes on June 26, 2008, and Giir and one of his trial attorneys testified. 3RP 3-182. Argument was completed on September 5, 2008, and the motion was denied by written order on September 19, 2008. CP 86-90; 4RP 3-34.

On September 30, 2008, Giir filed a notice of appeal, seeking review of both the Judgment and Sentence entered on November 9, 2007, and the Order Denying Motion to Withdraw Guilty Plea entered on September 19, 2008. CP 91.

The State has filed a motion to strike as untimely the notice of appeal as to the Judgment and Sentence.

2. SUBSTANTIVE FACTS

a. The Crimes

Defendant, Kero Giir, and the woman he killed, Roda Bec, both fled Sudan as children, spent several years as refugees in Kenya, and eventually came to the United States in 2001. CP 2, 48; 2RP 8, 19-21. They dated for several years after they arrived in the United States. CP 2. Their relationship deteriorated after Bec began to attend Western Washington University in the fall of 2004, and Bec told Giir that she wanted to break up with him. CP 2, 4, 45.

On February 20, 2005, Giir went to Bec's dormitory in Bellingham uninvited, they argued, and he threatened to kill her. CP 45. Bec's roommate reported the incident to police, but Bec told them that Giir had apologized and she did not wish to pursue a complaint. Id.

On Friday, May 27, 2005, Bec came back from Bellingham to visit her friend Veronica Abbas, who lived in Burien, Washington. CP 2. Bec intended to stay with Abbas for the weekend. Id.

That Friday night, Giir called and asked Bec to meet with him to discuss their relationship. Id. When Bec refused, he threatened to kill her and one of her brothers if she did not meet with him. Id. Abbas then spoke to Giir and told him that he could come to her apartment to talk to Bec the next morning if he did not come alone. Id.

The next morning, May 28, 2005, Giir went to a hardware store and bought two steak knives, the larger with a five-inch blade. CP 2. Giir then returned to his apartment and wrote a letter explaining that he intended to kill Bec because she had mistreated him. CP 2, 4-5. Giir later told police that he wrote the letter and left it for someone to find because he intended to commit suicide after he killed Bec. CP 4-5.

Giir went to Abbas' apartment at about 10:30 that morning and immediately confronted Bec. CP 2. They argued and then Giir pulled out a knife and stabbed Bec in the back as she sat on the couch. CP 2-3. Bec fell to the floor and Giir continued to stab her, stabbing her repeatedly as she crawled toward the back patio to get away from him. CP 3.

Abbas was at the door when Giir arrived at her apartment that morning. CP 2. Her 18-month-old child also was there.

Id.; 2RP 8, 11. Abbas saw the attack and tried to stop Giir by grabbing the hand that held the knife, but Abbas was severely cut herself, and could not stop him. CP 3; 2RP 8-9. She took her child, fled the apartment, and went to a neighbor's apartment for help. CP 3. That neighbor looked outside and saw Giir fleeing. Id.

By the time police and medics arrived, Bec was dead. CP 3. She had sustained about 20 stab wounds, including 4 fatal wounds to her chest and back, which penetrated her heart and both lungs; there were many defensive wounds on her hands and wrists. Id.; CP 45.

Eight minutes after the original 911 call, police received a report that a man had jumped onto Highway 509 from an overpass in an apparent suicide attempt. CP 3. That man eventually was identified as Giir. Id. After waiving his constitutional rights, Giir wrote a note to a detective that afternoon, stating that he had stabbed and killed his girlfriend. Id.

On May 29, 2007, two other detectives interviewed Giir. CP 4. Giir again was advised of his constitutional rights and waived them, then gave an audio-taped statement. Id. Giir described his relationship with Bec, her wish to break off the relationship, and his plan to kill her. Id. He described repeatedly stabbing Bec as she

tried to crawl away from him. Id. Giir said that he knew that he had killed Bec and had jumped off the overpass to try to kill himself. Id.

Giir admitted that Abbas was in the apartment during his attack on Bec, and that Abbas tried to intervene. CP 47. He said that he pushed Abbas away because his problem was not with her, but with Bec. CP 47, 62.

b. The Psychologists' Evaluations

Defense expert Julie Kriegler wrote a two-page summary of her findings relating to Kero Giir, dated February 13, 2006.

CP 41-42. That letter indicated that Kriegler had interviewed Giir and others, reviewed Giir's writings, and was familiar with his assessment and treatment by King County Jail personnel. Id.

Kriegler's interviews with Giir began in September of 2005.

3RP 115. Kriegler noted the extensive trauma in Giir's life history.

CP 41.²

Kriegler opined that Giir "suffers from extensive dissociative phenomena" and "indicators of mood disorder with psychotic features." CP 42. Kriegler said that Giir suffers from paranoia and

² Although there is no dispute that Giir suffered serious trauma in Sudan and as a refugee, Bec's family has repeatedly contested Giir's claim that he was conscripted into the SPLA. CP 129 n.1, 139; 2RP 23.

hallucinations. Id. Kriegler said, "He also experiences cognitive dysfunction in the form of a lost ability to think, reason, concentrate, or remember." Id. Kriegler concluded that, "Based on these chronic neuropsychiatric disturbances" and Giir's state of mind at the time of the homicide, she did not believe that Giir was capable of forming the mental state of premeditation due to diminished capacity. CP 42.

State expert Robert Wheeler wrote a 21-page psychological evaluation of Giir. Wheeler interviewed Giir for almost 10 hours, over two interviews that were videotaped. CP 44, 47, 54. Wheeler personally interviewed Giir's two roommates and Veronica Abbas. CP 55-59. Wheeler reviewed over 1200 pages of documents, including police reports, extensive writings of Giir (autobiographical and describing the murder), treatment records for Giir, Kriegler's notes from her interview with Giir, and Kriegler's report. CP 44.

Wheeler reviewed medical records from Harborview Hospital, where Giir was treated after the murder and his suicide attempt. CP 54. The records included a psychiatric consultation and mental status examination on May 31, 2005. Id. "There was no indication of the presence of any psychotic or dissociative symptoms." Id.

Wheeler reviewed jail medical records, which indicated that Giir was treated for a rash, wrist pain, depression, and post-traumatic stress disorder (PTSD). CP 54. An antidepressant medication was prescribed, but by March of 2006, Giir declined to take that medication, saying he no longer needed it and was at peace with himself; a June 2006 note indicated that Giir's depression had resolved. Id. Sometimes Giir reported dreams and flashbacks and sometimes he denied them, but the notes "consistently indicate that there were no psychotic symptoms." Id.

Giir's roommates (one was Giir's stepbrother) described him to Wheeler as a responsible person who "never seemed irrational, crazy or violent" and displayed no unusual behavior before the killing. CP 56-57.

Although Giir had described the events leading up to the murder and the killing itself in great detail to detectives two days after the crime, and had described the killing to defense expert Kriegler, he told Wheeler that he had no memory at all of that morning. CP 51-52, 55. Wheeler noted that "similar alleged amnesia is quite common among homicide defendants." CP 55.

Wheeler concluded that there was no indication that Giir was suffering from a mental disorder that would constitute insanity.³ He concluded that the purchase of the knives and the letter Giir wrote just before the murder provided no evidence to suggest that Giir was psychotic⁴ or in a dissociative state at the time. CP 61. He opined that at the time of the crime, Giir was not experiencing any mental disorder or defect that impaired his capacity to intend or plan his actions, or his capacity to reason with regard to his actions. CP 64.

Wheeler noted that after the murder, Giir exhibited symptoms of a depressive disorder and post-traumatic stress disorder (PTSD). CP 63-64. There was evidence that Giir's depressive symptoms (sadness, suicidal ideation, reduced energy, disturbed sleep, feelings of hopelessness) may have improved over the course of the last 18 months. CP 63. The PTSD symptoms (distressing memories and dreams, attempts to avoid thinking about the trauma, distress in response to cues symbolizing the

³ The definition of insanity requires that at the time of the offense, as a result of mental disease or defect, the actor was unable to perceive the nature and quality of the act charged or was unable to tell right from wrong with reference to that act. RCW 9A.12.010.

⁴ That is, he was not suffering from delusions, hallucinations, or grossly disorganized thought or behavior. CP 61.

events, some hyper vigilance, possible sleep disturbance, and feelings of detachment from others) are related to Giir's traumatic experiences in Sudan. Id.

Wheeler evaluated Giir's current mental status. CP 54. Wheeler reported that although Giir was somewhat guarded, he "appeared oriented and understood the charges against him." Id. Apart from pauses during discussion of Giir's experiences in Sudan,⁵ Giir's attention and concentration across two interviews of several hours each was good. Id. Giir's "thought processes were organized, linear, and relevant" and Giir denied having auditory or visual hallucinations. Id. There were no signs of hallucinations or delusions. Id. Wheeler noted, "There was no evidence from the content of his speech during this interview that Mr. Giir was experiencing any mental disorder that affected his capacity to describe and discuss his thinking and behavior rationally and coherently." CP 62.

⁵ Wheeler observed some long delays before Giir's responses when Giir discussed his experiences in Sudan; Giir appeared to be attending to internal stimuli or memories at those times but Giir would not report the content of his thoughts. CP 54.

C. ARGUMENT

1. THE DEFENSE ATTORNEY HANDLING THE MOTION TO WITHDRAW DID NOT PROVIDE INEFFECTIVE ASSISTANCE.

Giir argues that his counsel for the post-sentencing motion to withdraw his guilty plea was ineffective for failing to investigate the possibility that he was incompetent when he entered that plea. That argument should be rejected. There is no record to support the claim that trial counsel did not investigate the possibility that Giir was incompetent at the time of his plea. Moreover, there is no evidence that Giir was incompetent, so Giir cannot show that the failure to investigate a nonexistent defense was deficient representation or that he was actually prejudiced by that failure.

a. The Record Does Not Support The Claim That Trial Counsel Did Not Investigate Giir's Competency.

The record does not support Giir's claim that the attorney who handled his post-sentencing motion, Nancy Mattson, did not investigate his competency. The claim of deficient investigation must be rejected because the nature of the investigation has not been established. In re Gentry, 137 Wn.2d 378, 403-04, 972 P.2d 1250 (1999). Without evidence that there was no evaluation of a

defendant's mental state or evidence as to why expert testimony was not presented, the record does not support a claim that counsel neglected that issue. Id. at 404. With respect to deficient performance of counsel, the court must begin with "a strong presumption counsel's representation was effective," and must base its determination on the record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Giir's first attorney, Richard Warner, immediately brought on a social worker when he was assigned the case in June 2005. 3RP 114. He quickly retained psychologist Julie Kriegler, who had expertise in post-traumatic stress, and Kriegler interviewed Giir beginning in September 2005. 3RP 114-15. Kriegler wrote a summary report in February 2006 that supported her conclusion that Giir lacked capacity to premeditate this murder. CP 41-42. Warner must have discussed Giir's mental condition with Kriegler but the record does not reveal the nature and content of any of their discussions.

Psychologist Wheeler's report provides an evaluation of Giir's mental status at the time of Wheeler's two interviews, between May and October of 2006. CP 10-12, 54, 62. Warner interviewed Wheeler after Warner received that report. 3RP 117.

Warner met with people who were familiar with the local Sudanese community and investigated Giir's background and culture. 3RP 115-16.

Warner met with Giir many times in the jail. 3RP 113, 118-33. They discussed the crimes and Giir's family and cultural history. 3RP 118-19. Warner explained the different mental states that relate to the different crimes of homicide in Washington. 3RP 119-20. They discussed how Giir's traumatic history might support a diminished capacity defense. 3RP 120-22.

Warner did not have difficulty communicating with Giir. 3RP 123. Because Giir sometimes spoke softly, almost all of their contacts in the jail were face to face. Id.

In March and April of 2007, Warner had extensive discussions with Giir about the possibility of pleading guilty and the various permutations of crimes and weapon enhancements that might be part of a negotiated plea agreement. 3RP 127-29. Warner met with Giir for another 2.5 hour interview on August 7, 2007, discussing the case and possible resolutions. 3RP 130-32. On August 14, 2007, the day before the guilty plea was entered,

Warner and Gus Lindsey⁶ met with Giir for 1.4 hours and reviewed the guilty plea form with him in detail. 3RP 131-41. There was active discussion with Giir during this meeting. 3RP 137. In total, Warner met with Giir more than 10 times to discuss a possible plea. CP 206.

Warner testified to the interaction he had with Giir during the plea hearing. 3RP 141-47. He also described a 2.2 hour meeting with Giir face to face in the jail on August 30, about two weeks after the plea, to discuss the upcoming sentencing. 3RP 147.

Post-sentencing counsel had at least two psychological evaluations upon which to make the decision whether to pursue a claim that the defendant was incompetent at the time of the guilty pleas. She had transcripts of the plea hearing and the sentencing hearing. She had access to over 100 pages of autobiographical writings by Giir. CP 206. She had medical records from Harborview Hospital and the jail regarding Giir's mental condition. She had the opportunity to consult with Giir's former attorney as to his opinion of Giir's mental state.

⁶ Gus Lindsey was an attorney who assisted Warner with this case. CP 205; 3RP 125.

The record does not establish the nature of the conversations or interviews that trial counsel had with the experts who evaluated Giir before the trial in this case, the contents of the autobiographical writings by Giir, the contents of the medical records, or Warner's opinions that were conveyed to post-sentencing counsel. The record does not establish whether additional investigation was performed. Perhaps most critically, the record does not reflect the nature of post-sentencing counsel's own interactions with Giir.

Because Giir has not established the facts upon which this claim is premised, the claim of inadequate investigation must be rejected.

b. The Record Reflects No Doubt As To Giir's Competency.

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(14); *see also* State

v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).

RCW 10.77.060 provides that if a court finds there is a reason to doubt a defendant's competency, the court shall have the defendant evaluated by professionals who will report on the defendant's mental condition. RCW 10.77.060(1)(a).⁷

Giir's mental state at the time of the murder was evaluated both by psychologist Robert Wheeler and by defense psychologist Julie Kriegler. CP 41-64. Neither they nor the attorney who represented Giir raised any question about Giir's competency.

Kriegler's report does include an opinion that Giir "experiences cognitive dysfunction in the form of a lost ability to think, reason, concentrate, or remember." CP 42. On its face, this suggests an extreme disability that is not reflected anywhere in the record. In context, this statement appears to indicate only that these abilities are diminished to the extent that Giir was unable to premeditate the murder. CP 42.

⁷ In pertinent part, RCW 10.77.060(1)(a) provides:

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.

Giir was employed at Providence Hospital until the murder. 2RP 26. He attended school, including community college. CP 56, 87, 160. Giir lived with two roommates who did not believe that his behavior before the murder was in any way unusual. CP 56-57.

The transcript of the plea hearing does not offer any evidence that Giir was incompetent. His answers to questions were responsive to the questions asked. 1RP 3-17. When Giir was asked if he had had adequate time to speak to his attorney, Giir hesitated, then said, "I think I should talk to my attorney." 1RP 10. Asked if he needed more time with Warner, Giir said, "Not more time maybe," then agreed that "I have a question for him." 1RP 11.

After a break for that consultation, Giir was asked if he had time to talk it over with his attorney and responded, "Yes. He was able to answer my questions." Id. Warner told the court that Giir's reluctance earlier was "basically just a reluctance about the huge amount of time that he is facing, but not his acceptance of what he had done." 1RP 14-15.

After a long explanation by the judge about the finality of a guilty plea, the judge asked if Giir was sure that was how he wanted to proceed and Giir said, "Yeah, I am sure." 1RP 15. Giir said that the question he discussed with his attorney was "just small

question, not big one." Id. Asked whether he had plenty of time before the plea to talk to his attorneys, Giir again reassured the court, "Yeah. We did have time." 1RP 15-16.

At the conclusion of the plea hearing, Giir was asked how the guilty plea form was reviewed with him—whether he read it. 1RP 17. Giir said, "We read it together. The three of us." Id. Warner concurred: "We had a face-to-face yesterday afternoon, and spent about an hour and a quarter going through it line by line." Id.

Giir prepared a written statement to be read at his sentencing. 2RP 29. In that statement, Giir stated that he was "culturally and psychologically abused" and apologized for taking Bec's life, then related a proverb from his culture that ended with the king acting with "benevolence" and sparing a creature that harmed his wife. 2RP 29-31. This was a fairly sophisticated plea for mercy.

Giir later filed a personal declaration about his decision to plead guilty and the events before and during the plea. CP 34-39. He also testified about that process at the hearing on the motion to withdraw the pleas. 3RP 5-109. Giir has cited nothing in these detailed descriptions of the plea process, or in the plea colloquy

itself, as an indication that there was reason to believe that he was not competent to enter a guilty plea.

Warner testified at length about his many meetings with Giir and discussions about Giir's personal history, the crimes, the charges, possible defenses, and possible resolutions of the case. 3RP 118-33. Warner did not have trouble communicating with Giir and believed that Giir understood these discussions. 3RP 123, 132-41.

c. Giir Has Not Shown Deficient Performance Of Counsel Or Actual Prejudice.

To establish ineffective assistance of counsel, Giir must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced Giir. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

This general standard also applies to claims of ineffective assistance related to the entry of pleas, and in that context, the

showing of prejudice required is that absent the deficiency, the guilty plea would not have been entered. Hill v. Lockhart, 474 U.S. 52, 57-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The United States Supreme Court, in adopting that standard in the context of challenges to pleas, recognized that the requirement that the defendant show prejudice serves the fundamental interest in the finality of guilty pleas. Id. at 58.

The reviewing court must begin with a strong presumption that the representation of counsel was effective. Hutchinson, 147 Wn.2d at 206. "[T]his presumption will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). Giir has not shown that his attorney's performance was deficient.

When the allegation of ineffectiveness relates to failure to investigate, "a particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel's judgments." In re Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). The attorney's actions or inaction is evaluated based on "what was known and reasonable at the time the attorney made his choices." Id. at 253.

In Elmore, supra, the Washington Supreme Court rejected a claim that a capital defendant's attorneys were ineffective for failure to investigate his "mental deficiencies," including competence, before Elmore entered a guilty plea. Id. at 252-54. In that case, Elmore was not evaluated by any mental health expert before the plea was entered, although counsel was aware that he had suffered head injuries, had been exposed to neurotoxins, and had suffered abuse at the hands of his father. Id. at 245-46, 253. First, the court noted that it was not a case where counsel did not perform any investigation. Id. at 253. The court also found it significant that there was no indication that Elmore was incompetent (or suffered from diminished capacity to form the intent to commit the crime). Id.

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 Wash.2d 1017 (1995). There must be a link to capacity, a showing that the disorder interfered with the ability to voluntarily plead guilty. Id.

There is nothing to suggest that because of a mental disease or defect Giir might be unable to understand the nature of the proceedings or unable to assist his attorney. Nor does

Kriegler's conclusion that Giir's capacity to premeditate a murder was compromised by that mental illness suggest incompetency.

In re Pers. Restraint of Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001), on which Giir relies, found counsel deficient for failing to investigate and raise a competency issue, but in that case the defense attorney had two reports from experts before the plea was entered, one concluding that Fleming was incompetent to proceed and the other concluding that he was marginally competent. Id. at 858. Fleming's attorneys never informed the trial court of these opinions and never raised the issue of competency. Id. at 860.

In this case, two experts had evaluated Giir's mental state before he pled guilty. Giir had repeated conversations with two trial attorneys over the period of more than two years that his case was pending. There was no indication that he was incompetent. In fact, Wheeler addressed Giir's mental state at the time of his evaluation, noting that Giir understood the charges against him and was able to communicate rationally. CP 54, 62. Even if neither trial counsel nor post-sentencing counsel specifically consulted with a mental health expert about Giir's competency, that was not deficient investigation under these circumstances.

This argument on appeal was generated by the comment by the trial judge, that Mattson's argument in support of withdrawal of the plea was really that Giir was not competent to plead guilty. 4RP 29. While defense counsel agreed with that characterization of her argument, the argument that Mattson actually had presented was that cultural factors and Giir's PTSD made him more susceptible to coercion. However, that argument was not the core of Giir's claim for relief. His claims were that he was told that he must plead guilty, that he was misled by his attorney as to how long his sentence would be, that he did not know the State's recommendation until the plea hearing itself, and that he was told that the judge would punish him if the plea was not entered the day of the hearing. CP 37-38; 3RP 48-49, 53-68. These are not events that are subject to cultural interpretation; they are not implicit coercion.

The advice Giir claimed that he received would be inaccurate and coercive for any defendant. The trial court found Warner's testimony that he did not make these statements more credible than Giir's claims that he did. CP 87-89. The court noted that the claim of coercion was not raised until after sentencing, when Giir received a sentence higher than the defense recommendation. CP 90. Special sensitivity to persuasion or unusual readiness to follow advice of

counsel does not establish legal incompetency, which exists only if, because of mental disease or defect, the defendant cannot understand the nature of the proceedings or assist his or her attorney in the defense. RCW 10.77.010(14).

Further, Giir cannot establish the prejudice prong of his ineffective assistance claim. Even if counsel's performance was deficient, there must be a showing that but for counsel's errors, the result of the proceeding would have been different. State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006). In Fleming, supra, the court found that the prejudice requirement was satisfied in that case, where if the trial court had known of the evaluation opining that Fleming was incompetent, there was a reasonable probability that the court would not have accepted Fleming's guilty plea. Fleming, 142 Wn.2d at 866.

Giir makes no argument that if his competency had been investigated he would have been found incompetent to plead guilty and allowed to withdraw those pleas. That claim cannot be made, because there is no evidence that Giir was not competent. Speculation that a different result might have occurred is not sufficient. Id. at 99-102. The defendant must "*affirmatively prove prejudice*" to establish ineffective assistance of counsel. Id. at 102

(emphasis in original). Without that showing of prejudice, Giir's ineffectiveness claim must be rejected.

Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990), upon which Giir relies for the proposition that investigation is required if counsel has notice of mental problems, is inapposite. In that case counsel had notice that Bouchillon had a history of mental problems and had been previously institutionalized, but had no expert evaluate Bouchillon for competency or a potential mental defense. Id. at 506-97. Moreover, prejudice was established in that case because Bouchillon had subsequently been found to have been incompetent at the time that he pled guilty.

Giir asserts that Harris By and Through Ramseyer v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994), holds that if a defendant has a history of mental instability, counsel's inadequate investigation of the defendant's competency requires reversal. App. Brief at 18. Harris was a capital case, in which the defense attorney spent 14 hours interviewing witnesses, hired no mental expert to evaluate Harris, hired no investigator, and spent less than five hours talking to the defendant outside court. Id. at 1255-61. Counsel possessed but did not provide letters from Harris to evaluators at Western State Hospital, although the letters included delusional and bizarre

statements made by Harris. Id. at 1260. The court's finding of prejudice indicated that "the entire course of defense" would likely have been different, referring to presentation of possible mental defenses, advice by counsel that Harris make a statement prior to trial, advice that Harris testify, and the certainty that evidence of his mental problems would have been presented as mitigation evidence at the death penalty phase of trial. Id. at 1260.

The investigation of mental problems that did not occur in Harris did occur in the case at bar. At least one defense mental expert was hired and evaluated Giir. A psychologist hired by the State also evaluated possible mental defenses as well as Giir's mental state at the time of the evaluation. With no evidence that Giir was incompetent, there has been no showing of any probability that the only outcome at issue here, the denial of Giir's motion to withdraw his guilty pleas, would have changed if more investigation had been undertaken.

Even if the court concludes that counsel was ineffective for failure to investigate a post-sentencing claim that Giir was not competent at the time of the plea, the remedy would be to remand for a determination of competency at the time of the plea. If Giir was competent, the denial of the motion to withdraw the guilty pleas

should be affirmed. See United States v. Renfroe, 825 F.2d 763, 767 (3rd Cir. 1987). “Such a determination may be conducted if a meaningful hearing on the issue of the competency of the defendant at the prior proceedings is still possible.” Id.; see also United States v. Johns, 728 F.2d 953, 957-58 (7th Cir. 1984) (listing cases).

2. THE CONDITIONS OF SENTENCE ARE NOT WITHIN THE SCOPE OF THIS APPEAL.

The State has filed a separate Motion to Dismiss Notice of Appeal As To Judgment and Sentence As Untimely. If that motion is granted, the challenge to a condition of sentence is beyond the scope of this appeal. If Giir's argument is not stricken as requested in the same motion, the claim should be rejected for that reason.

The scope of appeal from a hearing under CrR 7.8 is limited to the issues raised in that hearing. State v. Gaut, 111 Wn. App. 875, 880-81, 46 P.3d 832 (2002). Although counsel below and on appeal refer to the motion to withdraw the plea under CrR 4.2(f), CP 30, App. Brief at 12, because the motion was made after sentencing, it properly must be considered under CrR 7.8. CrR 4.2(f).

3. THE MENTAL HEALTH CONDITION OF SENTENCE WAS PROPERLY IMPOSED.

In any event, the mental evaluation and treatment condition was properly imposed after Giir requested an exceptional sentence below the standard range based on his own assertion that there was a "failed mental defense," 2RP 27, which requires a finding that an impaired mental state influenced his capacity to appreciate the wrongfulness of his conduct at the time of the murder, or his capacity to conform his conduct to the law. RCW 9.94A.535(1)(e).

Giir asserted at sentencing that he suffered from Post-Traumatic Stress Syndrome. 2RP 25-26. Warner, his attorney, stated "When we talked about in the legal papers what is called a 'failed mental defense,' it's not saying that it is an excuse." 2RP 27. This remark apparently refers to a defense presentence report that was not filed with the court. See 2RP 28. The court also received a copy of psychologist Wheeler's report, which described the PTSD symptoms evidenced by Giir. 2RP 4.

The "failed mental defense" mitigating sentencing factor under RCW 9.94A.535 is that "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his

or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e). By relying upon this mitigating factor,⁸ Giir has asserted himself that his PTSD played a significant role in the crimes committed, a murder and an assault, and that satisfies the requirements of RCW 9.94A.505(9). The State did not dispute that he suffered from PTSD. 2RP 5.

Giir should not be heard now to complain that mental health treatment conditions cannot be imposed because the court did not specifically make a finding that he requested. He did not object to imposition of the condition at the time of sentencing. 2RP 37. Any error was invited. State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996).

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the trial court's order denying the motion to withdraw the guilty pleas entered by Giir in this case. If the court has not

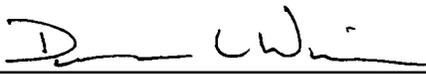
⁸ It is made clear by the State's response to the request for an exceptional sentence that this is the provision relied upon by the defense. CP 134-35.

stricken the claim that the mental health treatment condition was
improperly imposed, that condition should be affirmed.

DATED this 24th day of July, 2009.

Respectfully submitted,

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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 Respondent's Brief, in STATE V. KERO GIIR, Cause No. 62419-9-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.

W Brame

Name

Done in Seattle, Washington

7/24/09
Date

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