IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29258-4-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
CARL EUGENE ADAMS JR.,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Siddoway, J. — In July 2010, Carl Eugene Adams Jr. entered an *Alford*[1] plea of guilty to second degree assault, harassment, unlawful imprisonment, tampering with a witness, and violating a protection order. At his sentencing hearing three weeks later, Mr. Adams disavowed the voluntariness of his pleas and at the hearing's conclusion handed up his notice of appeal. We reject his counsel's argument that Mr. Adams' signed admissions and verbal acknowledgements were insufficient to provide a factual basis for his pleas of guilty, reject subsidiary arguments made by Mr. Adams in a statement of additional grounds, and affirm.

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

FACTS AND PROCEDURAL BACKGROUND

Forty-four-year-old Carl Eugene Adams Jr. and his wife Karen have been married for 28 years and have three children and six grandchildren. On April 6, 2010, their daughter LeAnn[2] called the police to report that her father had assaulted her mother. Officers responding to the call learned from LeAnn and her mother that Mr. Adams had held Mrs. Adams hostage for several hours, displaying a buck knife and threatening to kill her. He finally told Mrs. Adams that she could trade her truck for her life, at which point she signed over title to the truck and he left. Mr. Adams was thereafter arrested and charged with first degree assault, harassment, and unlawful imprisonment, with each charged as a domestic violence offense. A court order entered on April 8 included an order that Mr. Adams have no contact with the State's witnesses or the victim.

Despite the no-contact order, Mr. Adams told his wife in telephone calls made from the county jail, to refuse to cooperate with law enforcement and to write letters to the judge and the prosecutor's office asking that the charges be dropped. As a result of those conversations, which were recorded and monitored with notice to the parties, the State amended its information to charge Mr. Adams with violation of a no-contact order and witness tampering. It later amended the information to charge use of a deadly

[2] We refer to LeAnn by her first name, in order to avoid confusion with Karen Adams, whom we refer to as Mrs. Adams. We intend no disrespect.

weapon in the crimes committed on April 6.

Prior to the scheduled trial, the State moved the court to allow use of (1) audiotapes of the calls in which Mr. Adams encouraged his wife not to cooperate or testify and (2) the recorded statement provided by Mrs. Adams shortly following the assault, when she was cooperating with detectives and domestic violence counselors. At that time, she reported a number of violent threats and acts of intimidation and violence on the part of Mr. Adams and expressed concern that Mr. Adams would kill her, as he had threatened to do in the past. The State argued that use of Mrs. Adams' recorded statement was necessary because she was no longer cooperative. She had written several letters to judges of the superior court objecting to the no-contact order, attributing the altercation on April 6 to the couple's use of methamphetamine, and asking for leniency for her husband; she was now threatening not to appear at trial or to sit mute on the witness stand. The State argued that Mr. Adams had forfeited his right to confront Mrs. Adams' statement by procuring her unavailability as a witness.

On July 6, 2010, Mr. Adams entered *Alford* pleas of guilty to reduced charges, with a charge of second degree assault substituted for the charge of assault in the first degree. The prosecutor agreed to recommend the low end of the standard range with credit for time served in exchange for the pleas, resulting in a recommended sentence of 31 months. The court engaged in a colloquy with Mr. Adams in which Mr. Adams

confirmed that he had read through and signed the plea statement; that he had gone over it with his lawyer before signing it; that he understood it and had no questions about it; that he had completed the 11th grade and had no difficulty reading, writing, or understanding English; that he was aware of the ramifications of the plea agreement reviewed with him by the court; and finally, that he was making the pleas freely and voluntarily. Discussion of the factual basis for the pleas consisted of the following:

> THE COURT: Now, it's my understanding that you are entering Alford pleas on all of these counts; is that correct?
> THE DEFENDANT: Yes.
> THE COURT: Has [defense counsel] explained to you what an Alford plea is?
> THE DEFENDANT: Yes, sir.
> THE COURT: Okay. And under paragraph 11 on page 8 of this plea statement, you indicate that you are entering an Alford plea, the various elements that make up these crimes are listed there, and you say in your statement there that in order to take advantage of the plea agreement and the recommendation that the State is willing to make concerning sentencing, you are willing to enter this plea, even though you do not believe you are guilty of any or all of these charges, but you acknowledge that the State may have sufficient evidence to prove the various facts that would support all of the elements of these charges; is that correct?
> THE DEFENDANT: Yeah.
> THE COURT: Would you raise your right hand, please?
> (Defendant complied.)
> Do you swear the information contained in your statement on plea of guilty is true, so help you God?
> THE DEFENDANT: I do.

Report of Proceedings (RP) at 9-10. The written plea agreement included an acknowledgment by Mr. Adams of the ultimate facts the prosecutor was prepared to

prove against him. Clerk's Papers (CP) at 35-36. No further offer of evidence was made by the prosecutor nor does it appear from the transcript of the proceedings or the clerk's papers that the court reviewed the probable cause affidavit or police reports during the hearing. The trial court accepted the pleas, finding that they were knowingly, intelligently, and voluntarily made and that there was a factual basis for them.

When invited to speak at his sentencing hearing conducted approximately three weeks later, Mr. Adams stated, in part:

> On July 6 I was brought in front of you about 5 p.m. to enter a plea on a plea bargain. I really had no idea what I was pleading to. [Defense counsel] seen me that day. She seemed like she had a bad attitude and told me that if I didn't take the 31 months, that I would face 9 and a half years in prison over this if I took it to trial because they would tear my wife and my daughter down.
>
> Your Honor, I didn't really read any of that stuff mentioned to me that day because I was emotionally distraught. I called the next day, [defense counsel's] office, and I asked for paperwork so I would know what I was really getting into. It took 9 days for me to get this plea offer. Some stuff is wrote in like the deadly weapon enhancement and some stuff is scribbled out like the State would also recommend that the protection order be lifted if I plead to this plea bargain.
>
> Is that proper court proceedings to do this kind of stuff? Your Honor, I am not a criminal. I am a productive member of our society. And I have been. I haven't been in any trouble in over 18 years. I have no violent crime and never have I ever had a domestic violence crime with my wife.
>
> So I'm asking the Court to consider all this and not sentence me to prison or a strike. And please, lift the protection order so I can visit my wife and my daughter.

RP at 14-15. When the prosecutor responded, she contested Mr. Adams' claimed

misunderstanding, characterized him as manipulative, and noted that Mr. Adams "was looking at a significant amount of time, close to 22 years, I believe, with enhancements with the assault first had we proceeded to trial and prevailed" and that "[t]he writing was on the wall with this case, with the evidence as the State would have presented at trial." RP at 17, 19-20. After hearing from Mr. Adams' family and friends, all requesting leniency for him, the court followed the plea agreement and imposed a 31-month sentence. He acceded to the request of members of Mr. Adams' family that he abate the no-contact order strongly favored by the State.

The court commented with respect to Mr. Adams' objection to his pleas:

> Now, I know in both your statement and the other statements that were given that there was some criticism of [defense counsel]. I did not see that criticism in her handling of this case. I think the plea that we took in this particular case is a valid plea. I think it was – There's no error in the taking of that plea. But you do have other avenues to explore that if for some reason you think that there's a valid reason to do that.
>
> My experience is that just because cases don't come out in the way that people think they should come out in all cases that does not necessarily mean that the Court has erred or the attorneys involved have erred. But there certainly is that feeling.
>
> I just have been handed up to me a notice of appeal that [defense counsel] is filing on your behalf and you certainly are entitled to do that, I guess. Since you entered a plea of guilty the test by the Court of Appeals is different in determining if there has been any error that has been made concerning that.

RP at 39-40. Mr. Adams appeals the sentence on the basis that the trial court failed to establish the existence of a factual basis for the guilty pleas.

ANALYSIS

In *Alford*, the Supreme Court addressed whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt. 400 U.S. at 33. It held that when such a plea is accompanied by evidence against the defendant that substantially negates his claimed innocence and further provides a means by which the judge can test whether the plea is being intelligently entered, the validity of the plea "cannot be seriously questioned." *Id*. at 38. The court added:

> Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.

Id. at 38 n.10 (citations omitted). It noted that in the federal courts, this requirement is expressly addressed by rule 11 of the Federal Rules of Criminal Procedure. *Id.*

In our trial courts, the requirements are addressed by procedures provided in CrR 4.2. CrR 4.2(d) provides that the court shall not accept a plea 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 (matters not contested by Mr. Adams' counsel)[3] and that the court shall not enter a judgment upon a plea of guilty

[3] Mr. Adams' counsel acknowledges that the trial court "conducted an extensive

"unless it is satisfied that there is a factual basis for the plea." The factual basis required by CrR 4.2(d) must be developed on the record at the time the plea is taken. *State v. Osborne*, 102 Wn.2d 87, 95, 684 P.2d 683 (1984) (citing *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 210, 622 P.2d 360 (1980)). Any reliable source may be used, so long as the material relied upon by the trial court is made a part of the record. *Id*. (citing *Keene*, 95 Wn.2d at 210 n.2).

CrR 4.2(f) provides that the court shall allow a defendant to withdraw his plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. A manifest injustice is an injustice that is "obvious, directly observable, overt, not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Involuntariness of a guilty plea is a constitutional error that a defendant can raise for the first time on appeal. *State v. Knotek*, 136 Wn. App. 412, 422-23, 149 P.3d 676 (2006), *review denied*, 161 Wn.2d 1013 (2007).

CrR 4.2(g) provides that a written statement of the defendant in substantially the form provided by that rule shall be filed on a plea of guilty. Such a statement was completed and filed in connection with Mr. Adams' pleas and Mr. Adams acknowledged being provided with a copy. CP at 36. When a defendant fills out a written statement on

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colloquy at the time Mr. Adams entered his *Alford* plea." Br. of Appellant at 6. His sole challenge to the pleas is the alleged absence of an independent factual basis.

plea of guilty in compliance with CrR 4.2(g) and acknowledges that he has read it and understands it and that its contents are true, the written statement is prima facie verification of the plea's voluntariness. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). When the court goes on to inquire orally of the defendant and satisfies itself on the record of the existence of various criteria for voluntariness, the presumption of voluntariness is "well nigh irrefutable." *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

Mr. Adams signed paragraph 11 of the plea agreement, the completed portion of which states:

> 11. The judge has asked me to state what I did in my own words that make me guilty of this crime. This is my statement
>
> **I, [sic] choose to enter an Alford Plea of Guilty to the charges as set forth in this document knowing that if a judge or jury were to hear the charges at trial I am likely to be found guilty. In order to take advantage of the plea bargain offered by the prosecutor in this case, I wish to enter an Alford Plea of Guilty. In so doing I acknowledge the facts the prosecutor is prepared to offer against me.**
>
> **COUNT 1:** I, CARL EUGENE ADAMS JR., in the County of Walla Walla, State of Washington, on or about the 6th day of April, 2010, intentionally assaulted KAREN ADAMS with deadly weapon;
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> **COUNT 2:** I, CARL EUGENE ADAMS JR., in the County of Walla Walla, State of Washington, on or about the 6th day of April, 2010, knowingly and without lawful authority, did threaten to kill another, KAREN ADAMS, a family member;

> **COUNT 3:** I, CARL EUGENE ADAMS JR., in the County of Walla Walla, State of Washington, on or about the 6th day of April, 2010, did restrain KAREN ADAMS, a family member with deadly weapon;
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> **COUNT 4:** I, CARL EUGENE ADAMS JR., in the County of Walla Walla, State of Washington, between the 7th day of April, 2010, and the 16th day of April, 2010, did attempt to induce KAREN ADAMS, a family member, to testify falsely, and to unlawfully withhold testimony;
>
> **COUNT 5:** I, CARL EUGENE ADAMS JR., in the County of Walla Walla, State of Washington, between the 7th day of April, 2010, and the 16th day of April, 2010, did violate the restraining order.

CP at 35. Because this section of the form setting forth Mr. Adams' statement was completed, a succeeding paragraph, which can be marked to direct the court to other materials when the defendant does not make a statement, was left unmarked.[4]

Mr. Adams relies for the inadequacy of a factual basis for the pleas on the facts that (1) the trial court did not ask the prosecutor to provide a factual basis; (2) the probable cause affidavit, if considered by the trial court (and there is nothing in the transcript stating that it was), did not contain facts supporting the fourth and fifth charges added by amended complaint or any substantial bodily harm required for the reduced

[4] That paragraph states, "[ ] Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea." CP at 35 (alteration in original).

charge of second degree assault; and (3) there was no other colloquy establishing the factual basis. Br. of Appellant at 2-3. He asserts that his own statement does not contain any factual statements but merely recites an acknowledgement of "'the facts the prosecutor is prepared to offer against me.'" *Id.* at 3. We disagree. As pointed out by the State, Mr. Adams' written statement, although contained in a plea agreement that is denominated an *Alford* plea, contains, in substance, a signed, sworn admission to having committed the essential elements of each of the charged crimes. He acknowledges the facts the prosecutor is prepared to offer against him, and more: he admits intentionally assaulting his wife, threatening to kill her, restraining her, attempting to induce her to testify falsely and to unlawfully withhold testimony, violating the restraining order, and that his victim was a family member. CP at 35-36. These facts meet the essential elements of the crimes with which Mr. Adams was charged. *See* RCW 9A.36.021(1)(c) (assault in the second degree, with a deadly weapon); RCW 9A.46.020(1)(a)(i), (2)(b)(ii) (harassment by threats of bodily injury, immediately or in the future; including threats to kill); RCW 9A.40.040(1) (knowingly restraining as unlawful imprisonment); RCW 9A.72.120(1)(a) (attempting to induce a witness to withhold testimony); RCW 26.50.110(1)(a) (violation of order for protection); and RCW 10.99.020(5) (domestic violence offenses).

Both *Keene* and *Osborne* support the adequacy of Mr. Adams' written statement

and the court's colloquy. In *Keene*, the defendant's statement pleading guilty to forgery admitted to essential elements of two of the counts charged, although his admissions provided an insufficient factual basis for the third. The court held that with respect to the two counts for which the defendant's admissions were sufficient, the defendant's written statement provided a sufficient factual basis for the court to accept the plea, notwithstanding an equivocal statement made by the defendant during the hearing. 95 Wn.2d at 212. In *Osborne*, the trial court accepted the defendants' pleas during a hearing in which there was no explicit discussion of their factual basis although there was a thorough colloquy addressing the defendants' understanding of the charges and the voluntariness of the pleas, during the course of which there were references to the substance of the facts alleged and an acknowledgement by the defendants that they had thoroughly reviewed the evidence. The court held that matters discussed in the hearing sufficed to "incorporate" the prosecutor's earlier-filed affidavit in support of filing charges, even if the prosecutor's affidavit was not made an express part of the record in accepting the pleas. 102 Wn.2d at 96. Here, too, the elements from the amended information were set forth in full in the statement of defendant and Mr. Adams "acknowledge[d] the facts the prosecutor is prepared to offer against me." CP at 35. While the discussion of the underlying evidence was more limited in this case than in *Osborne*, Mr. Adams also read, signed, and acknowledged explicit admissions to the

essential elements of each crime charged.

There was a sufficient factual basis under CrR 4.2(d) for accepting Mr. Adams' guilty pleas.

STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds, Mr. Adams contends that (1) he was wrongfully charged with second degree assault because he did not cut, slice, or stab his wife at any time and (2) he did not understand what he was pleading to and the only reason he went along with an *Alford* plea was because his attorney presented the threat of a substantial sentence if he refused to plead. Because he did plead, we consider his arguments only to the extent that they might bear on the validity of his pleas.

As already addressed, there was a sufficient factual basis for Mr. Adams' plea to the charge of second degree assault with a deadly weapon. Assault in the second degree occurs where a person, under circumstances not amounting to assault in the first degree, assaults another with a deadly weapon. RCW 9A.36.021(1)(c). Common law assault includes putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). The State was not required to present evidence that Mr. Adams cut, sliced, or stabbed his wife.

In his statement on plea of guilty, Mr. Adams represented that no one had

threatened harm of any kind to cause him to make the pleas and that he understood all of the provisions of his pleas. CP at 35-36. In his colloquy with the court, he unequivocally reaffirmed these representations. RP at 2, 9. It is not clear that his lawyer's discussion of the sentence he faced if convicted at trial is fairly characterized as a "threat" at all; even if we accept his characterization, his bare allegation that his lawyer "kept threatening me with 9.5 years[,] 18 years[,] 20 something years" and that he was "misinformed" do not meet the demanding burden he bears to establish "manifest injustice" warranting withdrawal of his pleas under CrR 4.2(f). Statement of Additional Grounds for Review; *see Osborne*, 102 Wn.2d at 97 (citing *Taylor*, 83 Wn.2d at 596-97).

We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.