

original

NO. 35785-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAKE WAYNE VIGIL-CROSS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 04-1-05089-0

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant fail to preserve the issue of whether there was a sufficient factual basis for the plea, and in the alternative did the trial court properly find a sufficient factual basis for accepting the defendant's plea? (Appellant's Assignment of Error No. 1).

2. Does the defendant need to be specifically advised as to which party has the burden of disproving self-defense when the case law does not so require and there is evidence that the defendant was aware that the defense of self-defense existed? (Appellant's Assignment of Error 2).

B. STATEMENT OF THE CASE.

On November 1, 2004, JAKE WAYNE VIGIL-CROSS, hereinafter "defendant", was charged with murder in the first degree and two counts of assault in the first degree. CP 1-4. The declaration for the determination of probable cause, which was later used by the trial court to determine a factual basis for the defendant's plea, stated the following:

That in Pierce County, Washington, on or about the 10th day of September, 2004, the defendant, JAKE WAYNE VIGIL-CROSS, did shoot into a group of people killing Nathaniel Allen and injuring Anthony Po-Ching and Tina Attinello.

Defendant and several companions arrived at an outdoor party, uninvited, in the early morning hours of September

10th, 2004. The location of the party and the murder was 3220 ½ E. Roosevelt in Tacoma. A verbal confrontation occurred and the defendant and the others were told to leave.

Defendant pulled out a handgun he carried to the scene and began firing at the victims, who tried to run away. As many as eight or more shots were fired. The police evaluated the crime scene and believe that only one gun was fired.

The deceased, Nathaniel Allen was struck multiple times. Victim Anthony Po-Ching was struck multiple times in the back. Victim Tina Attinello was struck in the back of the leg as she tried to escape. Defendant and his friends ran away.

Defendant has admitted to a friend that he did the shooting, claiming however, that victim Nathaniel Allen had first pulled out a gun and was pointing it at Defendant's head. No eye witnesses confirm this claim. Two of the shooting victims, so far, have identified Defendant from a photo lineup as the shooter. The investigation is continuing.

CP 1-4.

On March 29, 2005, an amended information was filed, adding additional counts of unlawful possession of a firearm in the second degree, conspiracy to commit murder in the first degree, and solicitation to commit murder in the first degree. CP 6-12.

On October 4, 2005, an omnibus hearing was conducted, at which the defendant indicated that his defense was going to be that of self-defense. CP 61-62. On August 7, 2006, a second omnibus hearing was conducted at which the defendant reaffirmed that he would be asserting self-defense. CP 63-64.

On October 9, 2006, the defendant entered pleas of guilty to manslaughter in the second degree, assault in the first degree, and assault in the second degree. CP 28-36. In his written statement to the court, the defendant indicated:

I do not believe I have committed these crimes. However, after reviewing the evidence with my attorney I believe there is a substantial likelihood the jury would find me guilty of these crimes. I am pleading guilty to accept the State's agreement to reduce the charges and sentencing recommendation.

CP 61.

The State filed a prosecutor's statement regarding amended information, which indicated, in part, that the victim had been wearing a bulletproof vest and holding a gun in his hand at the time he was shot, and that those facts lent some support to the defendant's self-defense argument. CP 26-27. During his allocution, the defendant acknowledged that he believed he had a self-defense case. II¹RP 23.

The court sentenced the defendant to 120 months on count I, 318 months on count II, and 84 months on count III. CP 40-52.

¹ There are two volumes of verbatim reports of proceedings, which each numbered separately. For convenience of reference, the verbatim report of proceedings that occurred on October 9, 2006, shall be referred to as "IRP" followed by the page number. The verbatim report of proceedings from December 8, 2006, shall be referred to by "IIRP" followed by the page number.

C. ARGUMENT.

1. THE DEFENDANT HAS NOT PROPERLY PRESERVED THE ISSUE OF WHETHER THERE WAS A SUFFICIENT FACTUAL BASIS FOR HIS PLEA, AND IN THE ALTERNATIVE, TRIAL COURT PROPERLY FOUND THAT THERE WAS A FACTUAL BASIS.

a. The defendant did not properly preserve the issue of whether there was a sufficient factual basis for the plea and should be precluded from raising such issue on appeal.

While CrR 4.2(d) requires that the court taking the plea be “satisfied there is a factual basis for the plea” and that those underpinning facts are developed on the record of the plea hearing, the state and federal constitutions have no such requirement. In re Hilyard, 39 Wn. App. 723, 726, 695 P.2d 596 (1985), see State v. Osborne, 102 Wn.2d 87, 95, 684 P.2d 683 (1984). As a general rule, issues cannot be raised for the first time on appeal, and a guilty plea usually constitutes a waiver of the defendant’s right to appeal. State v. McFarland, 127 Wn.2d 322, 332, 333, 899 P.2d 1251 (1995), see State v. Majors, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). There is a limited exception where the issue being raised involves a manifest error affecting a constitutional right. State v. Scott, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). A “manifest” error requires that a showing of actual prejudice be made. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001), citing State v. McFarland, 127 Wn.2d at

333-334. Because the defendant argues for the first time on appeal that the factual basis requirement of CrR 4.2(d) was violated, such nonconstitutional issue has not been properly preserved for review.

In the present case, the defendant seeks relief under CrR 4.2(d), alleging that his plea was not voluntary and that “more facts needed to be uncovered.” Brief of Appellant at p. 10. The fact that the defendant now would have preferred more investigation does not rise to the level of a manifest error. The defendant chose to proceed with his plea knowing how much of the investigation had been done. It was the defendant who elected that the court consider only the original declaration in support of determination for probable cause. The defendant has waived any claim that there was an insufficient factual basis, as he cannot establish constitutional error.

- b. Assuming, arguendo, that this court were to find that the defendant could raise a challenge to the factual basis for his plea, the trial court properly found that a sufficient factual basis existed.

CrR 4.2(d) requires that the trial court determine that there is a factual basis for the plea prior to accepting a guilty plea. This requirement protects defendants who are in the position of voluntarily pleading guilty with an understanding of the nature of the charge, but who do not realize that the conduct does not actually fall within the charge. See State v. Zumwalt, 79 Wn. App. 124, 901 P.2d 319 (1995), overruled on other

grounds by State v. Bisson, 156 Wn.2d 507, 130 P.3d 820 (2006).

Although CrR 4.2(d)'s requirements are not constitutionally based, the lack of an adequate factual foundation for the plea may indicate that the defendant does not fully understand the law in relation to the facts and raises questions as to the voluntary nature of the plea. State v. Iredale, 16 Wn. App. 53, 55, 553 P.2d 1112 (1976), review denied, 88 Wn.2d 1005 (1977).

To determine whether there is a factual basis for the plea, the court need not be convinced beyond a reasonable doubt that the defendant is guilty; rather, it need only find that the evidence is sufficient for a jury to conclude that the defendant is guilty. State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). In making this determination, the court may consider any reliable source of information as long as the information is part of the record at the time of the plea. Saas, 118 Wn.2d at 43; In re Restraint of Keene, 95 Wn.2d 203, 210 n.2, 622 P.2d 360 (1980). The information in a prosecutor's declaration of probable cause or statement of fact is sufficient to establish a factual basis for the plea if it is before the court at the time of the plea and made part of the record at that time. See Osborne, 102 Wn.2d at 95-96; In re Keene, 95 Wn.2d at 210.

Due process requires a guilty plea to be knowing, intelligent, and voluntary. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969); In re Montoya, 109 Wn.2d 270, 277, 744 P.2d 340 (1987). A defendant must be apprised of the nature of the offense; i.e. the acts and

the mental state required to commit the crime, before a guilty plea will be accepted as knowing, intelligent, and voluntary. State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984). See also CrR 4.2(d)².

The record in this case, which included the original information, the supporting declaration of probable cause, and the prosecutor's statement in support of the amended information, show that defendant was adequately apprised of the charge. The defendant signed the acknowledgement on his written statements, which indicated that he had read and understood the charges. CP 29-36. This, and the trial court's careful inquiry about the voluntariness of the pleas, made the presumption of voluntariness "well nigh irrefutable." State v. Perez, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

The court only needed to find that there was evidence sufficient for a jury to conclude the defendant was guilty. State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 1112 (1991). The State, in the prosecutor's statement regarding amended information, indicated that the victim, while armed, did not fire a shot. CP 26-27. Additionally, the original declaration for determination of probable cause indicates that the victim was shot multiple times and that there were no eye witnesses to support the defendant's

² CrR 4.2(d) states:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

claim that the victim had a gun pointed at his head. CP 1-4. Both documents provide a sufficient factual basis for the trial court to conclude that a jury would have found the defendant guilty. There were facts for the court to rely on that disproved self-defense. The defendant now suggests that more facts needed to be uncovered in this case. Brief of Appellant at p. 10. A complete investigation is not required in order for the court to have a sufficient factual basis to accept a guilty plea. The trial court properly determined that there was a factual basis for the plea. Defendant is not entitled to relief on this issue.

2. CASE LAW REQUIRES THAT THE DEFENDANT BE MADE AWARE OF POSSIBLE DEFENSES, NOT NECESSARILY WHO HAS THE BURDEN OF PROOF REGARDING THOSE DEFENSES.

Before pleading guilty, a defendant should be apprised of possible defenses, assuming the defendant has made known facts that might form the basis of such defenses. See In re Montoya, 109 Wn.2d 270, 280, 744 P.2d 340 (1987), see also U.S. v. Frye, 738 F.2d 196, 199 (7th Cir. 1984) (“[B]efore pleading guilty a defendant should be made aware of possible defenses, at least where the defendant makes known facts that might form the basis for such defenses”) (citations omitted).

The court’s failure to advise the defendant of all possible defenses does not render a plea invalid as a matter of law. Montoya, 109 Wn.2d 270 at 280, citing Commonwealth v. White, 295 Pa. Super. 13, 440 A.2d

1198 (1982) (court’s failure to advise defendant of all possible defenses does not per se render a plea invalid; court need not inform the defendant of a particular defense where there is no evidence to support it). See also Dismuke v. U.S., 864 F.2d 106, 107 (11th Cir. 1989) (court had no obligation to inform the defendant of a possible “good faith” defense to the charges of dispensing controlled substances not in the usual course of professional practice for a legitimate medical purpose); U.S. v. Smith, 160 F.3d 117, 123 (2nd Cir. 1998) (“the court has no duty under [Federal] Rule 11(f) to anticipate or detect, and then rule out, defenses such as necessity”).

A court cannot determine whether a defendant knowingly entered a guilty plea without first examining what the defendant knew. E.g., In re Montoya, supra, (finding that there was no evidence to support a claim of self-defense, therefore, the court had no duty to advise the defendant of the burden of proof regarding self-defense); U.S. v. Frye, supra, 738 F.2d 196 (remanded for an evidentiary hearing because the defendant never admitted intent to steal—an essential element of the federal bank larceny statute); State v. Ross, 129 Wn.2d 279, 287-288, 916 P.2d 405 (1996) (finding that the defendant’s lack of knowledge concerning the mandatory imposition of community placement rendered his guilty plea involuntary); State v. Osborne, supra, 102 Wn.2d 87, 94-95 (in determining whether the defendant had actual knowledge of the mental element, the court could look at the implications from the prosecutor’s factual statement); Matter of

Keene, 95 Wn.2d 203, 622 P.2d 360 (1980) (finding that the defendant had actual notice of the “intent to injure and defraud” element of forgery based on the defendant’s acknowledgement that he received and read the information); State v. Littlefair, 112 Wn. App. 749, 765, 769, 51 P.3d 116 (2002) (vacating the defendant’s guilty plea because he did not “know from his attorneys or any other source that he would be subject to deportation”).

When a defendant raises the issue of self-defense, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. State v. Miller, 89 Wn. App. 364, 367, 949 P.2d 821 (1997). A claim of self-defense, however, is available only if the defendant first offers credible evidence tending to prove that theory or defense. State v. Dyson, 90 Wn. App. 433, 438, 952P.2d 1097 (1997); State v. James, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (the defendant bears the initial burden to produce some evidence demonstrating self-defense). In other words, a claim of self-defense must be based on something more than sheer speculation. If the defendant produces some evidence, then the burden shifts to the State to prove the absence of self-defense.

In Montoya, *supra*, the defendant asserted that evidence in the police reports suggested a claim of self-defense, and therefore he should have been informed of the burden of proof on a self-defense claim. Montoya, 109 Wn.2d 270 at 279. The court, however, held that Montoya’s assertions were not adequate to support a plausible self-defense

claim and that the trial court had no obligation to inform Montoya of a “purely hypothetical claim.” Id. at 280.

In State v. Rigsby, 49 Wn. App. 912, 747 P.2d 472 (1987), the defendant asserted that his plea was invalid because he was not informed that the State had the burden of proof beyond a reasonable doubt. Id. at 916. The court held that it is not required that the defendant be expressly advised of the State’s burden of proof in the plea process. Id. at 916-917.

- a. There was sufficient evidence that the defendant was aware that the defense of self-defense existed.

In the present case, the defendant does not assert that he did not know that self-defense was a possible defense, but asserts that he should have been told that the State would have the burden to disprove self-defense beyond a reasonable doubt. First, there is sufficient evidence to conclude that the defendant knew of the defense of self-defense.

He indicated on two separate omnibus orders that he was asserting a defense of self-defense. CP 61-62, 63-64. The defendant acknowledged his understanding of the defense during his allocution when he stated “I turned myself in on this matter because I really felt I had a self-defense case. . .” IIRP 23. Finally, the prosecutor’s own statement regarding the amended information indicated that there was some evidence to support

the defendant's self-defense argument. CP 26-27. Clearly, the issue of self-defense was a major issue in the case, and there is sufficient evidence to indicate that the defendant was aware that such defense existed.

- b. The defendant did not have to be advised that the State would have had the burden to disprove self-defense.

Second, the defendant did not have to be informed that the State had the burden to disprove self-defense beyond a reasonable doubt if the case proceeded to trial. As argued above, the defendant was aware that the possible defense of self-defense existed, and that is all that is required. In State v. Rigsby, supra, the court specifically held that a defendant does not need to be expressly advised of the State's burden of proof in the plea process. Rigsby, 49 Wn. App. 912 at 916-917. The court stated:

Finally, Rigsby contends that the plea was invalid because he was not informed that the State had the burden of proof beyond a reasonable doubt. He has cited no case which directly supports this proposition. A review of Boykin³, Holsworth⁴ and State v. Chervenell, 99 Wn.2d 309, 662 P.2d 836 (1983) indicates that a defendant must be advised of only the following constitutional rights: the right to remain silent, to confront his accusers and to a jury trial. Although the State's burden of proof is constitutional, In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), and a right which is waived by pleading guilty, State v. Tourtellotte, 88 Wn.2d 579, 583, 564 P.2d 799 (1977) (citing Santobello v. New York, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971)), neither Boykin nor its

³ Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274, (1969)

⁴ State v. Holsworth, 93 Wn.2d 148, 607 P.2d 845 (1980).

progeny requires express advisement of the State's burden of proof in the plea process.

Rigsby, 49 Wn. App. 912 at 916-917 (footnotes added).

The court in Rigsby held that the defendant need not be advised that the State has the burden of proof. Such requirement would logically apply to the burden of proof on a self-defense claim. If the court is not required to advise the defendant that the State has the burden of proving the elements of the crime, the court also should not be required to advise the defendant that the State has the burden of disproving certain defenses.

Both Montoya, supra, and State v. Haydel, 122 Wn. App. 365, 95 P.3d 760 (2004), hold that the defendant does not need to be advised as to the burden of proof if a self-defense claim is unsupported by the facts. Neither case, however, specifically states that, when validly raised, the court needs to advise as to both (1) the existence of the defense, and (2) the burden of proof regarding that defense. In Montoya, supra, the court relies on two cases, Commonwealth v. White, 295 Pa. Super. 13, 18, 440 A.2d 1198 (1982), and U.S. v. Frye, 738 F.2d 196, 199 (7th Cir. 1984), both of which hold that the defendant should be made *aware* of possible defenses, not who has the burden of disproving those defenses. There is no case cited by the appellant which required that the defendant be advised as to whom has the burden of disproving self-defense. However, Rigsby specifically holds that the defendant need not be advised as to whether the State has the burden of proof as part of the plea process. The appellant is

seeking to extend the holdings in Montoya, Haydel, and Rigsby to require that the defendant (1) be advised as to the existence of any possible defense, *and* (2) that the State has the burden of disproving a self-defense claim that is supported by some evidence. The cases cited by the appellant, at best, hold that the defendant be advised of the possible defenses. None of the cases cited hold that the defendant must be informed that the State bears the burden of disproving possible defenses. As argued above, the defendant was aware that self-defense was a possible defense in his case, and he elected to plead guilty to avoid a possible higher sentence.

3. ASSUMING, ARGUENDO, THAT THIS COURT WERE TO DETERMINE THAT, BASED ON THE RECORD BELOW, THE DEFENDANT SHOULD HAVE BEEN ADVISED THAT THE STATE WOULD HAVE TO DISPROVE SELF DEFENSE, THEN THIS COURT SHOULD REMAND THIS CASE FOR A REFERENCE HEARING FOR EVIDENCE REGARDING WHAT THE DEFENDANT WAS ADVISED.

In Haydel, the record was supplemented with supporting affidavits from Haydel's counsel which indicated that he had advised Haydel as to the State's burden of proof. Haydel, 122 Wn. App. 365, 371-372, 95 P.3d 760 (2004). The court held that such evidence supported the trial court's conclusion that Haydel was sufficiently advised as to the defense of self-defense. Id.

Assuming, arguendo, that this court were to find that the record is insufficient to determine if the defendant was properly advised as to a possible self-defense claim, this court should remand this case for a reference hearing at which time evidence can be admitted similar to that which was admitted in Haydel, to establish what information the defendant was provided regarding his self-defense claim.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that the defendant's conviction be affirmed.

DATED: July 3, 2007.

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Prosecuting Attorney



MICHELLE HYER
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WSB # 32724

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.30.07 
Date Signature

STATE OF WASHINGTON
BY  DEPUTY
07 JUL -5 PM 1:57
COURT OF APPEALS
DIVISION II