

No. 36237-6-II

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

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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STATE OF WASHINGTON,  
Respondent,

v.

DAVID T. GANNON,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

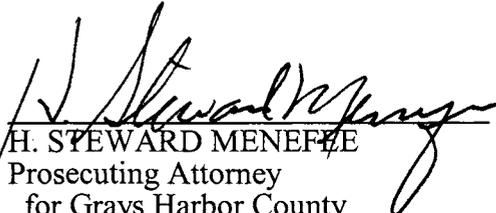
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THE HONORABLE GORDON L. GODFREY, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONDENT'S COUNTERSTATEMENT OF THE CASE**

On May 27, 2006, Charles Wilcox went to his parents' residence in Hoquiam to visit. After entering the home he found his stepfather, Vernon Bishop, lying dead on the living room floor and his mother, Maxine Bishop, lying on the floor of the hallway severely beaten but still alive. It was apparent that Mr. Bishop had been severely assaulted about the head prior to his death. A subsequent autopsy performed on Mr. Bishop determined that he died of blunt force trauma to the head and neck. His cervical vertebrae was broken and he had lacerations on the face and skull fractures. Mrs. Bishop was airlifted to Harborview Medical Center where she subsequently died on May 31, 2006, as a result of the injuries she had received. (CP 131)

The living room and master bedroom of the Bishop residence had been ransacked and a large glass display case in the living room had been broken into and items removed. A number of items of personal property, including gold and jewelry, were missing from the residence. Vernon Bishop was a trader in gems, gold and jewelry. (CP 131).

Brannon Morgan told Hoquiam police officers that the defendant and his girlfriend, April Hensley, had come to his place. The defendant

told Morgan that he had robbed the “gold guy” that Chuck Daggett had told him about. The defendant also told Morgan that he had “put the guy down.” Morgan indicated that the defendant was in possession of a large number of items, including Ziploc bags full of jewels, gold, jewelry, and lots of costume jewelry. Morgan told officers that Chuck Daggett was also present during these conversations. (CP 131-132).

Chuck Daggett told police officers that he had been acquainted with Vernon Bishop. For the past couple of years he had sold a number of items to Mr. Bishop at Bishop’s residence and he knew Mr. Bishop as the “gold guy”. Daggett told police that about a week earlier the defendant had showed up at Brannon Morgan’s apartment with some coins that he wanted to sell. Daggett took Gannon to the Bishop residence and Gannon waited outside while Daggett went in and sold the coins to Bishop and gave the money to the defendant. Daggett told police officers he was at Brannon Morgan’s when the defendant and April Hensley showed up. Daggett said they had what looked like a lot of junk jewelry that they spread out on the bed and they were carrying a number of items in a pillow case. Daggett told the officers that Hensley was upset and crying and that the defendant told him that he had gotten the items from the “gold guy.” Daggett said that the defendant said that he told the “gold guy” to stay on the floor, but that he would not. When the defendant started to tell him what he had done, April Hensley told the defendant to shut up. (CP 132-133).

April Hensley was subsequently arrested and interviewed by police. Hensley told police that Daggett had told the defendant that there was a lot of money, jewelry and gold at the Bishops' residence and it would be a good place to rob. She admitted to police that she and Gannon had gone over to the Bishop residence to rob it. She told officers that she waited at the YMCA which was about a block from the Bishop residence while the defendant went to the house. Approximately ten minutes later she went to the house and the defendant let her in. (CP 133).

She saw there was blood everywhere and that the "old guy" was on the floor mumbling. She saw blood all over his head and she saw an old lady lying in the hallway who had blood all over her. Hensley told officers that the defendant rummaged through cabinets taking jewelry and other items. She admitted also taking wristwatches, rings and jewelry from the Bishop residence. When Hensley was arrested she was wearing a jacket. The pockets of the jacket were stuffed with jewelry and other items that she admitted were jewelry items that were her cut of the goods that had been stolen from the Bishops'. Members of the Bishop family have examined these items and positively identified a number of these items as having come from the Bishop residence. (CP 133-134).

The defendant was subsequently arrested. At the time of his arrest he was in possession of a number of items of jewelry, including small baggies labeled consistent with baggies that were found at the scene of the homicide. The defendant admitted to officers that he had gone to the

Bishop residence, but claimed that he went there to make a deal on a ring and that no one was hurt. (CP 134).

The defendant was charged by Information filed on June 6, 2006, with two counts of First Degree Felony Murder, one count of Burglary in the First Degree and two counts of Robbery in the First Degree. (CP 1-3). The defendant appeared in the Grays Harbor County Superior Court on the same date at which time the court read each of the charges to the defendant. (RP 06-15-2006, pp. 2-4). The court then asked the defendant if he understood the charges. The defendant indicated that he did. (RP 06-15-2006, p. 4). The defendant was also served with a copy of the Information that the court had read to the defendant. (RP 06-15-2006, p. 4).

The defendant received his formal arraignment on June 26, 2006. At the arraignment the court again read each of the charges in the Information to the defendant. (RP 06-26-2006, pp. 6-8). The court again asked the defendant's counsel if he was satisfied that he had informed the defendant of the charges against him. The defendant's counsel answered that he was. The court proceeded to take the defendant's plea to each of the counts alleged in the Information. (RP 06-26-2006, pp. 8-9).

April Hensley on October 26, 2006, pled guilty to an Amended Information which charged her with two counts of Manslaughter in the First Degree and one count of Residential Burglary. In return for the

reduction of the charges, she agreed to testify against the defendant at his trial. (CP 135-141).

On Friday, March 2, 2007, the defendant's attorney, David Hatch, contacted the defendant and went over the process of the upcoming trial which was scheduled for March 6, the evidence in the case and the likely outcome. Hatch informed the defendant that if the jury believed April Hensley, "he was in deep trouble." (RP 04-04-2007, pp. 106-108).

Mr. Hatch then discussed the possibility of a plea agreement with the defendant that included the defendant being permitted to get married in the Grays Harbor County Jail. The defendant also wanted the plea agreement to reflect in writing a promise or guarantee of extended family visits. (RP 04-04-2007, pp. 108-109). Mr. Hatch was unable to get such a promise or guarantee from the State, but was able to determine what the Department of Corrections policy would be toward extending visitation and advised the defendant of the Department of Corrections process for family visitation. The defendant clearly understood that family visitation was not part of the plea agreement but still decided to plead guilty. (RP 04-04-2007, pp. 110, 111, 114).

On March 5, 2007, the defendant appeared in the Grays Harbor County Superior Court to change his plea pursuant to a written plea agreement. (CP 67-71). Mr. Hatch advised the court that he had reviewed the plea agreement and Statement of Defendant on Plea of Guilty with the

defendant and that he had read it to him verbatim. Mr. Hatch indicated that he had been discussing the plea agreement for some time and he was confident that Mr. Gannon was competent in making a knowing, intelligent and voluntary. The court then inquired of the defendant and the defendant acknowledged formally that Mr. Hatch's statement was true. (RP 03-05-2007, pp. 2-3). The court then went over the defendant's rights with him and questioned the defendant to determine if he understood those rights. (CP 03-05-2007, pp. 4-5). The court then read Counts 1 and 2 of the Information to the defendant and asked him as each count what his plea was. The defendant responded guilty to each of those two counts. (RP 03-05-2007, pp. 5-6). The court then advised the parties that he was incorporating the State's Statement of Probable Cause in the matter and the Statement on Plea of Guilty made by April Hensley. The court specifically then asked the defendant if he understood that he was incorporating those statements and then he asked the defendant if he agreed with those statements. The defendant answered affirmatively to both questions. (RP 03-05-2007, pp. 6-7). The court then stated that based upon the Affidavit of Probable Cause, statements made by Mr. Gannon in his Statement on Plea of Guilty and the Statement on Plea of Guilty of April Hensley there were sufficient facts to establish the charges and that he would therefore accept the plea. The court also asked the defendant once again if he agreed with all of those statements. The defendant again answered affirmatively. (RP 03-05-2007, p. 7). Shortly

after that the proceedings were interrupted by a loud cell phone ringing belonging to Barbara Bryson who was sitting in the court room. The judge instructed her to please turn her cell phone off. Mr. Hatch continued by indicating that he was handing up an order dismissing the remaining three counts in the Information and the other pending criminal case and setting a time for sentencing. During this time, Ms. Bryson was waving her arms back and forth saying to the defendant, "Don't do it, don't do it." (RP 03-05-2007, p. 7; CP 112-113). At that time, the defendant addressed the court and asked the court to be allowed to change his plea. The defendant told the court that he was "really not all here right now, you know what I mean? I mean, you see me as a person standing here, but I'm not all here right now. You know what I mean? I don't – I can't do it." (RP 03-05-2007, p. 8). The judge then took a recess indicating that he would allow the defendant to sit down and discuss the matter with his attorney. When the court reconvened the Judge asked Mr. Hatch how his client wished to proceed. The court also spoke directly to the defendant asking him if he had an opportunity to speak to his lawyer and compose himself. The defendant answered affirmatively and the court then briefly reviewed what had previously transpired during the acceptance of his guilty plea and asked the defendant again what he would like to do. The defendant indicated that he wished to go forward with his guilty plea at that time. (RP 03-05-2007, pp. 8-9).

The court then reviewed with the defendant a summary of what had taken place prior to the cell phone incident and inquired whether the defendant agreed with what had taken place at that time. The defendant stated that he did. (RP 03-05-2007, pp. 9-10). The court also asked the defendant again what his plea to Counts 1 and 2 and the defendant affirmatively answered guilty to both of those counts. (RP 03-05-2007, pp. 9-10). The court then again accepted the defendant's guilty plea and the matter was set for sentencing on April 9, 2007.

Subsequent to entry of his plea of guilty arrangements were made for the defendant's marriage and he was married on March 9, 2007, at the Grays Harbor County Jail.(RP 04-04-2007, p. 73). On March 12, 2007, the court received a letter from the defendant suggesting that he wished to change his plea. The court contacted his counsel and had a hearing that afternoon to determine what was going on. At that time, the defendant indicated to the judge that he wanted to withdraw his plea. The court then appointed separate counsel to represent the defendant for the purposes of motion to withdraw plea. (RP 03-12-2007, pp. 2-4).

At the hearing to withdraw his plea, the defendant testified that his attorney had advised him that it was probable that he was going to be convicted at trial because of his co-defendant's testimony in addition to the other evidence in the case. (RP 04-4-2007, pp. 51, 72). The defendant testified that he had fully reviewed the State's offer and the plea agreement and that he understood the consequences of his plea. (RP 04-04-2007, pp.

59-71). The defendant admitted that his counsel did not tell him that he had to plead guilty and that no one had threatened him or promised him anything other than what was in the plea agreement in return for his plea of guilty. (RP 04-04-2007, p. 72). The defendant testified that after initially entering a plea of guilty and then changing his mind, he decided to go forward with his plea of guilty because he would be found guilty no matter what and his fiancé, Ms. Bryson, told him that she will stand by him no matter what and that he needed to go forward with his plea. He testified that his attorney pointed out to him that the press was present and his chances at trial were poor. (RP 04-04-2007, p. 62). The defendant then testified that he lied to the court except for the part where he indicated that he knew his rights and understood his rights, but that was not right for him to plead guilty because he was not. (RP 04-04-2007, pp. 62,63).

The defendant's attorney, Mr. Hatch, testified that he reviewed his chances at trial with the defendant and told him that it would be likely that he would be convicted. (RP 04-04-2007, pp. 107, 108). Mr. Hatch testified that the defendant discussed getting married in the Grays Harbor County Jail and wanted the plea agreement to also guarantee him extended family visits in prison. (RP 04-04-2007, p. 108). Mr. Hatch subsequently informed the defendant that the State would not make any promises concerning visitation. (RP 04-04-2007, p. 112). Mr. Hatch then contacted the Department of Corrections and subsequently got the information the defendant asked for concerning visitation and relayed that to the defendant

on Monday, March 5, 2007, prior to his entry of plea of guilty. (RP 04-04-2007, p. 114). During his discussions with the defendant, Mr. Hatch pointed out to him that he was concerned that the defendant be aware that if he “went sideways” on the change of plea in open court on Monday that it might be reported in the press which concerned him since such publicity could affect any potential jurors. He also indicated the he told him that if he was going to change his mind, he had to do it before they came into court. (RP 04-04-2007, pp. 122, 123). Mr. Hatch testified that given the circumstances, the point of the plea agreement was to allow the defendant to have a chance of extended family visits with his fiancé after he went to prison. That was based on the Department of Corrections policy which treated prisoners who were married prior to arriving at prison differently for purposes of family visits than those who got married after prison. (RP 04-04-2007, p. 132).

Mr. Hatch testified that the defendant told him that the reason he changed his mind after initially pleading guilty was because his fiancé, Barbara Bryson, told him not to plead guilty, apparently when he turned around to see about the cell phone ringing. (RP 04-04-2007, pp. 118-119). Mr. Hatch testified that after he had spoken with Barbara Bryson, he came back into the court room and spoke again with the defendant and asked the defendant what he wanted to do. Mr. Hatch testified that he did not tell the defendant that he had to plead guilty because of the presence of a reporter, but he did remind him that that was one of the issues that he had

talked to him about since it could have an affect on his trial. After speaking with Mr. Hatch, the defendant then decided that he would go forward with his plea. (RP 04-04-2007, pp. 119-123). Mr. Hatch then testified that while he had contact with his client several times after entry of the plea, the defendant never spoke with him about withdrawing his plea after March 5, 2006. (RP 04-04-2007, pp. 125, 126). Mr. Hatch indicated that he had not seen the defendant's letter of March 12, 2007, until the judge called him in on the 12th and provided him with a copy of s prior to the hearing on that date. (RP 04-04-2007, pp. 124, 125).

After completion of the hearing on Motion to Withdraw Plea, the court entered findings that the testimony of the defendant's attorney, Mr. Hatch, was credible, but the testimony of the defendant and his wife, Barbara Gannon, were not credible. The court also found that the defendant had voluntarily entered his plea on March 5, 2007, and that he had been fully advised and understood his rights and the charges to which he was pleading guilty and the consequences of his plea. The court also found that the defendant was not coerced, threatened or improperly promised anything to secure his plea other than the promises contained in the plea agreement. The court also found that the defendant had not established the existence of a manifest injustice that would support withdrawal of his guilty plea and denied the defendant's motion to withdraw a plea. (CP 115-160).

## RESPONSE TO ASSIGNMENTS OF ERROR

**1. The defendant was aware of the nature of the charges to which he pled guilty.**

The defendant asserts, for the first time on appeal, that his plea of guilty to two counts of First Degree Felony Murder were involuntary because he was not informed at the time of his plea of the mental elements required for the crimes of Robbery and Burglary in the First Degree. The defendant specifically argues that, since his statement on plea guilty and the charge read to him by the court at the time of his entry of plea of guilty did not include the mental element of intent to steal and intent to assault, his plea was not voluntary.

A plea cannot be voluntary if the accused is not apprised of the nature of the charge to which he is pleading. Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253, 49 L.Ed.2d 108 (1976); In re Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987). At a minimum, the defendant would need to be aware of the acts and requisite state of mind in which they must be performed to constitute a crime. In re Keen, 95 Wn.2d 203, 207, 622 P.2d 360 (1980).

The courts have long held in Washington that the elements of the underlying felony are not elements of the crime of felony murder. State v. Medlock, 86 Wn.App. 89, 101-102, 935 P.2d 693, rev. denied, 133 Wn.2d 1012 (1997); State v. Bryant, 65 Wn.App. 428, 828 P.2d 1121, rev. denied, 119 Wn.2d 1015 (1992). The courts have held that although the underlying crime itself is an element of felony murder the defendant is not

actually charged with that crime. The predicate felony is a substitute for the mental state which the prosecution would otherwise be obligated to establish. State v. Medlock, Id., at 101. This means that the elements of the predicate felony are not elements of the crime of felony murder. State v. Bryant, supra, at 438.

In the Bryant case, the information read as follows:

That the defendant Leander Bryant in King County Washington on or about March 9, 1990, while committing and attempting to commit the crime of assault in the first degree and in the course of and in furtherance of such crime in immediate flight therefrom, did cause the death on or about March 11, 1990, of Doris J. Bryant, a human being who was not a participant in the crime.

State v. Bryant, supra, at 437. There the court held that such language properly charged the essential elements of felony murder and sufficiently apprised the accused of the act against him with reasonable certainty.

In this case the State charged the defendant with two counts of First Degree Felony Murder alleging:

Count 1.

That the said defendant, David Thomas Gannon, in Grays Harbor County, Washington, on or about on or between May 21-23, 2006, did commit or attempt to commit the crimes of Robbery in the First or Second Degree and/or the crime of Burglary in the First Degree and in the course of and in furtherance of such crimes or in the immediate flight therefrom, the defendant or another participant, caused the death of Vernon Bishop, not a participant in the

crime of Robbery in the First or Second Degree or Burglary in the First Degree.

The second count was identical with the exception that it alleged the death of Maxine Bishop. (CP 1-2). The same language was read to the defendant at the time of plea by the court. (RP 03-05-2007, pp. 5-6). The language of both of these two counts allege the elements of the crime of Second Degree Felony Murder.

Assuming *arguendo* that the state of mind of the predicate felony is an essential element, the defendant was well aware of the mental element of those underlying predicate felonies. The defendant was charged by Information with five counts, the first two comprising the First Degree Felony Murder charges at issue presently and three other counts which comprise the predicate felonies supporting the Felony First Degree Murder charges.

In Count 3, the defendant was charged with one count of Burglary in the First Degree which alleged that the defendant with intent to commit a crime against a person or property therein, entered or remained in the residence of Vernon and Maxine Bishop and while there, or in the immediate flight therefrom, did assault Vernon and Maxine Bishop.

Count 4 of the Information alleged that the defendant within intent to deprive did unlawfully take personal property from a person, Maxine Bishop, or in her presence, against her will by the use or threatened use of immediate force, violence or fear of injury to Maxine Bishop and that in

the course of the commission of said crime did inflict bodily injury on Maxine Bishop.

Count 5 was identical to Count 4 except that it named the victim as Vernon Bishop. Both count 4 and 5 clearly specify the intent to deprive element of robbery. The allegation in Count 3 clearly sets out the mental element of unlawful entry with intent to commit a crime together with an assault.

The Information and all five counts were read in their entirety to the defendant on two separate occasions. First, on June 15, 2006, at the time of his preliminary appearance and the second time on June 26, 2006, at the time of formal arraignment. (RP 06-15,16-2006, pp. 2-4, 6-8). The court specifically asked the defendant during his preliminary appearance if he understood the charges against him. The defendant answered yes. (RP 06-15-2006, p. 4). On June 26, 2006, after again reading all the charges in the Information to the defendant, the court inquired prior to taking the defendant's plea if the defense counsel was satisfied that he had informed the defendant of the charges against him. The defendant's counsel agreed.

Clearly, the defendant was aware that the predicate felony of robbery required an intent to deprive. Where a defendant has received an Information which described the acts and state of mind constituting a crime, he has been given adequate notice of the elements of the crime. State v. Montoya, 109 Wn.2d 270, 278-79, 744 P.2d 340 (1987); In re Keen, 95 Wn.2d 203, 208-209, 622 P.2d 360 (1981).

The courts have held where the underlying predicate of felony murder charges an assault it is sufficient to apprise a defendant that a knowing or purposeful conduct was contemplated and adequately apprises a person of the intent element of assault. State v. Osborn, 102 Wn.2d 87, 94-95, 684 P.2d 683 (1984); State v. Smith, 74 Wn.App. 844, 849-850, 875 P.2d 1249 (1994). On this record it is clear that the defendant was aware of the nature of the offense to which he was pleading guilty, including the mental state associated with the predicate felonies underlying the charges of First Degree Felony Murder. It is significant that nowhere in the record until this appeal does the defendant ever question or indicate that he was unaware of the nature of these charges.

**2. The defendant's guilty plea was voluntary and not the result of coercion.**

The defendant asserts that his plea was involuntary due to the State's offer to allow him to get married while in the Grays Harbor County Jail and because the defendant feared a "figurative lynching in the press."

The defendant also argues that the court should liberally allow the withdrawal of pleas when there is a fair and just reason for doing so.

CrR 4.2(f) controls the withdrawal of guilty plea prior to sentencing. That rule provides:

(f) Withdrawal. The court should allow the defendant to withdraw the defendant's plea of guilty whenever it appears that the

withdrawal is necessary to correct a manifest injustice....

This places a demanding standard on the defendant who has the burden to show an injustice that is obvious, directly observable, overt and not obscure. State v. Saas, 118 Wn.2d 3, 42, 820 P.2d 505 (1991), citing State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). This heavy and demanding burden is placed on the defendant because CrR 4.2(d) prevents the court from accepting guilty plea unless it is satisfied that there is a factual basis for the plea, that the plea has been made voluntarily and competently and that the defendant understands the nature of the charges to which he is pleading and the consequence of his plea. State v. Taylor, 83 Wn.2d at 596.

To effectuate CrR 4.2(d), the rule requires that if the defendant is pleading guilty based upon a plea agreement with the prosecutor, the plea agreement be in writing and become part of the record. CrR 4.2(e). Furthermore, the defendant must execute a written of plea of guilty detailing his basic constitutional rights, setting forth the consequences of his entry of a plea of guilty and ensuring the court that his plea of guilty is voluntary and signed by the defendant. CrR 4.2(g). Basically, CrR 4.2(d), (e), and (g) are carefully designed to make certain the defendant's rights have been fully protected before the guilty plea is accepted. Taylor, 83 Wn.2d at 596.

The Washington Supreme Court has recognized four indicators of "manifest injustice," (1) denial of the effective assistance of counsel; (2)

the plea was not ratified by the defendant; (3) the plea was involuntary; and (4) the plea was not kept by the prosecution. State v. Saas, 118 Wn.2d at 42. When a defendant completes a plea statement and admits to reading, understanding and signing it, a strong presumption is created that the plea is voluntary. State v. Smith, 134 Wn.2d, 849, 852, 953 P.2d 810 (1998). When the defendant seeks to retract his written admission to the court that his plea was voluntary, he bears a heavy burden trying to convince the court that the plea was coerced. State v. Frederick, 100 Wn.2d 550, 558, 674 P.2d 136 (1983). Absent anything the record which would indicate that the plea was coerced, a mere allegation by the defendant will not overcome this highly persuasive evidence of voluntariness. State v. Osborn, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). A trial court's denial of a motion to withdraw plea of guilty is reviewed for abuse of discretion. State v. Bao Sheng Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006); State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001).

The defendant submitted to the court a signed Plea Agreement and Statement of Defendant on Plea of Guilty. The defendant acknowledge to the court that his attorney had read these documents to him and that he understood all the information on the forms. He acknowledged his attorney's statement to the court that he was making a knowing, intelligent and voluntary decision to plead guilty. (RP 03-05-2007, pp. 2-3). The defendant also acknowledged each of the constitutional rights that he was

waiving by entering a plea of guilty after the judge read them and specifically questioned him concerning them. (RP 03-05-2007, pp. 4-5). The defendant did not at any point during the proceedings of March 5, 2007, indicate that any threats or coercion had taken place or that any promises had been made that were not included on the written Plea Agreement and Statement of Defendant on Plea of Guilty.

The defendant now argues that the State used his desire for family visitation to coerce his plea guilty. The record does not support that. The only offer the State made was dismissal of three counts from the Information, two counts of First Degree Robbery and one count of First Degree Burglary respectively, the dismissal of a separate pending drug case and the waiver of the jail rules prohibiting weddings in the Grays Harbor County Jail. (CP 67-71, 72-80). In fact, the issue of extended family visitation was raised by the defendant during plea negotiations. (RP 04-04-2007, p. 108). He understood clearly the State was not making any promises concerning visitation or that anyone else is making any promises to him about his visitation status. (RP 04-04-2007, p. 112). The defendant was disappointed that the State would not make any promises or guarantees concerning his visitation but indicated to his attorney that he still wanted to plead guilty. (RP 04-04-2007, p. 114).

It is clear from the record that at no time did the State ever raised the issue of visitation with the defendant's family. That issue was raised

by the defendant and he was clearly aware the State was not making any promises at all concerning visitation.

The essence of the agreement is the defendant's ability to get married in the Grays Harbor County Jail. The defendant's attorney testified that if the defendant got married before he got to prison he would have an opportunity to have extended family visits with his wife. However, if the defendant got married in prison he would not qualify for those types of visits. (RP 04-04-2007, p. 132). Thus the issue was not whether or not the defendant could get married, but when and where. If the defendant had gone to trial the next day and been acquitted he could have gotten married at his leisure. On the other hand, if the defendant was convicted as the defendant expected, then he would have to wait until he got to prison to get married. At no time was the State withholding from the defendant his ability to get married. The offer to allow him to get married at the Grays Harbor County Jail was a benefit to the defendant in the same manner that a reduced sentence, limitation on restitution, or dismissal of a charge would be. It certainly does not rise the level of a threat that coerced the defendant into entering a plea of guilty that he did not wish to enter into.

In a similar situation where a father entered into a plea of guilty in return for reduction of charges against his son, the court held the defendant's claim that he felt pressured into the plea agreement because he did not want his son to have a felony conviction, the desire to help a loved

one and the accompanying emotional psychological pressure did not, standing alone, render a guilty plea properly taken pursuant to CrR 4.2 involuntary. State v. Williams, 117 Wn.App. 390, 71 P.3d 686 (2003). Similarly in this case, the defendant's subjective reason for pleading guilty, i.e., some desire to get to prison quicker to expedite his visitation process or the advantage that would be gained by being married prior to going to prison do not constitute threats or coercion.

The defendant also claims that he pled guilty because he feared a "lynching" in the press if he had not gone forward with his plea of guilty. Again, the presence of a reporter in an open court proceeding simply cannot constitute a threat or coercion that would justify the withdrawal of an otherwise voluntary and proper plea of guilty. The defendant does not cite any authority for that argument except State v. Frederick, 100 Wn.2d 550, 674 P.2d 136 (1983), which concerns a more traditional coercion situation where Frederick was claiming that his plea was the result of a threat by his co-defendant to kill him if he did not plead guilty. Frederick involved a habitual criminal proceeding where the defendant was seeking to attack a prior plea of guilty with evidence that he had been threatened and thus coerced into pleading guilty. The trial court in that case had refused to allow the defendant to present that evidence since the alleged threat and coercion were not the result of governmental action. The Supreme Court simply ruled that coercion did not have to be the result of

governmental action. State v. Frederick, 100 Wn.2d at 556. However,

State v. Frederick also held:

We emphasize, however, that a defendant who seeks to later retract his admission of voluntariness will bear a heavy burden in trying to convince a court or jury that his admission in open court was coerced. The task will be especially difficult where there are other apparent reasons for pleading guilty, such as a generous plea bargain or virtually incontestable evidence of guilt.

State v. Frederick, 100 Wn.2d at 558.

The court in Frederick also stated “we doubt that a trial court would ever be justified in rejecting as a matter of law the strong prima facie evidence of voluntariness provided by denial of the coercion in open court at the time of the plea...” State v. Frederick, 100 Wn.2d at 558.

While pretrial publicity certainly can be a legitimate concern for a defendant, the courts have remedies to ensure fair trials in such situations, change of venue, sequestration of the jury or even delay of trial to ensure the defendant would get a fair trial. The defendant’s attorney indicated to his client that while he was concerned about the possible affect if his client reversed himself in open court during an attempted entry of a plea, he also indicated that he did not tell his client that he had to go forward with his plea of guilty simply because a reporter was present in the courtroom. (RP 04-04-2007, pp. 121-123).

In summary, there is simply nothing in the record to suggest that any of the defendant’s family exerted any pressure, demands or threats

upon the defendant to plead guilty. Nor was the State's offer to allow the defendant to get married in the county jail prior to going to prison a threat or coercion that would per se render a guilty plea involuntary. That would be particularly true where the promise to allow the defendant to marry is placed on the record in a plea agreement and Statement of Plea of Guilty. The record also indicates that while defendant's counsel was concerned about coverage of a defendant's aborted entry of plea of guilty on the eve of trial as practical matter, he did not indicate that the fact that a reporter was present required him to go forward with the plea.

It was apparent from the record that the defendant had only wavered in entering his plea because he fiancé had interrupted the proceedings with her cell phone and then signaled to the defendant not to plead guilty. The defendant's halt of the proceedings was not because of any threat or coercion or fear that the media was present, but simply because he suddenly found his fiancé signaling to him not to do it. (CP 112-113, RP 04-04-2007, pp. 118-119). The defendant was not originally pleading guilty because of a media "lynching" and in the end he went forward with his plea once his fiancé informed him that she had panicked that she loved him and would stand by him and that he should take the deal. (RP 04-04-2007, p. 128). In other words, the defendant did not go forward with his plea simply because a reporter was there, but because his fiancé indicated that she now agreed with the plea and that he should go

forward with the plea for the same reason he originally began the process.  
This is not coercion.

Furthermore, the testimony given by Mr. Hatch, defendant's counsel and the only witness the court found credible combined with the record of the proceedings at the time of entry of plea the signed Plea Agreement and the signed and completed Statement of Defendant on Plea Agreement established that a manifest injustice had not occurred in this case.

#### CONCLUSION

The defendant's plea of guilty was voluntary. The defendant was aware of the nature of the offenses to which he was pleading guilty and the plea was not the result of any threats or coercion. The trial court did not abuse its' discretion in denying the defendant' motion to withdraw his plea of guilty. This Court should affirm the conviction.

Respectfully Submitted,

  
H. STEWARD MENEFF  
Prosecuting Attorney  
for Grays Harbor County  
WSBA #9354

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STATE OF WASHINGTON  
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DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 36237-6-II

v.

**DECLARATION OF MAILING**

DAVID THOMAS GANNON,

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 1<sup>st</sup> day of February, 2008, I mailed a copy of the Brief of Respondent to David L. Donnan and Maureen Marie Cyr; Washington Appellate Project; 1511 Third Avenue Suite 701; Seattle, WA 98101-3635, and David Thomas Gannon 922022; Washington State Penitentiary; 1313 North 13th Avenue; Walla Walla, WA 99362, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman