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COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON
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DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT LEWIS RAY, III,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion to withdraw his guilty plea because the defendant neither voluntarily nor knowingly entered it.

2. The trial court erred when it entered findings of fact 3, 4, 5, 6 and 7 because they are unsupported by substantial evidence.

Issues Pertaining to Assignment of Error

1. Does a defendant knowingly enter a guilty plea when the trial court during the guilty plea colloquy fails to inform the defendant of the applicable standard ranges, of the statutory maximums, and of the fact that one offense carries a mandatory sentence of life in prison?

2. Does a trial counsel's failure to adequately prepare a defense and does a court's abuse of discretion in denying a motion to continue to allow the defense to secure exculpatory evidence coerce a defendant into entering a guilty plea against his will?

3. Does a trial court err when it enters findings of fact unsupported by substantial evidence?

STATEMENT OF THE CASE

On the evening of August 21, 2005, Police Officer Marsh responded to a call at an apartment complex on SW 13th Street in the City of Chehalis on the report of a domestic assault. SCP 1-2. Once at the complex, a woman named Rachel Leisure ran up to him and yelled: "He tried to kill me! He had his hands on my neck and tried to choke me!" *Id.* As she made this statement, she saw the defendant run down the side of the apartment, which fact she pointed out to the officer. *Id.* Officer Marsh then chased the defendant, ordering him to stop. *Id.* After a short foot chase, the defendant stopped in an adjacent field, and Officer Marsh arrested him. *Id.* According to a probable cause affidavit later filed by a deputy prosecutor from the Lewis County Prosecutor's Office, Ms. Leisure made the following further allegations against the defendant.

Officer Marsh learned from Ms Leisure that she had a valid protection order against Mr. Ray. She stated that he was at her apartment the night before for about two hours to see their daughter and she told him to leave, which he did. She went to work the next morning and when she came home she found Mr. Ray had let himself back into her apartment. She stated that he was intoxicated and that he attacked her and then pounded his own head into the wall. Officer Marsh could see a half dollar sized bump on her forehead as well as swelling of her lower lip and redness on the sides of her neck. Ms Leisure stated that Mr. Ray threatened to kill her. Ms Leisure stated that he was out of control. Ms Leisure tried to run into the bathroom and hide. Mr. Ray barged into the room and pinned her up against the wall. She tried to flee but he tackled her to the ground. He put his knee into her jaw. He then flipped her over, covered her mouth and grabbed at her genital area. He then began choking her and

attempting to smother her. Ms Leisure thought she was going to die. Mr. Ray then went into the kitchen and grabbed a large butcher knife and began saying that he want to gut Ms Leisure.

Officer Marsh observed the hole in the wall put there by Mr. Ray hitting his head against the wall. Officer Marsh confirmed that a valid protection order was in place

Officer observed red marks on Mr. Ray's nose and forehead. Mr. Ray stated that he was at Ms Leisure's apartment the night before and in the morning she asked him to leave. He stated that he returned to the apartment when she was gone. Mr. Ray admitted that he was aware that there was a valid no contact order.

SCP 2.

Based upon these claims, on August 22, 2005, the Lewis County Prosecutor's Office charged the defendant with first degree burglary while armed with a deadly weapon, indecent liberties with forcible compulsion while armed with a deadly weapon, second degree assault while armed with a deadly weapon, unlawful imprisonment while armed with a deadly weapon, and felony harassment while armed with a deadly weapon. CP 1-4. The prosecutor later amended the information three times and added a charge of felony harassment while armed with a deadly weapon and a charge of bail jumping based upon the defendant's failure to appear in court on March 16, 2006. CP 8-11, 17-21, 22-25.

Sometime in September of 2005, the Superior Court appointed a local

attorney by the name of Jonathan Meyer to represent the defendant. RP 3-5.¹ After receiving this appointment, Mr. Meyer sent four separate letters dated 4/4/06, 6/06, 8/31/06, and 10/2/06 asking the prosecutor to arrange a defense interview with Ms Leisure. Exhibits 1-4. Mr. Meyer also made a number of oral requests to the prosecutor in charge of the case for him to arrange a defense interview with Ms Leisure. RP 10-11. The defendant signed five waivers of speedy trial and the court continued the case five times in order to facilitate this interview. RP 13-14.

Finally, on October, 9, 2005, the defense was able to begin its interview with Ms Leisure at the prosecutor's office. RP 12. However, Ms Leisure either arrived late or left early and the defense was not able to complete the interview. RP 14-15. As a result, the parties agreed to schedule a follow-up interview with Ms Leisure, and the court continued the trial date a sixth time, from October 16, 2006, to January 8, 2006. RP 14-15.

On January 4, 2007, the parties appeared before the court for a trial confirmation hearing. RP 18; Exhibit 15 1-11. At that hearing the parties

¹The record in this case includes three volumes of verbatim report. The first is the transcript of the motion to withdraw guilty plea, held on August 6, 2007, and referred to herein as "RP." The second is the transcript of the guilty plea hearing held on January 16, 2007, and referred to herein as "RP I." The third is the transcript of the sentencing hearing held on August 15, 2007, referred to herein as "RP II." The record also includes clerk's papers, referred to herein as "CP," and supplemental clerk's papers, referred to herein as "SCP."

noted that the defense has still not been given an opportunity to finish its interview with Ms Leisure. *Id.* In addition, Mr. Meyer informed that court that based upon his inability to finish his interview with Ms Leisure, he was not prepared to go to trial and could not provide the defendant with an adequate defense. RP 34-35; Exhibit 15 1-11. The defendant was present and heard his attorney make this statement. *Id.* Upon hearing this, the court changed the trial date from January 8th to January 11th and ordered the parties to appear back before the court on January 10th for another confirmation hearing. *Id.*

Between the 4th and the 10th, the defense was finally able to finish its interview with Ms Leisure. RP 20-21. During this interview, Ms Leisure claimed that since the incident was some sixteen months previous, she had only had two telephone contacts with the defendant. RP 20-21, 40-41. She also stated that she had spoken with a person by the name of Seth Joyce about her allegations. *Id.* In fact, the defendant had told his attorney Ms Leisure had called him on many, many occasions since the date of his arrest, and that cell phone records would verify that fact. *Id.*

On January 10, 2007, the parties again appeared before the court. Exhibit 16, 1-14. At that time, the defendant's attorney moved for a continuance of the trial date, stating that based upon Ms Leisure's claims, he now needed to obtain telephone records and to interview Mr. Joyce in order

to be able to effectively represent the defendant. *Id.* He went on to state that without obtaining these records and without interviewing this new witness, he would not be able to effectively represent the defendant. *Id.* The defendant was in court on this date and again heard what his attorney stated. *Id.* The court denied the motion for a continuance and ordered the parties to appear before the court the next day. *Id.* The defendant's attorney responded as follows:

MR. MEYER: Your Honor, I'm going to strenuously object, and I will put on the record right now that I will be ineffective assistance of counsel tomorrow. I won't know what to object to. There's absolutely no way he can be prepared to go to trial tomorrow based upon an interview that the state just got us three days ago. We have to get experts in, as far as his phone records, to get those phone records introduced, to show the fact that she lied during an interview which was conducted three days ago. There's absolutely no way we can have that pulled together by tomorrow.

Exhibit 16 8-9.

On January 11th, 2007, the parties again appeared before the court. Exhibit 17. The defendant's attorney again moved for a continuance, again stated that without time to obtain the necessary telephone records and interview of Mr. Joyce, he could not effectively represent the defendant. *Id.* The defendant again heard his attorney make this statement. RP 25-26; 34-35. The court denied the motion to continue and ordered the parties to appear on January 16th for trial. Exhibit 17.

On January 16th, 2007, the parties appeared for trial. RP I. At that

time, the defendant's attorney again moved for a continuance, informing the court that he had been unable to get the necessary telephone records and he had been unable to find and interview Mr. Joyce. RP I 2-4. Once again, defense counsel informed the court in front of the defendant that he was not ready to go to trial and could not effectively represent the defendant. RP I 6-13. When the court denied the motion to continue, counsel moved to withdraw, and then stated the following when the court asked why counsel wanted to withdraw. RP I 13.

MR. MEYER: Then I ask that I be allowed to withdraw.

THE COURT: Why?

MR. MEYER: Because I cannot effectively represent him. I have talked to this court. I have told them the steps that I have taken to try and get an interview. We were able to get an interview the Monday before. Were there other requests? Yes, there were other requests.

RP I 14.

The defendant's attorney also met privately with the defendant and told him that he was not prepared to go to trial, that based upon this lack of preparation and the trial court's refusal to grant a continuance, the defendant had no chance at trial and would be convicted. RP 26-28; CP 217-221, 225-227. Based upon this fact, defense counsel recommended that the defendant accept the state's offer to plead to one count of first degree burglary and one count of indecent liberties with forcible compulsion. *Id.*

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The defendant had always maintained his innocence on all of the charges. RP 31-33. In fact, the state had made a number of offers to settle the case, and the defendant had consistently refused any accommodation other than a dismissal. *Id.* However, based upon his attorney's statements that he was unprepared and could not present a defense, the defendant reluctantly accepted the offer and entered an *Alford* plea to these two charges. RP 54, 65-80; CP 217-221. According to the defendant, he felt forced to enter the plea based upon the fact that his attorney had repeatedly told him that he could not adequately represent him at trial. *Id.*

Based upon defense counsel's statement that the defendant would accept the state's offer, the court ordered a pause in the proceedings while the defendant's attorney prepared and went over a plea form with him. RP I 23. The defendant thereafter appeared before the court for a guilty plea colloquy. RP I 25-32. During the colloquy, the court did not inform the defendant what the statutory maximums were for the offenses to which he was pleading guilty. *Id.* The court did not inform the defendant what the standard ranges were for the offenses to which he was pleading guilty. *Id.* The court did not inform the defendant that under RCW 9.94A.712, the court would sentence the defendant to life in prison and lifetime community custody. *Id.* The court did not inform the defendant that under RCW 9.94A.712 he would have to serve a minimum mandatory time before first even being considered for

release, and that even then he was not guaranteed release. *Id.*

During the guilty plea colloquy, the court noted that it had reviewed the probable cause statement and that this was the only evidence the court considered in determining whether or not there was a factual basis for the *Alford* plea. RP I 26. After the colloquy, the court accepted the defendant's plea, ordered the Department of Corrections to prepare a pre-sentence investigation report, and set a sentencing date. RP I 31-32. However, prior to that date, the defendant retained his own attorney, and filed a motion to withdraw his guilty plea with a supporting memorandum. CP 47-50. The defendant also filed a number of supporting documents, including transcripts of the hearing leading up to the guilty plea hearing, along with affirmations by counsel, the defendant, and his father, who was present with the defendant when his prior attorney recommended that he plead guilty. CP 62-192, 217-221, 222-224, 225-227.

On August 6, 2007, the court called the case for hearing on the defendant's motion. RP 1-2. At that time, the defense called three witnesses: (1) the defendant's prior attorney, (2) the defendant, and (3) the defendant's father. RP 2-64, 65-103, 104-118. This witnesses testified to the facts previously noted in the Statement of the Cases. *Id.* In addition, defendant's prior attorney testified that he did not know why he had never brought a motion before the court to depose Ms Leisure. RP 35. During the hearing,

the defense presented a number of Exhibits in support of the motion, including copies of prior counsel's letters to the prosecutor requesting an interview with Ms Leisure, transcripts of the 1/4/07, 1/10/07, 1/11/07, and 1/16/07 hearings, and telephone records that proved that Ms Leisure had lied during her interviews with the defense. Exhibits 1-22.

Following argument, the court denied the motion and proceeded with sentencing. RP 119-137. The court then sentenced the defendant within the standard range. CP 283-296. Later, the court entered the following findings of fact and conclusions of law on the motion.

FINDINGS OF FACT

1. That Mr. Ray had numerous opportunities to inform the court during the plea process that he either didn't want to plead guilty or that he was confused or distraught about his options or the process, but chose not to do so.

2. Mr. Ray was not distraught at the change of plea hearing.

3. Mr. Ray admitted at the hearing to withdraw plea that he was not forced to plea and that he did so voluntarily.

4. Mr. Ray pled for particular reasons including a very favorable plea offer that resulted in reduction of his possible prison term, dismissal of charges, and the opportunity to see his daughter while she was still a child.

5. Mr. Ray's decision to plead guilty was an intentional, intelligent and voluntary decision.

6. The State's evidence against Mr. Ray was overwhelming.

7. Mr. Meyer was not unprepared for trial.

8. The level of contact between Mr. Ray and Mr. Meyer did not prejudice Mr. Ray.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the defendant and the subject matter of this action.

2. The entire events of this case occurred in Lewis County, Washington.

3. That withdrawal of the plea is neither necessary nor manifest.

4. That Mr. Ray was not, in any event, prejudiced by the plea agreement.

CP 281-282.

Following entry of the judgement and sentence, the defendant filed timely notice of appeal. CP 297.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE THE DEFENDANT NEITHER VOLUNTARILY NOR KNOWINGLY ENTERED IT.

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.3d 1005 (2001). Guilty pleas that are entered without a statement of the consequences of the sentence are not “knowingly” made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

Failure to inform a defendant of direct sentencing consequences upon a plea of guilty is also governed by court rule. Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a “manifest injustice.” A plea that is not knowingly, voluntarily and intelligently entered produces a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505 (1991). Finally, since pleas which are not knowingly, voluntarily, and

intelligently entered violate a defendant's right to due process, they may be challenged for the first time on appeal. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991 (2000).

For example, in *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), the state originally charged the defendant with First Degree Kidnaping, First Degree Rape, and Second Degree Assault. The defendant later agreed to plead guilty to a single charge of Second Degree Rape upon the state's agreement to recommend a low end sentence upon a range that both the state and the defense miscalculated at 86 to 114 months. In fact, at sentencing, the court and the attorneys determined that the defendant's correct standard range was from 95 to 125 months. Although the state recommended the low end of the standard range, the court imposed an exceptional sentence of 136 months based upon a finding of intentional cruelty. The defendant thereafter appealed, arguing that his plea was not voluntarily, knowingly, and intelligently made, based upon the error in calculating his standard range.

On appeal, the Court of Appeals affirmed, finding that since the defendant did not move to withdraw his guilty plea at the time of sentencing when the correct standard range was determined, he waived his right to object to the acceptance of his plea. On further review, the Washington Supreme Court reversed, finding that (1) a claim that a plea was not voluntarily made constituted a claim of constitutional magnitude that could be raised for the

first time on appeal, (2) that the record did not support a conclusion that the defendant waived his right to claim his plea was involuntarily, and (3) a plea entered upon a mistaken calculation of the standard range is not knowingly and voluntarily made. The court stated the following on the final two holdings:

Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence. Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. The defendant's choice of remedy does not control, however, if there are compelling reasons not to allow that remedy. Walsh has chosen to withdraw his plea. The State has not argued it would be prejudiced by withdrawal of the plea.

The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

State v. Walsh, 143 Wn.2d at 8-9. See also, *State v. Kisse*, 88 Wn.App. 817, 947 P.2d 262 (1997) (Mistaken belief that the defendant qualifies for a SOSSA sentence is a basis upon which to withdraw a guilty plea).

In the case at bar, the defendant did not voluntarily and knowingly enter his plea because (1) the trial court's inadequate colloquy did not properly inform the defendant of the effect of his plea, and (2) his trial attorney's inability to prepare an adequate defense in light of the court's refusal to grant a continuance coerced the defendant into entering a plea

against his will. The following presents these two arguments.

(1) The Trial Court's Inadequate Colloquy Failed to Inform the Defendant of the Effects of His Guilty Plea.

When a defendant enters a plea of guilty to a criminal charge, he or she waives a series of fundamental constitutional rights, including the right to jury trial, the right to the presumption of innocence, the right to confront the state's witnesses, the right to testify, the right to call exculpatory witnesses, the right to compel witnesses to appear, and the right to present exculpatory evidence, among other rights. *Boykin v. Alabama, supra; State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). This is why a defendant who does not enter a guilty plea knowingly or voluntarily is allowed to withdraw that plea, and to present the issue for the first time on appeal. *Id.* Indeed, the purpose of the court mandated guilty plea form and mandated guilty plea colloquy is to assure that a defendant who gives up so many fundamental constitutional rights is acting knowingly and voluntarily. *State v. James*, 138 Wn.App. 628, 158 P.3d 102 (2007). As with all constitutional rights, waivers will not be implied and will only be sustained if knowingly, voluntarily, and intelligently entered. *State v. Riley*, 19 Wn.App. 289, 294, 576 P.2d 1311 (1978).

In the case at bar, the trial court's colloquy did not inform the defendant of any of the direct consequences of his plea. The court did not

inform the defendant what the statutory maximums were for the offenses to which he was pleading guilty. The court did not inform the defendant what the standard ranges were for the offenses to which he was pleading guilty. The court did not inform the defendant that under RCW 9.94A.712, the court would sentence the defendant to life in prison and lifetime community custody. The court did not inform the defendant that under RCW 9.94A.712 he would have to serve a minimum mandatory time before first even being considered for release, and that even then he was not guaranteed release. In addition, in spite of the fact that this was an *Alford* plea, neither the court nor the state presented a factual basis for the plea. Rather the court merely reviewed the probable cause statement without engaging the defendant in a conversation concerning what that evidence included. Under these facts, the trial court completely failed in its duty to inform the defendant of the direct consequences of his plea. Thus, the guilty plea in this case was not knowingly entered and the trial court erred when it denied the defendant's motion to withdraw that plea.

(2) Trial Counsel's Failure to Adequately Prepare a Defense and the Court's Abuse of Discretion in Denying a Motion to Continue Coerced the Defendant into Entering a Guilty Plea Against His Will.

Under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, all defendant's in criminal cases are entitled

to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). At a minimum, this includes the right to counsel who had adequate time to prepare a defense. *Welfare of J.M.*, 130 Wn.App. 912, 922, 125 P.3d 245 (2005). The trial court's failure to grant a continuance to counsel who is unprepared to present a defense not only constitutes an abuse of discretion, but it also denies a defendant effective assistance of counsel. *Id.*

For example, in *In re R.R.*, 134 Wn.App. 573, 141 P.3d 85 (2006), a father appealed the termination of his parental rights, arguing that the trial court's failure to grant his attorney's motion for a continuance in order to adequately prepare for trial denied the father effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. In this case, the state filed a petition to terminate a father's parental rights. The day before trial, the court appointed an attorney to represent the father. This attorney immediately contacted the Assistant Attorney General (AAG) who represented the state. The AAG agreed not to oppose the attorney's motion to continue the trial in order to adequately prepare a case.

However, the next day the defendant failed to appear at the trial, and the AAG opposed the continuance. In spite of the fact that the attorney had spoken with the father and informed the court that his client was absent

because he missed the bus, the court denied the motion to continue and insisted that the attorney proceed with no preparation. Following trial, the court granted the petition to terminate and the father appealed, arguing ineffective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Fourteenth Amendment. The Court of Appeals agreed with this argument and reversed. The court held:

Nelson received no discovery, had no opportunity to review the documents identified by DSHS in the Notice of Intent to Admit, and had no opportunity to interview the witnesses listed by DSHS or to obtain an independent evaluation of Ramsey. As Nelson explained to the court:

I am unable and would not do an opening statement and would not do any cross examination.... My professional duty would not permit me to go forward on a case that I was just appointed yesterday. I have not received any discovery, haven't spoken with any witnesses, haven't received a witness list, have received absolutely nothing. So I will be here. However, I don't believe that I could adequately represent Mr. Ramsey under these circumstances.

Under either the fair hearing standard in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), or the meaningful hearing standard in *Moseley*, 34 Wn.App. 179, 660 P.2d 315 (1983), Nelson could not provide effective assistance of counsel without additional time to prepare. *In the Matter of the Welfare of J.M.*, 130 Wn.App. 912, 922, 125 P.3d 245 (2005). We conclude the trial court's decision to deny the motion to continue the termination trial deprived Ramsey of the right to effective assistance of counsel and was an abuse of discretion.

In re R.R., 134 Wn.App. at 585-586.

In the case at bar, trial counsel was also unprepared to proceed to trial

because he did not have time to gather evidence that would seriously question the credibility of the complaining witness. In addition, counsel did not have time to find and interview a person the complaining witness identified as having information about the case. This lack of preparation was the direct result of counsel's failure to interview the complaining witness until just before trial. Whether or not the blame for this failure lies with defense counsel or not is unresolved from the record in this case. Certainly counsel made numerous attempts to secure this interview through the prosecutor, who apparently undertook the responsibility to arranging the interview. However, after the state's repeated failure to produce the witness, one is left to wonder why counsel did not move the court for a deposition.

Ultimately, however, the issue of blame is irrelevant. The salient point is that counsel was unprepared, he informed the court that he was unprepared with his client listening, and he repeatedly informed the defendant that (1) he was unprepared for trial, and (2) the defendant would be convicted because of that lack of preparation. In fact, the level of lack of preparation is also irrelevant. Rather, what is relevant to the argument that the defendant was coerced into entering a guilty plea is the fact that defense counsel repeatedly communicated to the defendant that counsel was unprepared, because the defendant's reasonable belief that his attorney was unprepared coerced him into entering a guilty plea and giving up his right to trial. In

essence, these repeated communications forced the defendant into the “Hobson’s choice” of either pleading guilty and going to prison for less time (thereby giving up his right to trial), or going to trial without sufficient preparation, being convicted, and going to prison for more time (thereby giving up his right to effective assistance of counsel).

The situation in this case is analogous to that in which the state’s failure to provide timely discovery puts a defendant in the position of either waiving speedy trial in order to have time to adequately prepare (thereby being forced to give up the right to speedy trial) or refusing to waive speedy trial and proceeding to trial without adequate preparation (thereby being forced to give up the right to effective assistance of counsel). The following examines the law on this issue.

In *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997), the defendant was charged with two counts of second degree theft under a probable cause statement that alleged that he had stolen a rifle, a fish-finder, and a scanner out of a house in which he was staying. According to the probable cause statement, the defendant later pawned all three items, two at one pawn shop and the third at another. Three days before trial and without prior notice to the defense, the court allowed the state to amend the information to charge a third count of theft (for the third item), and three counts of trafficking in stolen property (for pawning the three items).

The defense later moved to dismiss the added charges, arguing in part that it was unprepared to respond to them, thus putting the defendant in the unfair position of either having to give up his right to speedy trial or give up his right to effective assistance of counsel. The trial court granted the motion, and the state appealed the dismissal of the amended charges. Following argument, the Court of Appeals reinstated the third theft charge, but affirmed the dismissal of the three trafficking charges on a separate legal theory. The state then obtained review before the Supreme Court.

Ultimately, the Supreme Court affirmed the decision of the Court of Appeals that the trial court properly dismissed the three trafficking charges. However, it did so on the basis that the dismissal was proper under CrR 8.3(b), which allows the trial court to dismiss a charge “on its own motion in the furtherance of justice.” In its analysis, the court noted that for a dismissal to be proper under CrR 8.3(b), the defense must prove (1) government misconduct that (2) causes prejudice to the defendant’s case. As to the second criteria, the court held:

The state, by adding four new charges just before the scheduled trial date, without any justification for the delay in amending the information, forced Mr. Michielli either to go to trial unprepared, or give up his speedy trial right. *See also State v. Sulgrove*, 19 Wn.App. 860, 578 P.2d 74 (1978) (charge dismissed under CrR 8.3(b) after the State charged the wrong crime, amended to correct it the day before trial after defense motioned for dismissal, and then failed to produce necessary evidence to support the correct charge on the day of trial).

State v. Michielli, 132 Wn.2d at 245.

The defendant in this case does not make a speedy trial argument. He was prepared to yet again waive that right in order to have adequate time to prepare his defense. However, trial counsel's repeated statements that he was unprepared and the trial court's refusal to grant a continuance put the defendant in the same unfair position that the defendant in *Michielli* found himself. Either give up one right (to speedy trial) or another (the right to effective assistance. In the case at bar, the defendant was forced to either give up his right to trial or his right to effective assistance. Trial counsel's repeated statements that he was unprepared, and the trial court's refusal to grant a continuance thus coerced the defendant into entering a guilty plea that he did not want to enter. Consequently, the defendant's plea was not voluntary.

II. THE TRIAL COURT ERRED WHEN IT ACCEPTED THE DEFENDANT'S ALFORD PLEA TO THE CHARGE OF INDECENT LIBERTIES BY FORCIBLE COMPULSION BECAUSE THE STATE FAILED TO ESTABLISH A FACTUAL BASIS TO BELIEVE THAT THE DEFENDANT COMMITTED THIS OFFENSE.

The court's duty to ensure that a guilty plea is knowingly, voluntarily, and intelligently entered is heightened when the defendant enters an *Alford* or *Newton* plea as did the defendant in this case. Under the decision in *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), the United State's Supreme Court held that a defendant who denies guilt may

nonetheless enter a guilty plea if the court finds a factual basis for the plea. As the court noted, this was precisely the situation in *Alford* where the defendant wanted to accept the plea bargain in order to avoid the death penalty and limit the maximum sentence to 30 years.

As previously recounted, after Alford's plea of guilty was offered and the State's case was placed before the judge, Alford denied that he had committed the murder but reaffirmed his desire to plead guilty to avoid a possible maximum provided for second degree murder.

North Carolina v. Alford, 400 U.S. at 31.

The need for the court to exercise extra caution when taking an *Alford* plea was restated in *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976). In this case the Washington Supreme Court adopted the *Newton* plea procedure and quoted the following from *United States v. Gaskins*, 158 U.S.App.D.C. 267, 485 F.2d 1046, 1049 (1973) and that federal court's comments on accepting *Alford* pleas under the federal rules:

When a defendant seeks to plead guilty while protesting his innocence, the trial judge is confronted with a danger signal. It puts him on guard to be extremely careful that his duties under Rule 11 are fully discharged.

State v. Newton, 87 Wn.2d at 373 (quoting *Gaskins*, *supra* at 1049).

Under *Alford*, a defendant may plead guilty without admitting guilt, as long as there is a factual basis to believe he committed the charged crime. *See In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 744 P.2d 340 (1987). A factual basis exists if there is sufficient evidence from which a jury could

conclude the defendant is guilty. *State v. Newton, supra*; see also *State v. Arnold*, 81 Wn.App. 379, 382, 914 P.2d 762 (1996).

In the case at bar, the defendant entered an *Alford* plea to a charge of first degree burglary and a charge of indecent liberties with forcible compulsion. This latter charge is found in RCW 9A.44.100(1)(a), which states in relevant part:

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

(a) By forcible compulsion;

RCW 9A.44.100(1)(a).

The term “sexual contact” as it is used in this statute is defined in RCW 9A.44.010(2), which states:

(2) “Sexual contact” means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2).

Consequently, in order to sustain an *Alford* plea to a charge of indecent liberties by forcible compulsion under RCW 9A.44.100(1)(a), the record must contain some evidence to prove that the defendant “touched” the “intimate parts” of Ms Leisure, and that he did so “for the purpose of gratifying” either his or her “sexual desire.” The problem with this case is that (1) the only evidence presented in support of the guilty plea was the

probable cause statement, and (2) the probable cause statement does not prove this essential element of the offense. The probable cause affidavit states:

Officer Marsh learned from Ms Leisure that she had a valid protection order against Mr. Ray. She stated that he was at her apartment the night before for about two hours to see their daughter and she told him to leave, which he did. She went to work the next morning and when she came home she found Mr. Ray had let himself back into her apartment. She stated that he was intoxicated and that he attacked her and then pounded his own head into the wall. Officer Marsh could see a half dollar sized bump on her forehead as well as swelling of her lower lip and redness on the sides of her neck. Ms Leisure stated that Mr. Ray threatened to kill her. Ms Leisure stated that he was out of control. Ms Leisure tried to run into the bathroom and hide. Mr. Ray barged into the room and pinned her up against the wall. She tried to flee but he tackled her to the ground. He put his knee into her jaw. ***He then flipped her over, covered her mouth and grabbed at her genital area.*** He then began choking her and attempting to smother her. Ms Leisure thought she was going to die. Mr. Ray then went into the kitchen and grabbed a large butcher knife and began saying that he wanted to gut Ms Leisure.

Officer Marsh observed the hole in the wall put there by Mr. Ray hitting his head against the wall. Officer Marsh confirmed that a valid protection order was in place

Officer observed red marks on Mr. Ray's nose and forehead. Mr. Ray stated that he was at Ms Leisure's apartment the night before and in the morning she asked him to leave. He stated that he returned to the apartment when she was gone. Mr. Ray admitted that he was aware that there was a valid no contact order.

SCP 2 (emphasis added).

The only portion of this affidavit that even speaks of the "intimate parts" of Ms Leisure is the sentence: "He then flipped her over, covered her

mouth and grabbed at her genital area.” Were this sentence accompanied by any statement whatsoever that the defendant make some type of sexual statement, or acted in any type of a sexual manner, then it might be sufficient to sustain a guilty plea to attempted indecent liberties at the most. The problem in the case at bar is that this is not the context of the sentence. Rather, the context of the sentence is that the defendant was drunk, upset, and was violently attacking Ms Leisure without the slightest sexual connotation at all. Even seen in the light most favorable to the state, the affidavit does not support a conclusion that the defendant acted with any sexual motivation at all. Consequently, the trial court erred when it accepted the defendant’s *Alford* plea to the charge of indecent liberties because the record does not establish a factual basis that the defendant committed this offense.

III. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT 2, 3, 4, 5, 6, AND 7 BECAUSE THEY ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts’ findings “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.”

State v. Ford, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the case at bar, the defendant has specifically assigned error to findings of fact 2, 3, 4, 5, 6, and 7. These findings stated as follows:

2. Mr. Ray was not distraught at the change of plea hearing.

3. Mr. Ray admitted at the hearing to withdraw plea that he was not forced to plea and that he did so voluntarily.

4. Mr. Ray pled for particular reasons including a very favorable plea offer that resulted in reduction of his possible prison term, dismissal of charges, and the opportunity to see his daughter while she was still a child.

5. Mr. Ray's decision to plead guilty was an intentional, intelligent and voluntary decision.

6. The State's evidence against Mr. Ray was overwhelming.

7. Mr. Meyer was not unprepared for trial.

CP 297.

The record at the motion to withdraw guilty plea does not support the court's entry of these findings. As concerns Finding 2, the only evidence presented at the motion was that the defendant was distraught. This evidence came from the testimony of the defendant, his father, and his first attorney.

The state presented no evidence on this issue at all. Thus, this finding is unsupported by the evidence. Similarly, Findings 3, 4, and 5 are also unsupported by any evidence. Once again, the only evidence presented at the motion to withdraw the guilty plea was the testimony of the defendant, his father, and his prior attorney. They all indicated that the defendant did not act voluntarily, and that the only reason he entered his guilty plea was that the trial court's refusal to grant a continuance, and his attorney's continued statements that he was unprepared, coerced the defendant into pleading guilty.

Finding of Fact 6 stating that the state had overwhelming evidence is also unsupported by the evidence before the court. In fact, as the state itself admitted at the hearing, the evidence the state had boiled down to a question of credibility between Ms Leisure and the defendant. The state elicited the following during its cross-examination of the defendant's first attorney:

Q. So it really boiled down in part to them believing Mr. Ray or Ms Leisure as to what happened?

A. Which is why we needed the phone records.

RP 62.

The defense continued this line of inquiry on re-direct examination of the defendant's prior attorney when it elicited the following:

Q. Now, you have tried a number of criminal cases, and when you have a case where the primary evidence is the alleged victim

saying one thing and the defendant saying another, don't the cases often turn on what little other pieces of evidence that you can get in that might discredit one witness or corroborate your own witness?

A. Most definitely.

CP 64.

However, exactly where the state came up with Finding of Fact 6 is uncertain, however, as these questions and answers illustrate, the evidence the state had in this case was far from overwhelming. Thus, substantial evidence does not support Finding 6.

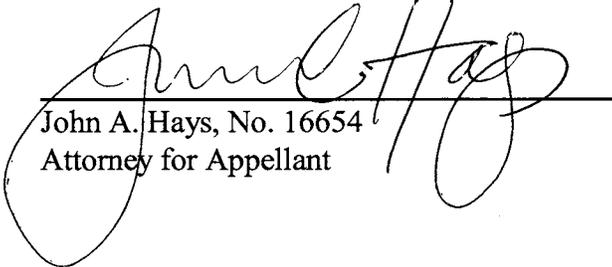
Finally, the overwhelming evidence presented at trial was that the defendant's attorney was not prepared for trial. He repeatedly stated this to the court at four hearings prior to the trial date, and he repeated this testimony at the motion to withdraw guilty plea. He had a case, as both parties pointed out, that primarily turn upon the credibility of Ms Leisure as opposed to his client. The evidence that he did not have time to uncover, and which the defense did uncover after the trial, proved that Ms Leisure lied during her interview with the defense. This evidence of the numerous telephone calls she made to the defendant, as opposed to the two she claimed she made, also called into question her motive for making her claims against the defendant. Thus, as the defendant's prior attorney repeatedly stated, he was unprepared to go to trial given the late interview with Ms Leisure and the substance of her statements. Thus, substantial evidence does not support Finding 7.

CONCLUSION

The trial court erred when it denied the defendant's motion to withdraw his guilty plea because he did not voluntarily or knowingly enter it. In addition, the state failed to present a factual basis for the plea on the charge of indecent liberties. As a result, this court should reverse the trial court and remand with instructions to grant the defendant's motion.

DATED this 12th day of February, 2008.

Respectfully submitted,


John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**RCW 9A.44.010(2)
Definitions**

As used in this chapter:

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

**RCW 9A.44.100(1)(a)
Indecent Liberties**

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

(a) By forcible compulsion;

RCW 9.94A.712

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a); committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(32)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435.

