

No. 46451-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MARK LEE VIPPERMAN, JR.,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-00996-0
The Honorable Frank Cuthbertson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court erred when it accepted Mark Lee Vipperman's guilty plea without adequately determining whether he understood the nature of the charges to which he was pleading.

II. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Where the crime of malicious harassment requires proof of a "true threat" and proof that the victim was selected based on his or her race, and where the court failed to determine if Mark Lee Vipperman understood these requirements, did the trial court err when it found that Vipperman understood the nature of the charges and when it accepted Vipperman's guilty plea?

III. STATEMENT OF THE CASE

The State charged Mark Lee Vipperman, Jr. with assault in the second degree (RCW 9A.36.021), malicious harassment (RCW 9A.36.080), and intimidating a witness (RCW 9A.72.110). (CP 4-6) The State alleged that Vipperman was armed with a deadly weapon when he committed the assault and harassment offenses. (CP 4-5) According to the probable cause declaration:

The victims, J. and L. Jones, are listed as a black female and male. The defendant is listed as a white male. The victims call police to report that they were walking on a bridge over the Puyallup River when they were approached by the defendant who

threatened to cut them. More specifically, the victims state the defendant came up running from behind them yelling racial slurs and calling them “niggers.” At some point, he pulls a large machete type knife from his waist area and held it out saying he was going to cut them. He told the male victim that he was going to cut his throat and cut off his “dick.” The defendant was also yelling they were liars.

Officers were directed to a van in which the defendant was a passenger. The defendant was taken out of the van and the victims identified him as the person who had threatened them.

. . . [A] meat cleaver type knife was found [in the van]. . . . The victims reported they felt threatened by the statements made by the defendant to them.

(CP 3)

Vipperman entered a guilty plea to an amended Information charging malicious harassment, committed while armed with a deadly weapon. (CP 21, 22, 23-32; 5/28/14 RP 2, 5-6)¹ The court found his plea to be knowing and voluntary, and found a factual basis for the charges. (RP 6) The court sentenced Vipperman within his standard range to a total of 19 months of confinement. (RP 8; CP 33-34, 38, 41) This appeal timely follows. (CP 48)

IV. ARGUMENT & AUTHORITIES

Due process requires that a guilty plea be knowing, intelligent and voluntary. In re PRP of Hews, 108 Wn.2d 579, 590,

¹ The transcripts will be referred to by the date of the proceeding.

741 P.2d 983 (1987); Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). This requirement is incorporated into Washington's criminal rules:

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.

CrR 4.2(d) (emphasis added).

CrR 4.2(d) requires that a trial court ensure that a defendant's plea is made voluntarily with an understanding of the nature of the charges before it accepts a guilty plea. A guilty plea is not truly voluntary "unless the defendant possesses an understanding of the law in relation to the facts." In re PRP of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)). "Due process requires that a defendant be apprised of the nature of the offense in order for a guilty plea to be accepted as knowing, intelligent, and voluntary. Real notice of the nature of the charge is 'the first and most universally recognized requirement of due process.'" State v. Osborne, 102 Wn.2d 87, 92-93, 684 P.2d 683 (1984) (quoting Henderson, 426 U.S. at 645). "At

a minimum, 'the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime.'" Osborne, 102 Wn.2d at 93 (quoting Keene, 95 Wn.2d at 207).

For example, in State v. Powell, 29 Wn. App. 163, 627 P.2d 1337 (1981), this Court set aside the guilty plea of a defendant charged with first degree murder. There, the only factual basis made on the record at the time the plea was taken was the defendant's statement taken from his statement on plea of guilty pursuant to CrR 4.2. The defendant admitted, "I did participate in the 1 (degree) murder of Charles Allison." 29 Wn. App. at 165. This Court noted that during the colloquy between the trial judge and the defendant, no attempt was made to orally elicit a description of the defendant's acts or state of mind which resulted in the charge to which he pleaded. 29 Wn. App. at 167. In addition, the Court found the defendant's written statement to be a mere conclusion of law which failed to set forth any of the elements from which a jury could have found him guilty of first degree murder. 29 Wn. App. at 167.

Similarly, in this case, the record does not establish that Vipperman understood the nature of the crime to which he pleaded

guilty or what facts the State would have to prove for a jury to find him guilty. The State charged Vipperman pursuant to RCW 9A.36.080(1)(c), which states: “A person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victim’s race . . . Threatens a specific person or group of persons and places that person, or members of the specific group of persons, in reasonable fear of harm to person or property.”

To be guilty of malicious harassment, the threat must be a “true threat,” which is a “statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life” of another person. State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007) (quoting State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)).

Furthermore, simply uttering a racial slur during the commission of the crime is not sufficient, by itself, to prove that the crime was committed because of the defendant’s perception of the victim’s race. See State v. Talley, 122 Wn.2d 192, 201, 858 P.2d 217 (1993); State v. Pollard, 80 Wn. App. 60, 65, 906 P.2d 976

(1995). The statute does not criminalize uttering biased remarks during the commission of another crime). Pollard, 80 Wn. App. at 65. Rather, the State must show that the defendant selected his victim on a basis listed in the statute. Talley, 122 Wn.2d at 201 (statute punishes the selection of the victim).

There is nothing in the record to show that Vipperman understood these requirements. When asked in his Statement of Defendant on Plea of Guilty to list what he did to make him guilty of the crime, Vipperman writes:

On March 12, 2014, in Pierce Co., WA, I maliciously and intentionally threatened Lavert and Janea Jones, and placed them in reasonable fear of harm to their persons because of my perception of their race. In the commission of making the threat, I was armed with a knife, a deadly weapon.

(CP 31)

At the plea hearing, the trial court asked Vipperman whether his attorney had explained “what malicious harassment is,” and Vipperman responded “Yes.” (05/28/14 RP 4) Later, the court made the following inquiry of Vipperman:

THE COURT: Paragraph 11 is where you state what makes you guilty. It says:
On March 12th, 2014, in Pierce County, Washington, I maliciously and intentionally threatened L.J. and J.J. and placed them in reasonable fear of harm

to their persons because of my perception of their race. In the commission of making the threat, I was armed with a knife, [a] deadly weapon.

Is that your statement?

THE DEFENDANT: Yes.

THE COURT: And how do you plead to malicious harassment?

THE DEFENDANT: Guilty.

THE COURT: I'm going to enter your guilty plea along with the finding that your decision to plead guilty is knowing, intelligent, and voluntary, and there's a factual basis to support your plea in paragraph 11.

(05/28/14 RP 5-6) Neither the prosecutor nor the judge recited any additional facts or explained the meaning of the elements of the crime. And neither the prosecutor nor the judge mention the "true threat" or the "selection of the victim" requirements.

Simply reciting the elements of the crime and asking if Vipperman understood the charges, and Vipperman's simple "yes" response, does not show that Vipperman truly understood the nature of the malicious harassment allegation, and the elements the State was required to establish before he could be convicted. See State v. S.M., 100 Wn. App. 401, 415, 996 P.2d 1111 (2000) (the defendant's "simple 'yes' response to the court's oral question about the meaning of sexual intercourse" is not adequate).

Accordingly, "the record does not affirmatively show that"

Vipperman “understood the law in relation to the facts or entered the plea intelligently and voluntarily,” and the trial court erred when it accepted Vipperman’s guilty plea. S.M., 100 Wn. App. at 415.

V. CONCLUSION

“[F]ailure to comply fully with CrR 4.2 requires that the defendant's guilty plea be set aside and his case remanded so that he may plead anew.” Wood v. Morris, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976). The trial court here failed to comply with due process standards or with CrR 4.2 because it did not ensure that Vipperman understood the nature of the malicious harassment charge or the facts necessary to prove the charge. Accordingly, Vipperman’s conviction should be reversed and his case remanded for a new plea hearing.

DATED: November 26, 2014



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CERTIFICATE OF MAILING

I certify that on 11/26/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Mark Lee Vipperman, Jr., DOC #345985, Monroe Corrections Center, PO Box 777, Monroe, WA 98272.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

November 26, 2014 - 3:56 PM

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