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Division Two
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CRYSTAL SHARE JACKSON, Appellant.	No. 52353-1-II UNPUBLISHED OPINION

GLASGOW, J.—Crystal Share Jackson appeals the trial court's denial of her motion to withdraw her guilty plea to first degree premeditated murder and second degree manslaughter. Jackson argues that her guilty plea to the first degree premeditated murder charge was involuntary because it lacked a factual basis and she did not understand the relationship between her conduct and the charged crimes. She also contends that she received ineffective assistance of counsel with regard to her plea. Finally, Jackson asks this court to reverse the trial court's denial of her motion to withdraw her plea because the trial court excluded her expert witness from the courtroom during Jackson's testimony at the hearing on that motion.

We affirm. The factual basis in the record at the time of Jackson's guilty plea was sufficient to support a conviction for first degree premeditated murder. The record reflects that Jackson understood how her conduct related to the charges and her plea was not involuntary. Jackson did not receive ineffective assistance of counsel because her trial counsel's performance was not deficient. The trial court did not err by excluding her expert from the courtroom at the plea withdrawal hearing.

Jackson raises additional arguments for reversal in a statement of additional grounds (SAG). We decline to consider these arguments because they rely on evidence outside the record.

FACTS

A. Murder of Jesus Isidor-Mendoza

Jackson lived in Tacoma, Washington, with her four children and her younger teenage brother. She sold marijuana and methamphetamine to lower level dealers through a gang-related drug distribution network that operated in several states. Jackson sold drugs out of her home and stored drugs and money there. Beginning in fall 2014, Jackson rented her detached garage to Darrel Daves, who was a dealer in her drug operation. Daves's friend, Wallace Jackson,[1] frequently came to Jackson's house. Jackson, Daves, and Wallace also used marijuana and methamphetamine together.

Jackson's drug sales routinely netted $7,000 per month, and she kept significant amounts of cash in a safe in her room. In November 2014, the safe was not locked because Jackson had lost the key. On November 17, 2014, Jackson discovered that $5,000 was missing from the safe. Jackson accused Daves and Wallace of taking the money. Daves and Wallace accused a third person, Jesus Isidor-Mendoza, of stealing the money. Isidor-Mendoza was an 18 year old who worked with Daves as a drug dealer. Jackson had met Isidor-Mendoza prior to the day her money went missing, but it is not clear from the record how well she knew him.

On November 18, 2014, Isidor-Mendoza was killed at Jackson's home. The details of the killing are disputed, and the record reflects conflicting statements about what happened to him. The following information was presented in the probable cause declaration, which provided the

[1] Crystal Jackson and Wallace Jackson are not related. We refer to Wallace Jackson by his first name to avoid confusion.

factual basis for Jackson's guilty plea according to her stipulation. The probable cause declaration was based on statements the police obtained from Jackson, Wallace, Daves, Jackson's brother, one of Jackson's daughters, Isidor-Mendoza's mother, and a few other witnesses.

Isidor-Mendoza arrived at Jackson's house and entered the detached garage where Daves and Wallace were. A few minutes later, Jackson, who was in the house, heard loud yelling. She went into the garage and saw Wallace holding Isidor-Mendoza by the hair and having sex with him. Isidor-Mendoza appeared to be in pain. Wallace and Isidor-Mendoza were both naked. Jackson left the garage and went back in the house.

Jackson then heard an outside faucet running. She went back to the garage. She saw that Wallace and Daves had filled a large bucket from the backyard with water and they were forcing Isidor-Mendoza's head into it. Isidor-Mendoza's hands were behind his back, Daves was holding Isidor-Mendoza's legs, and Wallace was holding his head underwater. After a few minutes, Jackson returned to the house.

About 20 or 30 minutes later, Daves entered Jackson's house, where he retrieved "a long machete-type knife that he knew was kept there." Clerk's Papers (CP) at 4. Daves then returned to the garage. Next, Jackson "heard what she believed to be a scraping or scrubbing noise coming from the garage." CP at 4. Jackson returned to the garage and found that Isidor-Mendoza was on his stomach on the garage floor with his hands behind his back. He appeared to be dead. Daves was using the knife to "hack at the back of [his] legs." CP at 4.

Daves and Wallace then went in and out of the house, getting cleaning supplies and garbage bags. Jackson told the police that she left with her kids for a while because she was afraid. She said that when she came back several hours later, Isidor-Mendoza's body was gone and she saw a large, sealed black garbage bag, which she believed contained his body.

The bag remained at Jackson's home for four days, but Jackson and her children started to notice the smell. Jackson said Daves and Wallace told her they needed her help. They put Isidor-Mendoza's body in Jackson's car and drove it to a house where Wallace used to live. Wallace and Jackson threw the bag down a steep hillside behind the house.

Wallace told the police a different story—that Jackson threatened him with a gun and demanded he help her dispose of a body. He said Jackson showed him a garbage bag that he believed contained a decaying human body. Wallace said he helped dispose of the body in a ravine behind a house. Wallace reported that Jackson said nothing about the dead person, except that he had "f[****]d up." CP at 3. Wallace's girlfriend confirmed that Wallace told her he had assisted Jackson with disposing of a body.

Jackson's daughter told the police that she recognized Isidor-Mendoza and that before he was killed, he had been caught stealing something from Jackson's bedroom.

B. Jackson's Plea

In February 2015, Jackson, Wallace, and Daves were charged with first degree premeditated murder under RCW 9A.32.030(1)(a).

Jackson was assigned a court-appointed attorney, Ann Mahony. Mahony prepared the case for trial for a year and a half. Mahony explained to Jackson the charges she was facing, the concept of accomplice liability, the State's evidence, and possible defenses. Even though Mahony knew that Jackson had some mental health issues, Mahony did not have trouble communicating with Jackson, nor did Mahony think that Jackson's mental health issues prevented Jackson from assisting in her own defense. After looking "at every possible defense," Mahony decided the evidence did not support a mental health defense. Verbatim Report of Proceedings (VRP) (July 7, 2017) at 28.

In April 2016, the State offered a plea agreement. Jackson was to plead guilty to first degree premeditated murder and second degree manslaughter, but if she provided "complete and truthful information" to the State, law enforcement, and her attorneys at all times, and if she provided truthful testimony against Wallace and Daves at their trial, the State would dismiss the first degree murder conviction and request that she be sentenced for second degree manslaughter. CP at 661. If she failed to provide complete and truthful information and to testify truthfully at trial, this would constitute a breach of the plea agreement and she would be sentenced for first degree premeditated murder. Jackson could not "hold back any information," and the deputy prosecuting attorney's reasonable belief that she was not being completely truthful pretrial or that she did not testify truthfully would be enough to establish a violation of the plea agreement. CP at 662. Truthfulness at trial would "be determined by considering [Jackson's] testimony in light of her tape-recorded offer of proof." CP at 662.

If sentenced for first degree premeditated murder, Jackson faced a standard range sentence of 240-320 months. If sentenced to second degree manslaughter, the standard range sentence was 21-27 months.

On April 12, 2016, Jackson gave a recorded offer of proof. Jackson provided more information that did not appear in the statement of probable cause, including that she was a drug dealer, she had discovered $5,000 missing from her unlocked safe the day before Isidor-Mendoza was killed, and she had accused Wallace and Daves of stealing the money, who in turn accused Isidor-Mendoza. She continued to maintain that she did not know Isidor-Mendoza personally.

Jackson also claimed that Wallace and Daves fought in her bathroom inside her house and damaged the faucet in her shower while cleaning themselves up after the murder. When asked about a photo of Isidor-Mendoza's dead body on her phone, Jackson said that it was possible that

a third person, Jakeel Mason, had seen the photo on her phone, but she insisted she did not take the photo or show it to him. She said she could not possibly have shown the photo to anyone because Wallace and Daves confiscated her phone during the murder and did not return it to her until after she helped them dispose of the body.

On April 13, 2016, the State filed an amended information charging Jackson with first degree premeditated murder under RCW 9A.32.030(1)(a) and second degree manslaughter under RCW 9A.32.070(1).

Mahony met Jackson in the jail to discuss the plea agreement and go over Jackson's plea statement. Mahony did not recall bringing a copy of either the probable cause declaration or proposed plea agreement with her. But Mahony testified that she went over the probable cause declaration with Jackson during her pre-plea representation.

By the time the State offered a plea bargain, Jackson's attorney had been preparing the case for trial for about a year and a half, met with Jackson regularly to discuss the case, and had been talking to Jackson for months about a possible offer of proof, plea bargaining, and reduced charges. Some of these meetings lasted hours. And each time Mahony brought discovery for Jackson to review, the probable cause declaration was in the discovery notebooks. Mahony testified that prior to the change of plea hearing, she read the plea agreement with Jackson, encouraged her to ask questions about anything she did not understand, and "felt comfortable" that Jackson understood the plea agreement. VRP (Aug. 25, 2017) at 38.

A change of plea hearing occurred the day after the State filed the amended information. Jackson had checked a box on the plea statement indicating that the trial court could review the probable cause statement to establish a factual basis for the plea. At the plea colloquy, the trial court confirmed that Jackson understood that it would review the probable cause declaration, rather

than a statement in her own words, to decide if a factual basis for her plea existed. Jackson agreed. Based on the probable cause declaration, original and amended information, the guilty plea statement, and the proposed plea agreement, the trial court found a factual basis sufficient to support a conviction for first degree premeditated murder or second degree manslaughter.[2]

During the plea colloquy, the trial court asked Jackson if she had gone over the probable cause declaration and her guilty plea statement with her attorney, paragraph by paragraph and line by line. The trial court asked if her attorney had answered her questions, and if the answers were to her satisfaction. Jackson answered yes to all of these questions. The trial court then asked Jackson if she needed more time to talk to her attorney. Jackson said no. The trial court then instructed her to stop the proceedings and talk to her attorney if she had any questions. After the plea colloquy, the trial court accepted Jackson's guilty plea as knowing, intelligent, and voluntary.

C. Wallace's and Daves's Trial

Before Wallace's and Daves's trial, Jackson was interviewed twice more by the defense and the State. Some of the information she disclosed in these interviews contradicted her past statements and she acknowledged she had lied before. Notably, Jackson acknowledged she did know Isidor-Mendoza well; she did not leave the house with her children on the night of the murder, but she did go out to purchase cleaning supplies; she had previously lied about Wallace and Daves fighting in the bathroom and damaging the shower; and Wallace and Daves did not confiscate her phone. The State determined that despite these inconsistencies, it would not withdraw the plea deal so long as Jackson was completely truthful in her trial testimony.

[2] The trial court was aware of Jackson's offer of proof but was not provided with a transcript, nor was the offer of proof described to the court at the time of the plea.

Jackson testified for a full day at the trial against Daves and Wallace. The next day, Jackson, Mahony, the prosecutor, and Daves's and Wallace's attorneys had a private conversation with Jackson to discuss a chronology question. Jackson then acknowledged two additional pieces of information that she had not testified to the day before or offered in prior statements. Jackson said that an additional person, Demetrius "Fresh" Dixon,[3] was present at her house the day before the murder, even though she had not mentioned him when asked in her testimony at trial to describe what happened the day before the murder. Jackson also admitted she had shown a photo of Isidor-Mendoza's dead body to Mason,[4] which was inconsistent with her past statements about the photo on her phone. The photo reportedly showed Isidor-Mendoza's body in a bathtub, raising the possibility that the body was inside Jackson's house at some point.

Based on these new revelations, the State decided the trial testimony Jackson gave was not truthful and it could not use Jackson as a witness. The State moved to strike Jackson's testimony or alternatively for a mistrial. Wallace pleaded guilty to first degree rendering criminal assistance before the trial court decided the State's motion. The trial court then declared a mistrial. The charges against Daves were eventually dismissed.

D. Motions to Enforce the Plea Agreement and Motion to Withdraw the Plea

The State then moved to enforce the plea agreement, arguing Jackson had materially breached the agreement and should be sentenced for first degree premeditated murder. New counsel was appointed for Jackson, and Jackson then moved to enforce the plea agreement in her favor. Jackson argued that no material breach occurred, or in the alternative, that she should be permitted to withdraw her guilty plea. Jackson asserted that there was no factual basis for the plea

[3] Dixon was no longer alive at the time of the trial.
[4] Mason was no longer alive at the time of trial.

to first degree premeditated murder, there was no showing that she understood the plea or its consequences, and she received ineffective assistance of counsel at the plea stage.

The trial court held an evidentiary hearing over the course of one year between June 2017 and June 2018. Jackson presented two experts, Dr. Michael Stanfill and Dr. Natalie Brown, who testified that Jackson had mental health issues, substance abuse issues, fetal alcohol spectrum disorder, and cognitive impairments. The experts also testified that Jackson's IQ was below average, and that she falls in the "mild level of intellectual disability." VRP (May 21, 2018) at 123. Stanfill concluded, however, that Jackson was competent to plead guilty. According to Brown, Jackson could not have understood all the elements of the plea because she did not understand abstract concepts, but Brown did believe Jackson "knew what the charge was and she knew the consequences of the plea." VRP (June 11, 2018) at 326.

Prior to Brown's testimony, the State moved to exclude her from the courtroom while Jackson finished testifying. Jackson objected, arguing that it would enrich Brown's expert opinion to observe Jackson testify live. The trial court ruled that it was appropriate to exclude Brown from the courtroom to ensure that watching Jackson did not bolster Brown's testimony. Brown testified that her inability to witness Jackson's live testimony resulted in "a small deficit" in her opinion testimony that was "superficial" because her opinion primarily reflected the results of psychological testing. VRP (May 21, 2018) at 137.

In August 2018, the trial court denied Jackson's motion to withdraw her guilty plea. In written findings of fact and conclusions of law, the trial court found that Jackson was the "key player" in a "very detailed drug distribution network." CP at 254. The trial court was "persuaded that [Jackson] ha[d] a mild intellectual disability based upon the testing performed by [Stanfill] and [Brown]." CP at 254. Nonetheless, the trial court concluded she successfully conducted a

sophisticated drug dealing business, which required her to keep track of "money owed and money paid in multiple transactions on an ongoing and fluid basis," and Jackson was not "merely following simple instructions" from others. CP at 254-55. Accordingly, the trial court found it was also "not credible" that Jackson was unable to understand the plea agreement's requirements. CP at 255. Further, the trial court found that "[t]he record [was] replete" with instances where Jackson "knowingly lie[d] with intent to deceive," and she admitted to telling self-serving lies. CP at 257. The trial court noted that Jackson appeared to "conform her testimony" to Brown's opinion testimony about her cognitive impairments. CP at 258.

The trial court concluded that Jackson materially breached the plea agreement because there were serious inconsistencies between her pretrial statements and testimony at trial, and she provided new information after her first day of trial testimony that "would wholly undermine the State's case." CP at 254. The court concluded that Jackson was competent to plead guilty and she understood the relationship between her conduct and the charges against her. The trial court also concluded that Mahony provided effective assistance of counsel. The trial court did not separately rule on whether there was a factual basis for the plea, but in the context of finding that counsel's advice to accept the plea deal was supported by the evidence, the trial court concluded that "[g]iven the weight of the evidence against Ms. Jackson, it seems patently clear that at a minimum she would be found guilty of being an accessory to Murder in the First Degree." CP at 266.

The trial court imposed a 320-month sentence for first degree premeditated murder. Jackson appeals the trial court's denial of her motion to withdraw her guilty plea.

ANALYSIS

I. MOTION TO WITHDRAW GUILTY PLEA

A. Background on Withdrawing a Guilty Plea and Standard of Review

Under CrR 4.2(f), a trial court must permit a defendant to withdraw a guilty plea if "withdrawal is necessary to correct a manifest injustice." "A manifest injustice is one that is obvious, directly observable, overt, and not obscure." *State v. Wilson*, 162 Wn. App. 409, 414, 253 P.3d 1143 (2011). Per se manifest injustice exists where "(1) the defendant did not ratify the plea, (2) the plea was not voluntary, (3) the defendant received ineffective assistance of counsel, or (4) the plea agreement was not kept." *Id.* at 414-15. The manifest injustice standard is a high bar, but the "heavy burden [on the defendant] is justified by the greater safeguards [under CrR 4.2] protecting a defendant at the time [they] enter[ed] [their] guilty plea." *Id.* at 414.

Due process requires a court to accept a guilty plea "only upon a showing the accused . . . enter[ed] the plea intelligently and voluntarily." *State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010). If the "defendant complete[d] a plea statement and admit[ted] to reading, understanding, and signing it," we apply a strong presumption that the defendant's guilty plea was voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). If the trial court then "'inquire[d] orally of the defendant and satisfie[d themselves] on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well[-]nigh irrefutable.'" *State v. Knotek*, 136 Wn. App. 412, 428-29, 149 P.3d 676 (2006) (quoting *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982)).

The voluntariness inquiry under CrR 4.2(d) requires the trial court to determine that a factual basis supports the plea and the defendant understands how their conduct satisfied the charged offense. *State v. Codiga*, 162 Wn.2d 912, 923-24, 175 P.3d 1082 (2008). The

voluntariness requirement does not mandate that the trial court "'be convinced beyond a reasonable doubt that [the] defendant is . . . guilty.'" *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 198, 137 P.3d 835 (2006) (quoting *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976)). The court must only find that sufficient evidence from any reliable source in the record at the time of the plea could reasonably support a guilty verdict. *Id*.; *see also Codiga*, 162 Wn.2d at 924. To assess factual basis, the trial court may use the prosecutor's declaration of probable cause if it is part of the record and was adopted by the defendant. *Codiga*, 162 Wn.2d at 924. The trial court may also make reasonable inferences based on the facts and circumstances. *State v. Easterlin*, 159 Wn.2d 203, 210, 149 P.3d 366 (2006).

CrR 4.2(d)'s voluntariness requirement also requires the trial court to determine that the defendant understood "the nature of the charge and the consequences of the plea." This means the "defendant must understand the facts of [their] case in relation to the elements of the crime charged, protecting the defendant from pleading guilty without understanding that [their] conduct falls within the charged crime." *Codiga*, 162 Wn.2d at 924. But the trial court need not "orally question the defendant" to assess understanding and can look to the plea documents. *Id.* at 923 (emphasis omitted).

We review the trial court's findings of fact for substantial evidence and its conclusions of law de novo. *State v. Schwab*, 141 Wn. App. 85, 91, 167 P.3d 1225 (2007). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the finding is true. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). The defendant has the burden of establishing that the trial court's findings of fact supporting the denial were not supported by substantial evidence. *A.N.J.*, 168 Wn.2d at 107. We defer to the trier of fact on matters of credibility. *Bao Sheng Zhao*, 157 Wn.2d at 202.

B. Knowing, Intelligent, and Voluntary Plea

Jackson argues that her guilty plea was not knowing, intelligent, and voluntary because, she says, none of the documents in the record at the time of the April 14, 2016 change of plea hearing established that she "acted with premeditated intent to commit first degree murder," either as "a principal or an accomplice." Br. of Appellant at 32. Jackson also argues that she did not understand how her alleged conduct satisfied the elements of first degree premeditated murder. She argues that her plea was involuntary, thereby establishing per se manifest injustice. We disagree.

1. Factual basis

We review whether the documents in the record at the time of the change of plea hearing contained sufficient evidence, or reasonable inferences that could be drawn from that evidence, such that a trier of fact could convict Jackson of first degree premeditated murder as a principal or accomplice. *Bao Sheng Zhao*, 157 Wn.2d at 198; *Codiga*, 162 Wn.2d at 924; *Easterlin*, 159 Wn.2d at 210.

a. First degree premeditated murder

Under RCW 9A.32.030(1)(a), a defendant may be convicted of first degree premeditated murder if the State proves beyond a reasonable doubt that the defendant acted "[w]ith . . . premeditated intent to cause the death of another person" and "cause[d] the death of [that] person." Under RCW 9A.32.020(1), "premeditation . . . must involve more than a moment in point of time." Premeditation requires "'the deliberate formation of and reflection upon the intent to take a human life' and involves 'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995)). "Premeditation

may be proved by circumstantial evidence" so long as the inferences drawn are reasonable and the evidence supporting premeditation is substantial. *Id.* at 643.

Four nonexclusive factors are "particularly relevant" evidence of premeditation. *Id.* at 644. These factors are "motive, procurement of a weapon, stealth, and the method of killing." *Id.* However, a "wide range" of other facts can also be relevant and can "support an inference of premeditation." *State v. Aguilar*, 176 Wn. App. 264, 273, 308 P.3d 778 (2013). Evidence of a "lengthy and excessive attack" indicates that the defendant had time to deliberate and consider their "actions for the requisite time." *Id.* at 274. And in *State v. Sherrill*, evidence of "multiple attacks over several hours . . . combined with multiple wounds and sustained violence . . . support[ed] an inference of deliberation and reflection." 145 Wn. App. 473, 486, 186 P.3d 1157 (2008). Likewise, in *State v. Notaro*, "procuring a weapon to facilitate the killing . . . and inflicting multiple wounds or shots" was evidence of premeditation. 161 Wn. App. 654, 672, 255 P.3d 774 (2011).

In contrast, in *State v. Hummel*, Division One reversed the defendant's conviction for first degree murder, holding that the evidence of premeditation was insufficient. 196 Wn. App. 329, 359, 383 P.3d 592 (2016). Hummel was accused of killing his wife, who had disappeared. Hummel continued to collect her retirement benefits, but later claimed she had committed suicide. *Id.* at 332-36. On appeal, Division One held, "the State presented no evidence of motive, planning, the circumstances or the method and manner of death, or the deliberate formation of the intent to kill" before the victim's death. *Id.* at 358. The court rejected the State's argument that premeditation could be inferred based on Hummel's conduct after his wife's death. In that case, the court considered "evidence that Hummel disposed of [his wife's] body, concealed her death, and

fraudulently obtained her disability checks after she died" as "evidence of guilt," but the court concluded that these things did "not prove premeditation." *Id.* at 356-57.

b. Accomplice liability

Under RCW 9A.08.020, a person may be guilty of first degree murder under an accomplice liability theory even if their conduct does not actually cause the death of another person. Under RCW 9A.08.020(3)(a)(i)-(ii), an accomplice is a person who "[s]olicits, commands, encourages, or requests [another] person to commit [the crime]" or who "[a]ids or agrees to aid [another] person in planning or committing" the crime, while knowing "that [their conduct] will promote or facilitate the commission of the crime." *See also* WPIC 10.51.[5]

Under RCW 9A.08.020, a person cannot be liable as an accomplice based solely on a "failure . . . to come to the aid of another." *State v. Jackson*, 137 Wn.2d 712, 722, 976 P.2d 1229 (1999). "Accomplice liability requires an overt act." *State v. McCreven*, 170 Wn. App. 444, 477, 284 P.3d 793 (2012). And mere presence is also not sufficient for accomplice liability. *Id*. at 477-78. However, "'[a]id can be accomplished by being present and ready to assist.'" *State v. Truong*, 168 Wn. App. 529, 540, 277 P.3d 74 (2012) (quoting *State v. Collins*, 76 Wn. App. 496, 501-02, 886 P.2d 243 (1995)).

The State is not required to prove "'that the principal and accomplice share[d] the same mental state.'" *State v. Dreewes*, 192 Wn.2d 812, 824-25, 432 P.3d 795 (2019) (internal quotation marks omitted) (quoting *State v. Guloy*, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985)). The State is

[5] The pattern jury instruction defining "accomplice liability" provides: "The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 10.51 (4th ed. 2016).

only required to prove "that the accomplice had general knowledge of [the] coparticipant's substantive crime, not that the accomplice had specific knowledge of the elements of the coparticipant's crime." *Truong*, 168 Wn. App. at 540. A trier of fact may split the elements of a crime between coparticipants so long as at least one participant had the required mental state and one participant, but not necessarily the same one, carried out the criminal act. *Dreewes*, 192 Wn.2d at 824. An accomplice to first degree murder need only know they are "facilitating a homicide." *In re Pers. Restraint of Sarausad*, 109 Wn. App. 824, 836, 39 P.3d 308 (2001). The accomplice "need not have known that the principal had the kind of culpability required for any particular degree of murder." *Id*.

In sum, to conclude that a factual basis supported Jackson's guilty plea to first degree premeditated murder, we must be satisfied that a trier of fact could have reasonably concluded, based on the documents the trial court relied on, that (1) Jackson aided or facilitated the killing; (2) Jackson knew that she was facilitating murder of any degree; (3) one of the participants, but not necessarily Jackson, had premeditated intent to kill Isidor-Mendoza; and (4) one of the participants, but not necessarily Jackson, committed the actual killing of Isidor-Mendoza. *See id.*

c. Whether a factual basis supported Jackson's guilty plea

In assessing whether a factual basis existed at the plea hearing, the trial court relied on the probable cause declaration, the original and amended information, the guilty plea statement, and the proposed plea agreement. Based on these documents, the trial court found a factual basis sufficient to support a conviction for first degree premeditated murder or second degree manslaughter.

We agree with Jackson that no rational trier of fact could have concluded, based on the record at the time of her guilty plea, that she had premeditated intent to kill Isidor-Mendoza as a

principal. The probable cause declaration did not support a reasonable inference that Jackson deliberately formed a plan to kill Isidor-Mendoza and killed him herself. Evidence that Jackson concealed and helped dispose of Isidor-Mendoza's body *after* his death, does not support an inference of premeditation in this case.

We conclude, however, that the evidence was sufficient to support a conviction for first degree premeditated murder as an accomplice. RCW 9A.08.020(2), (3)(a). There is no dispute that Wallace or Daves killed Isidor-Mendoza. And the evidence was sufficient to support an inference that at some point during the attack, Wallace or Daves premeditated Isidor-Mendoza's murder. As in *Aguilar*, *Sherrill*, and *Notaro*, Daves's and Wallace's attack was lengthy and excessive because it involved raping, beating, drowning, and possibly stabbing Isidor-Mendoza. Wallace and Daves had the opportunity to deliberate and reflect on their actions. *See Aguilar*, 176 Wn. App. at 272-274. Wallace and Daves procured means to kill—a bucket filled with water from Jackson's yard and a machete from Jackson's house. *See Pirtle*, 127 Wn.2d at 644. The method of killing was prolonged and violent, involving either drowning due to repeatedly dunking Isidor-Mendoza's head underwater, or a wound inflicted with the machete after the dunking, or both. *See id.* The probable cause declaration also raises a motive—that Isidor-Mendoza had stolen from Jackson.

Moreover, a trier of fact could have inferred from all of the information in the probable cause declaration that Jackson knew Wallace and Daves were preparing to kill Isidor-Mendoza and she aided them. Jackson provided access to the means to kill Isidor-Mendoza and a venue for the killing. She knowingly permitted Daves to obtain a machete from her house and the bucket in which Isidor-Mendoza was likely drowned. *See Jackson*, 137 Wn.2d at 722. A trier of fact could reasonably have concluded that she did not merely fail to act, but was present and ready to render aid, and that she did render aid by providing the supplies and the venue they needed to complete

the murder. Indeed, Mahony testified that she encouraged Jackson to agree to the plea bargain because although the evidence of premeditated murder was thin, the "ready to assist" language in the accomplice liability pattern jury instruction convinced her that going to trial created a real risk that a trier of fact would find Jackson guilty. *See* WPIC 10.51.

A rational trier of fact could also have inferred that Jackson had motive to solicit or at least knowingly promote Isidor-Mendoza's death. This inference is supported by Jackson's daughter's statement that Isidor-Mendoza stole from Jackson and is further reinforced by Wallace's report that Jackson said Isidor-Mendoza had "f***ed up." CP at 3. Moreover, Jackson's actions after Isidor-Mendoza's death—concealing his body and disposing of it—were evidence of guilt even if concealment did not prove premeditation in this case.

The trial court did not err by finding that a factual basis supported Jackson's guilty plea. We hold that Jackson has not demonstrated that her guilty plea was involuntary on the grounds that it lacked a factual basis.

2. Jackson's understanding of the relationship between facts and law

Jackson argues that her plea was not knowing, intelligent, and voluntary because the record did not affirmatively demonstrate that she understood how her actions and mental state constituted a crime. She also asserts that the plea process was rushed and she felt pressured into "acquiesc[ing] to her attorney's advice and then to the trial court's leading questions." Br. of Appellant at 45. We disagree.

Jackson relies on *A.N.J.* and *State v. S.M.*, 100 Wn. App. 401, 996 P.2d 1111 (2000). In *A.N.J.*, the Washington Supreme Court held that a 12-year-old boy accused of first degree child molestation was entitled to withdraw his guilty plea because he did not understand that "mere contact with another [as opposed to contact for sexual gratification] was insufficient to constitute

the crime." 168 Wn.2d at 120. Similarly, in *S.M.*, another case involving a juvenile charged with a sex offense, we held that the defendant's plea statement did not show that he understood the meaning of "sexual intercourse," and his one-word "yes" to the judge's question about whether he knew the meaning of the term failed to establish that S.M. understood the nature of the charges. 100 Wn. App. at 414-15. In both *A.N.J.* and *S.M.*, the defendants received ineffective assistance of counsel and had almost no contact with their respective attorneys before pleading guilty. *A.N.J.*, 168 Wn.2d at 120; *S.M.*, 100 Wn. App. at 411-12.

Here, by the time the State raised the possibility of a plea bargain, Mahony had been preparing the case for trial for about a year and a half, met with Jackson regularly to discuss her case, and had been talking to her for months about a possible offer of proof, plea bargaining, and reduced charges. Some of these meetings lasted hours. Mahony "had at least one conversation about" the probable cause declaration, and brought it with her each time she brought Jackson discovery. VRP (Aug. 25, 2017) at 60. Mahony also recalled that at some point in her months-long representation of Jackson prior to her guilty plea, she went over the elements of the charges in the information and brought "the jury instructions from the book about accomplice liability." VRP (July 7, 2017) at 29.

Jackson's reliance on *A.N.J.* and *S.M.* is unpersuasive. Both of those cases involved a juvenile pleading guilty to a sex offense, where it was unclear that the defendant understood the charges. In contrast to both *A.N.J.* and *S.M.*, Mahony communicated extensively with Jackson about her charges and her plea, and she explained in depth how Jackson's conduct could have exposed her to a guilty verdict for first degree premeditated murder as an accomplice.

Nor did Jackson's experts' testimony conclusively establish that she failed to understand how her conduct related to the charges. Brown testified that Jackson could not have understood all

aspects of her plea because she did not understand abstract concepts. But Brown also opined that Jackson understood the charges against her, the consequences of pleading guilty, and that less time attached to a second degree manslaughter conviction than to a first degree premeditated murder conviction. Jackson's other expert, Stanfill, testified that Jackson was competent to plead guilty, despite a mild intellectual disability. Although Stanfill thought Jackson did not "fully understand the intricacies" of the charges, the facts, and the plea, VRP (Mar. 28, 2018) at 65, he concluded Jackson had "basic . . . floor capacity" and competency to enter a voluntary, constitutionally valid guilty plea, VRP (Mar. 28, 2018) at 16-17.

Here, Jackson affirmed her understanding of the nature of the charges against her on the record. The trial court had no further obligation to orally question Jackson on the degree of her understanding of the nature of the charges. *Codiga*, 162 Wn.2d at 923. The presumption of voluntariness was "well[-]nigh irrefutable." *See Knotek*, 136 Wn. App. at 428-29. The evidence does not show that Jackson failed to understand the nature of the charges and she has not overcome the presumption that her plea was voluntary.

C. Ineffective Assistance of Counsel

Jackson also argues that her trial counsel was ineffective because she failed to investigate whether Jackson had mental health issues or cognitive impairments. Jackson asserts that this is another reason why she should have been allowed to withdraw her plea. We disagree.

1. Ineffective assistance of counsel standards

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Jackson must show that her counsel's performance was deficient and that

deficient performance prejudiced her. *Grier*, 171 Wn.2d at 32. A failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). To establish deficient performance, Jackson would need to show that investigating her mental health would have produced new information that would have been useful to her defense. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004).

Jackson relies on *State v. Fedoruk*, 184 Wn. App. 866, 871, 339 P.3d 233 (2014), where the defendant's history included a traumatic head injury, a diagnosis of schizophrenia, two admissions to a psychiatric hospital, and prescriptions for psychotropic and antipsychotic medications. Fedoruk had also previously been charged with criminal offenses and found not guilty by reason of insanity. *Id.* at 872.

In contrast, the State relies on *In re Pers. Restraint of Elmore*, where the Supreme Court concluded that defense counsel's decision not to have the defendant evaluated by a mental health expert before he pleaded guilty was objectively reasonable. 162 Wn.2d 236, 254, 172 P.3d 335 (2007). The evidence of guilt was overwhelming, Elmore had no plausible defenses, and he "never wavered in his desire to plead guilty." *Id.* Accordingly, defense counsel opted to advise Elmore to plead guilty and then rely on his "remorse and willingness to take responsibility" at the sentencing phase. *Id.* Attempting to "diminish Elmore's culpability through presentation of mental health experts" at a guilt trial would have undermined that reasonable strategy. *Id.*

2. Whether Jackson's trial counsel was ineffective

Jackson argues that her experts' testimony established that her trial counsel's performance was deficient. Brown testified that Mahony failed to ask Jackson "questions that would elicit a clear, accurate understanding of what Ms. Jackson understood in terms of the legal processes that

were going on." VRP (June 11, 2018) at 324. Stanfill testified that Jackson's trial counsel misunderstood the level of Jackson's comprehension.

Expert testimony, however, is not dispositive of whether Mahony's representation was constitutionally deficient. We conduct an objective inquiry into deficient performance that seeks to "eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. We assess counsel's performance "by examining the circumstances *at the time of the act*" and in light of all of the circumstances. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 694, 327 P.3d 660 (2014) (emphasis added), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018); *State v. Weaville*, 162 Wn. App. 801, 823, 256 P.3d 426 (2011). The key question in the objective inquiry is whether there exists some "conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

In *Fedoruk*, the defendant had a preexisting diagnosis of schizophrenia, had previously been found not guilty by reason of insanity, and had been admitted to psychiatric institutions.[6] 184 Wn. App. at 871-72. Jackson did not have such an extensive history of legal trouble arising from mental health issues. Mahony considered every possible defense, including a mental health defense, before deciding that, based on the facts of the case, a mental health defense would not likely be successful if Jackson went to trial. "If reasonable under the circumstances, trial counsel need not investigate lines of defense that [they have] chosen not to employ." *Riofta v. State*, 134 Wn. App. 669, 693, 695, 142 P.3d 193 (2006), *aff'd*, 166 Wn.2d 358, 209 P.3d 467 (2009). Mahony's decision not to pursue a mental health defense before the plea was a conceivably legitimate tactic. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

[6] Fedoruk's lawyers raised his mental health as a defense, but they did so just before trial, and coupled with the trial court's decision not to grant a continuance, this resulted in a finding of ineffective assistance of counsel. *Fedoruk*, 184 Wn. App. at 876-77, 883.

At the plea withdrawal hearing, Mahony testified that, in hindsight, it was possible she should have explored Jackson's mental health issues more. But Mahony also said she and Jackson were able to communicate meaningfully, Jackson appeared to understand what Mahony said to her, and Mahony understood Jackson. Stanfill and Brown also testified that a non-mental health professional may not have detected Jackson's impairments. Stanfill testified that he could not say whether it was more probable than not that Jackson's posttraumatic stress disorder affected her ability to communicate with Mahony. And as in *Elmore*, once the plea had been offered, it was reasonable for Mahoney to recommend that Jackson quickly accept it because it offered the prospect of a ten-fold sentence reduction.

Mahony's performance did not fall below an objective standard of reasonableness when she chose not to investigate Jackson's mental health pre-plea. Because we hold that Mahony's performance was not deficient, we do not consider prejudice. *Hendrickson*, 129 Wn.2d at 78. Jackson is not entitled to withdraw her guilty plea due to ineffective assistance of counsel.

II. EXCLUSION OF DEFENSE EXPERT FROM COURTROOM DURING PLEA WITHDRAWAL HEARING

Jackson argues that the trial court abused its discretion and violated Jackson's Sixth Amendment right to present a defense by excluding Brown from the courtroom during Jackson's testimony at the plea withdrawal hearing. Jackson argues that ER 615 exempts experts from witness exclusion orders when reasonably necessary to a party's case. Jackson contends that ER 615 must be interpreted in light of ER 703, which permits an expert witness to testify to an opinion informed by facts or data "'perceived . . . at . . . the hearing.'" Br. of Appellant at 56 (emphasis omitted) (quoting ER 703). Jackson claims that excluding Brown from the courtroom violated her right to present a complete defense because Brown was not able to testify as effectively and credibly as she would have been had she observed Jackson's live testimony. We disagree.

Defendants have a constitutional right to present a defense in criminal prosecutions. U.S. CONST. amends. V, VI, XIV; WASH. CONST. art. I, §§ 3, 22. Jackson does not provide any authority for the proposition that the constitutional right to present a defense extends to proceedings other than trial, like a hearing on a motion to withdraw a guilty plea. Nor does Jackson present authority to establish that the right protects a defendant's ability to develop evidence, rather than to present evidence.

Moreover, even if the constitutional right to present a defense were to apply, the analysis requires us to evaluate harmlessness and any error was harmless here. *See State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). Brown herself testified that not seeing Jackson's live testimony created only "a small deficit" in her ability to articulate her opinion, because "test results are really what matter in informing any of us what she is capable of in her mind," and Jackson received extensive psychological testing that Brown conducted and reviewed. VRP (May 21, 2018) at 135; VRP (June 11, 2018) at 351. Brown also testified that the information she would have gotten from watching Jackson testify would have been "superficial." VRP (May 21, 2018) at 137. Brown was able to review transcripts of Jackson's past testimony and thoroughly articulated her opinion that Jackson had mental health issues and cognitive impairments that impacted her ability to process complicated information and answer questions. Brown further testified that Jackson was suggestible and likely to acquiesce to authority figures. Thus, Jackson is unable to show prejudice resulting from any error.

Jackson has not shown that a constitutional right to present a defense applies in these circumstances but, even if it did, excluding Brown from the courtroom during Jackson's testimony was harmless.

III. STATEMENT OF ADDITIONAL GROUNDS

Jackson argues that her trial counsel was biased against her. She asserts that Mahony "acted as if she didn't care what happened to" her. SAG at 1. Jackson, who is Black, argues that Mahony made a racially charged comment by asking, "[W]hy do you people always get in [trouble] with the law[?]" SAG at 1. Jackson further asserts that the judge would not let her fire Mahony. Jackson contends that Mahony failed to give her discovery for the first two and a half years of her case, which was "part of the reason [Mahony] made [her] take the [plea]." SAG at 1.

These arguments rely entirely on evidence and facts not in the current record. While Jackson may raise these issues in a personal restraint petition, we decline to consider them in this direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

CONCLUSION

We affirm the trial court's denial of Jackson's motion to withdraw her guilty plea. Jackson's guilty plea was knowing, intelligent, and voluntary, she received effective assistance of counsel, and the trial court did not err by excluding a witness from the courtroom during Jackson's testimony at the plea withdrawal hearing. We decline to consider Jackson's SAG arguments because they rely on evidence outside of the record.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Lee, C.J.

Cruser, J.