

No. 48034-4-II

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

STATE OF WASHINGTON, RESPONDENT

V.

FRANK WALLMULLER, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Toni. A. Sheldon, Judge

No. 11-1-00463-5

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**BRIEF OF RESPONDENT**

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A. INTRODUCTION

In this case Wallmuller pled guilty to one count of rape of a child in the first degree and to one count of sexual exploitation of a minor. At the time of entering the plea, Wallmuller was represented by competent counsel. The trial court judge engaged in a painstakingly thorough colloquy with Wallmuller and confirmed that Wallmuller understood the charges to which he was pleading guilty and that he pleading guilty knowingly, voluntarily and intelligently. Wallmuller's answers to the judge's questions were unequivocal.

Slightly more than one year after pleading guilty, Wallmuller filed a motion to withdraw his guilty plea. The trial court appropriately denied Wallmuller's motion. Wallmuller now appeals the trial court's denial of his motion to withdraw his guilty plea.

B. STATE'S COUNTER-STATEMENTS OF ISSUES  
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Wallmuller contends that his guilty plea in this case was involuntary and that he, therefore, must be permitted to withdraw his guilty plea. But the record shows that the trial court judge engaged in a thorough colloquy with Wallmuller prior to accepting his guilty plea and that the judge painstakingly verified that Wallmuller entered his guilty plea knowingly, voluntarily, unequivocally, and intelligently.

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Therefore, the validity and finality of Wallmuller's guilty plea should be sustained on appeal.

2. Wallmuller contends that he received ineffective assistance of counsel when pleading guilty in the instant case and that he, therefore, should be permitted to withdraw his guilty plea. But the record does not support Wallmuller's factual contentions and, to the contrary, the record shows that Wallmuller received competent counsel and that he knowingly, voluntarily, intelligently and unequivocally pled guilty. Therefore, this Court should deny Wallmuller's appeal, and the validity and finality of Wallmuller's guilty plea should be sustained on appeal
3. The trial court denied Wallmuller's motion to withdraw his guilty plea because Wallmuller did not demonstrate that withdrawal of the plea was necessary to prevent a manifest injustice. Wallmuller contends that the trial court abused its discretion because it applied the standard provided by CrR 4.2(f) rather than the standard provided by CrR 7.8. The State contends that the trial court did not err or abuse its discretion, because Wallmuller was required to satisfy both CrR 4.2(f) and CrR 7.8, and that, because Wallmuller did not satisfy CrR 4.2(f), the trial court was not required to engage in a moot consideration of CrR 7.8.

C. FACTS AND STATEMENT OF THE CASE

a) Substantive facts

On December 29, 2011, the Mason County Prosecutor's Office filed with the Mason County Superior Court a motion and declaration to determine probable cause that Frank Wallmuller had committed the crimes

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of rape of a child in the first degree and sexual exploitation of a minor,  
CP 320-323.

In the declaration of probable cause, Detective Jack Gardner of the Mason County Sheriff's Office declared that school officials had reported a sexual assault after a 16-year-old student had written about the assault in one of her class assignments. CP 321. Officers contacted the victim and learned that the perpetrator had sexually assaulted her on at least two separate occasions, with the first occurring *on or about* January 1, 2006, when she was ten years old. CP321. The victim reported that the incident occurred when she was spending the night at her friend's house, where she slept in the living room. *Id.* The perpetrator, a man named "Frank" who about 60 years old, slept in the same room. *Id.* During the night, Frank awakened the ten-year-old victim by slipping his hands under her clothing and touching her vagina. *Id.*

As he removed her clothing, Frank put his hand over her mouth and told her to be quiet or she'd get into trouble. *Id.* He then raped her – inserting his penis into her vagina. *Id.* During the rape, Frank took photos of the act on his flip-style phone. *Id.* Frank then forced the victim to perform oral sex on him, and during the act, he took more pictures of her. *Id.*

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The next morning, Frank told the victim that he would be driving her home. CP 322. While driving her home, Frank pulled off the road and told the victim to take off her pants and underwear. *Id.* He then posed her in sexual positions to provide clear pictures of her exposed vagina, and he took more pictures of her genitalia. *Id.*

The investigation that ensued led to discovery that “Frank” was in fact Frank Wallmuller, the defendant-appellant. *Id.* Prior to discovery of this crime, Wallmuller had been arrested and convicted of similar crimes against another child, who happened to live in the house where Wallmuller first assaulted the victim in the instant case. *Id.* As a result of the investigation that led to Wallmuller’s prior conviction, officers already had Wallmuller’s cell phone in evidence, and on the phone there were pictures of sex acts committed against unidentified children, which included pictures of the victim as described by the victim in the instant case. *Id.*

b) Procedural facts and history.

Based on these facts, the State charged Wallmuller with one count of rape of a child in the first degree and one count of sexual exploitation of a minor. CP 318-19. On June 3, 2014, Wallmuller pled guilty to these

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charges. CP 307-16. More than one year later, on June 30, 2015, Wallmuller moved to withdraw his guilty plea. CP 286-87. On July 27, 2015, the trial court denied Wallmuller's motion to withdraw his guilty plea. CP 266; RP 1-16 (No. 48034-4-II).<sup>1</sup> On August 21, 2015, Wallmuller filed a notice of appeal, specifying that he was appealing the trial courts denial of his motion to withdraw his guilty appeal. CP 263-64. This Court issued a perfection letter on September 17, 2015, giving this appeal the case number of 48034-4-II. CP 801. On November 9, 2015, this Court issued a second perfection letter, setting new dates. CP 230-31.

Wallmuller has filed other appeals in this case, but these other appeals are not at issue in the instant case and are not addressed in the facts or the State's argument below.

D. ARGUMENT

1. Wallmuller contends that his guilty plea in this case was involuntary and that he, therefore, must be permitted to withdraw his guilty plea. But the record shows that the trial court judge engaged in a thorough colloquy with Wallmuller prior to accepting his guilty plea and that the judge

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<sup>1</sup> There are two verbatim reports designated in this appeal. One of the reports was transcribed specifically for this case, and the appeal number for this case, 48034-4-II, appears on the coversheet. The other transcript was prepared for a separate, earlier appeal of this case; therefore appeal number 46460-8-II appears on the cover page of this transcript. The transcript of appeal number 46460-8 was transferred to this case by this Court's order dated March 25, 2016. To distinguish between the two transcripts, the State will cite the corresponding appeal number in parenthesis after each citation to the verbatim reports.

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painstakingly verified that Wallmuller entered his guilty plea knowingly, voluntarily, unequivocally, and intelligently. Therefore, the validity and finality of Wallmuller's guilty plea should be sustained by this Court on appeal.

- a) Standard of review for Wallmuller's claim that his guilty plea was involuntary.

Appellate review of the validity of a guilty plea is de novo. *Young v. Konz*, 91 Wn.2d 532, 536, 588 P.2d 1360 (1979).

- b) Background facts relevant to Wallmuller's claim that his guilty plea was involuntary

Wallmuller appeared in the trial court with his counsel on June 3, 2014, and entered a change of plea to guilty. CP 307-16; RP 32-48 (No. 46460-8-II). Prior to submitting the statement of defendant on plea of guilty to the trial court, Wallmuller's attorney addressed the court and explained the change of plea, as follows:

MR. QUILLIAN: Good morning, Your Honor, Robert Quillian, attorney of record for Mr. Wallmuller as of last Tuesday. Your Honor, just by way of a bit of background, as the Court will recall, on the 27th of May Mr. Wallmuller abandoned his pro se status and the Court asked me to assume representation of Mr. Wallmuller, which I did at the time. The matter was set for trial today. As soon as I assumed representation I wrote Mr. Wallmuller a fairly lengthy letter, which actually he has not gotten yet, but I did meet with him in the jail earlier this morning at some length and reviewed that letter with him and discussed his options with him in detail.

He requested a meeting with myself and Mr. Dorcy, and that's why there was a slight delay this morning in getting started.

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Mr. Dorcy graciously agreed to meet with myself and Mr. Wallmuller in the jail and we held that meeting as well to discuss what we're about to do here. I then met with Mr. Dorcy, filled out a form, a Statement of Defendant's Plea of Guilty form, went back down to the jail and reviewed that in detail with Mr. Wallmuller. He has indicated to me that he desires to change his plea to the original Information, which charges one count of rape of child in the first degree and one count of sexual exploitation of a minor.

He and I discussed both - I have discussed with him at length and to my satisfaction, and I believe to Mr. Wallmuller's satisfaction, that decision. He met again with myself and Mr. Dorcy and went over what the State's recommendation would be, which is reflected in this Statement of Defendant on Plea of Guilty. Mr. Wallmuller, myself, and Mr. Dorcy have all signed it and I am asking the Court at this time to proceed with a change of plea hearing with regard to Mr. Wallmuller's case. If I may approach?

RP 32-33. Counsel then passed to the bench Wallmuller's written Statement of Defendant on Plea of Guilty to Sex Offense. RP 33; CP 307-316.

The trial court judge then engaged in a long colloquy with Wallmuller, during which the trial judge painstakingly verified that Wallmuller's guilty pleas were his voluntary, knowing, and intelligent choice and that there was a factual basis for both of the charges to which Wallmuller pled guilty. RP 33-42.

On appeal, Wallmuller contends that his guilty plea was not voluntary. Br. of Appellant at 7. To support this contention, Wallmuller

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isolates from the verbatim report a single exchange with the trial court, *id.*, which appears in the transcript as follows:

THE COURT: The Court has read the arresting agency affidavit. Mr. Wallmuller, are you pleading guilty today by your own choice?

MR. WALLMULLER: Well, yeah, based on the . . .

THE COURT: On the advice of counsel, what you've heard, what you thought about, and you're decided on your own to plead guilty today; is that correct?

MR. WALLMULLER: Yes, Your Honor.

THE COURT: Have there been any other promises that have been made to you to cause you to plead guilty today that were not written down on this plea form?

MR. WALLMULLER: No, Ma'am.

RP 42 (No. 46460-8). Wallmuller contends that this passage from the verbatim report shows that trial court judge cut him off and would not let him answer for himself when the judge asked him whether he was pleading guilty by his own choice. Br. of Appellant at 7.

But in response, the State contends that Wallmuller has not provided sufficient facts to support his contention. The ellipses in the quoted passage, above, show only that Wallmuller trailed off when speaking and that he did not complete his sentence. Wallmuller contends that after cutting him off, the trial court judge then spoke for him. Br. of Appellant at 7. But rather than speaking for Wallmuller, as he contends, the trial court judge was actually asking him a question, which appears in

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the transcript clearly punctuated with a question mark. RP 42 (No. 46460-8). When a speaker actually talks-over or cuts-off another speaker, the transcripts use dashes, rather than ellipses. *See, e.g.*, RP 7, lines 20-25 (No. 48034-4); RP 15, lines 4-11 (No. 48034-4); RP 8, lines 12-22 (No. 46460-8); RP 10, lines 14-24 (No. 46460-8).

Additionally, Wallmuller contends that he had concerns about his attorney's willingness or ability to mount a defense, that his attorney did not conduct an adequate investigation, and that the State possesses a video that would exonerate him. Br. of Appellant at 7-8. But to support these factual assertions Wallmuller cites only to his own uncorroborated allegations that he made to the trial court more than one year after he pled guilty. Br. of Appellant at 7-8; CP 307-16; RP 32-42 (No. 46460-8); RP 6-16 (48034-4).

c) Legal analysis applicable to Wallmuller's claim that his guilty plea was involuntary

When a defendant completes a plea statement and admits to reading, understanding, and signing it, reviewing courts presume the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). Here, Wallmuller's "Statement of Defendant on Plea of Guilty to Sex Offense," signed by Wallmuller on June 3, 2014, contains numerous

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statements in bold print that demonstrate Wallmuller's understanding of the charges to which he was pleading guilty and the rights that he was giving up by entering the plea of guilty. CP 307-316. Wallmuller signed the guilty plea form directly under language stating as follows:

My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge."

CP 315. One of the "above paragraphs" that Wallmuller acknowledged that his attorney had explained to him and had fully discussed with him is paragraph 8, which states: "I make this plea freely and voluntarily." CP 314. Additionally, Wallmuller's attorney also signed the guilty plea statement, directly below the following language: "I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement." CP 315.

Still more, when a trial court verifies the criteria of voluntariness in a colloquy with the defendant, the presumption of voluntariness is "well nigh irrefutable." *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982). Here, the trial court judge engaged in a colloquy with Wallmuller and painstakingly verified the voluntary, knowing, and intelligent nature

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of his guilty plea. RP 33-43 (No. 46460-8). Wallmuller gave clear, unequivocal answers to the judge's questions. *Id.*

"To be voluntary, a plea of guilty must be freely, unequivocally, intelligently and understandingly made in open court by the accused person with full knowledge of his legal and constitutional rights and of the consequences of his act." *Woods v. Rhay*, 68 Wn.2d 601, 605, 414 P.2d 601 (1966). Here, the trial court's exhaustive colloquy with Wallmuller demonstrates that Wallmuller freely and voluntarily entered the guilty plea. RP 33-43 (No. 46460-8).

2. Wallmuller contends that he received ineffective assistance of counsel when pleading guilty in the instant case and that he, therefore, should be permitted to withdraw his guilty plea. But the record does not support Wallmuller's factual contentions and, to the contrary, the record shows that Wallmuller received competent counsel and that he knowingly, voluntarily, intelligently and unequivocally pled guilty. Therefore, this Court should deny Wallmuller's appeal, and the validity and finality of Wallmuller's guilty plea should be sustained on appeal.

a) Standard of review for claim of ineffective assistance of counsel.

A claim of ineffective of assistance of counsel is reviewed de novo on appeal. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

The defendant bears the burden of demonstrating both deficient

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performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

b) Legal analysis of Wallmuller's claim of ineffective assistance of counsel.

“When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record.” *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260, 1266 (2011), citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Wallmuller asserts very few facts in the argument section of his brief in support of his claim of ineffective assistance of counsel, but those that he does assert are unsupported by any citation to the record. Br. of Appellant at 8-14.

First, Wallmuller alleges without citation to the record that “there was no investigation of any possible defense...” Br. of Appellant at 12. Next, he alleges that he “had a potential defense based on the video exonerating him of the charges.” Br. of Appellant at 13. But again, there is no citation to the record to support Wallmuller’s assertion that there is a video, or that he had a defense based on it, or that it was in any way “exonerating[.]” Finally, Wallmuller asserts that his “counsel told him to plead guilty after conducting an ineffective and cursory investigation into the circumstances surrounding the incident.” Br. of Appellant at 13. But

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once more, Wallmuller provides no citation to the record to support this assertion of fact. Accordingly, Wallmuller's assertions of fact do not support his legal arguments. *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011).

To establish ineffective assistance of counsel that resulted in a guilty plea, Wallmuller must show: (1) that counsel's performance was deficient, meaning it fell below an objective standard of reasonableness; and, (2) that he was prejudiced by his counsel's deficient performance. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). Reviewing courts strongly presume effective representation. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). "In a plea bargaining context, 'effective assistance of counsel' merely requires that counsel 'actually and substantially [assist] his client in deciding whether to plead guilty.'" *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (alteration in original) (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901, review denied, 96 Wn.2d 1023 (1981)). The prejudice prong requires a showing that but for counsel's errors, it is reasonably probable that the defendant would not have pleaded guilty and would have insisted on going to trial. *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993); *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203

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(1985). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, Wallmuller has failed to make either showing.

The videos known to exist in this case are the videos on Wallmuller's cell phone, which show him having sex with children, one of whom is the victim in the instant case. CP 321-323. The victim identified Wallmuller as the perpetrator and identified herself as one of the victims portrayed in the videos. RP 322. Wallmuller describes these facts as "exonerating" and claims that he was denied an "opportunity to present his colorable defense" based on this video. Br. of Appellant at 13. But these facts are not exonerating, nor do they present a colorable defense. Still more, Wallmuller has not explained how the facts known to him when seeking to withdraw his plea were different from those known to him when he pled guilty. In summary, Wallmuller has failed to show that his counsel was ineffective and has failed to show that he has suffered prejudice. Therefore, his claim of ineffective assistance of counsel should be denied. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

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3. The trial court denied Wallmuller's motion to withdraw his guilty plea because Wallmuller did not demonstrate that withdrawal of the plea was necessary to prevent a manifest injustice. Wallmuller contends that the trial court abused its discretion because it applied the standard provided by CrR 4.2(f) rather than the standard provided by CrR 7.8. The State contends that the trial court did not err or abuse its discretion, because Wallmuller was required to satisfy both CrR 4.2(f) and CrR 7.8, and that, because Wallmuller did not satisfy CrR 4.2(f), the trial court was not required to engage in a moot consideration of CrR 7.8.

a) Standard of review

A trial court's decision on a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (citing *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 879–80, 123 P.3d 456 (2005)). A trial court abuses its discretion if its decision “is manifestly unreasonable or based upon untenable grounds or reasons....” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.3d 615 (1995).

b) Legal analysis

Wallmuller contends that the trial court applied the wrong legal standard when denying his motion to withdraw his guilty plea because the trial court's basis for its denial was that Wallmuller had not shown that

withdrawal was necessary to prevent a manifest injustice. Br. of Appellant at 14-15. Wallmuller contends that the manifest injustice standard is applicable to CrR 4.2(f) but that, because his motion was a post-judgment motion, the court must analyze his motion under CrR 7.8 rather than CrR 4.2(f). *Id.* To support his contention on this point, Wallmuller cites *State v. Lamb*, 175 Wn.2d 121, 285 P.3d 27 (2012), and also cites footnote 4 of *State v. Robinson*, 172 Wn.2d 783, 791, 263 P.3d 1233 (2011). Br. of Appellant at 14-15.

The State contends that Wallmuller has misapplied the language of *Lamb* to the instant case, because the context of *Lamb* was the opposite of that of the instant case. In *Lamb*, the Court was considering the State's appeal of the trial court's *granting* of the defendant's motion to withdraw his guilty plea, whereas the instant case concerns Wallmuller's appeal of the trial court's *denial* of his motion to withdraw his guilty plea. *Lamb* at 125-26.

The distinction is important because in *Lamb* the trial court based its decision *allowing* withdrawal of the guilty plea only on its finding that withdrawal was necessary because not allowing withdrawal of the plea "would be fundamentally unfair and constitute a manifest injustice." *Id.* at 125. The Supreme Court reversed, reasoning in part that "[w]hile

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correction of a manifest injustice is a sufficient basis to permit withdrawal of a guilty plea under CrR 4.2(f), withdrawal of Lamb's guilty plea *must also meet* the requirements set forth in CrR 7.8 since the motion was made after judgment was entered." *Lamb* at 128 (emphasis added). Thus, under *Lamb* it would be error to *allow* the post-judgment withdrawal of a plea based only on a finding of manifest injustice under CrR 4.2(f), but it would not necessarily be error for the trial court to *deny* a motion to withdraw a guilty plea where, as in the instant case, the defendant has not demonstrated that withdrawal of the plea is necessary in order to prevent a manifest injustice. *Lamb* at 127-29.

*State v. Robinson*, 172 Wn.2d 783, 797 n.4, 263 P.3d 1233 (2011), provides further support for the State's position. The defendant in *Robinson* "moved to withdraw his plea before entry of judgment and thus only needed to satisfy CrR 4.2(f)." *Robinson* at 797, n.4 (citations omitted). But the *Robinson* Court then clarified, that "[i]f Robinson had moved to withdraw his plea after he was sentenced and the judgment was entered, he *would have also had* to satisfy CrR 7.8(b)..." *Robinson* at 797, n.4 (emphasis added)(citations omitted).

Here, the trial court originally sentenced Wallmuller on June 27, 2014. CP 357-73; RP 49-75 (No. 46460-8). Wallmuller filed his motion

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to withdraw his plea on June 30, 2015; thus, his motion was a post-judgment motion. CP 286-87. As a post-judgment motion to withdraw his plea, Wallmuller was required to satisfy both CrR 4.2(f) and CrR 7.8(b). *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012); *State v. Robinson*, 172 Wn.2d 783, 797 n.4, 263 P.3d 1233, 1239 (2011). Under CrR 4.2(f), the trial court “shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” Here, the trial court found that Wallmuller’s guilty plea was “entered knowingly, intelligently and voluntarily” and that Wallmuller “failed to demonstrate that withdrawal is necessary to prevent a manifest injustice.” RP 16 (No. 48034-4); CP 266. “[A] ‘manifest injustice’ is ‘an injustice that is obvious, directly observable, overt, [and] not obscure.’” *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). As argued throughout the State’s brief, Wallmuller has not demonstrated a manifest injustice in the instant case.

Thus, Wallmuller did not satisfy both CrR 4.2(f) and CrR 7.8(b), because the court’s findings show that CrR 4.2(f) is not satisfied. Therefore, even if Wallmuller would have satisfied CrR 7.8, which he didn’t, the trial court nevertheless did not abuse its discretion when it

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based its denial of Wallmuller's motion on his failure to demonstrate that withdrawal of the plea was necessary in order to prevent a manifest injustice. *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012); *State v. Robinson*, 172 Wn.2d 783, 797 n.4, 263 P.3d 1233, 1239 (2011).

However, there are more facts that might not, but arguably might, be important to this Court's decision; so, in the interest of full disclosure, the State provides these facts here, as follows: On July 9, 2014 – before Wallmuller's motion to withdraw his plea, and before the trial court ruled on Wallmuller's motion -- Wallmuller filed a notice of appeal, wherein he challenged the June 27, 2014, judgment and sentence. CP 355-56. This Court provided case number 46460-8 to the appeal and on October 6, 2014, issued a perfection letter. CP 353-54. It was while appeal number 46460-8 was pending that Wallmuller filed his motion to withdraw his plea and the court issued its order denying his motion. CP 286-87; CP 266. Then, about six months after the trial court had denied Wallmuller's motion to withdraw his guilty plea, this Court then issued its mandate in Wallmuller's appeal and remanded the case for resentencing. CP 346-52. On March 8, 2016, the mandated resentencing occurred, and the trial court entered a new judgment and sentence. CP 329-45. On March 16, 2016, Wallmuller appealed the new judgment and sentence. CP 327-28.

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# Errata Page

Finally, on April 5, 2016, Wallmuller filed yet another motion to withdraw his guilty plea. CP 325-26.

This Court's decision in No. 46460-8 remanded for "resentencing" but was silent on the issue of the trial court's *judgment* order. Thus, the State contends that this Court's mandate requiring *resentencing* did not disturb the post-judgment status of Wallmuller's motion to withdraw his guilty plea. Nevertheless, even if one were to argue that (because the case was remanded for resentencing) Wallmuller's motion should be viewed in hindsight as a pre-judgment motion rather than a post-judgment motion, this turn of events would nevertheless not weigh in favor of Wallmuller's position on appeal. This is so because if Wallmuller's motion to withdraw his guilty plea was pre-judgment rather than post-judgment, then it is clear that CrR 7.8 would not apply, and in such circumstances the trial court would be required to consider only CrR 4.2(f). *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012); *State v. Robinson*, 172 Wn.2d 783, 797 n.4, 263 P.3d 1233 (2011).

But, as argued above, irrespective of whether Wallmuller's motion to withdraw his guilty plea was a pre-judgment motion or a post-judgment motion, he was nonetheless required to satisfy both CrR 4.2(f) and CrR 7.8, and thus, the trial court did not err when it denied Wallmuller's

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motion because he had not demonstrated withdrawal was necessary to prevent a manifest injustice. *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012); *State v. Robinson*, 172 Wn.2d 783, 797 n.4, 263 P.3d 1233 (2011); RP 16 (48034-4); CP 266. Still more – even though the State contends that, because the trial court correctly found that Wallmuller had not satisfied CrR 4.2(f), the court was not required to engage in the additional, but moot, effort to analyze the case under CrR 7.8 – the record shows that Wallmuller also could not satisfy the requirements of CrR 7.8.

Under CrR 7.8(b), a court may relieve a party from a final judgment based on mistake, inadvertence, excusable neglect, newly discovered evidence, or the concluding, catchall provision of CrR 7.8(b)(5), which states that relief may be granted for “[a]ny other reason justifying relief from the operation of the judgment.” The record here shows that none of the provisions of CrR 7.8(b) are applicable to Wallmuller’s motion to withdraw his guilty plea, as there has been no mistake, inadvertence, excusable neglect, or newly discovered evidence. And to obtain relief under CrR 7.8(b)(5), Wallmuller must show “extraordinary circumstances” not covered by any other section of CrR 7.8. *State v. Aguirre*, 73 Wn. App. 682, 688, 871 P.2d 616 (1994). Wallmuller has not demonstrated extraordinary circumstances, and the

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record does not support a finding of extraordinary circumstances in this case.

Thus, in conclusion, the trial court did not abuse its discretion by denying Wallmuller's motion to withdraw his guilty plea in this case.

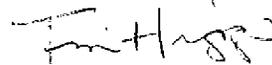
*State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012).

E. CONCLUSION

Wallmuller has not shown that that his counsel provided ineffective assistance to him when he pled guilty, and he has not shown that his plea of guilty was involuntary. Nor has Wallmuller otherwise demonstrated that withdrawal of his plea of guilty is necessary to correct a manifest injustice. Therefore the trial court did not abuse its discretion when it denied Wallmuller's motion to withdraw his plea of guilty. Accordingly, the State contends that this Court should deny Wallmuller's appeal.

DATED: July 7, 2016.

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# MASON COUNTY PROSECUTOR

**July 07, 2016 - 4:43 PM**

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