IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PATRICK ARTHUR PICCOLO, Appellant.	No. 36312-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Patrick Piccolo moved to withdraw his *Alford*[1] plea to one count of first degree murder and one count of second degree murder on the ground that he was incompetent at the time he entered it. The trial court ordered a competency evaluation and, after hearing three days of testimony, concluded that Piccolo was competent at the time he entered his guilty plea and could not withdraw it. Piccolo appeals, arguing that (1) the trial court had no authority to order a competency evaluation, (2) the trial court failed to conduct a mandatory competency hearing or to follow the proper procedures for a competency hearing, and (3) he is entitled to withdraw his plea because the trial court did not explain his self-defense claim during his plea colloquy. He also argues ineffective assistance of counsel regarding these three aspects of

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

the proceedings. We affirm.

FACTS

The State charged Piccolo with two counts of first degree aggravated murder with firearm enhancements and one count of second degree arson. In its probable cause declaration, the State alleged that on August 3, 2005, Piccolo gave a ride to his wife, Janine Piccolo, and Kenneth DeBord[2] after DeBord was released from the Pierce County Jail. Piccolo later told police that he had shot and killed his wife and DeBord inside his pickup truck, giving varying accounts of why and how he did this, and that he had dumped their bodies in the Columbia River. One of Piccolo's family members admitted to police that he had burned the pickup truck at Piccolo's request.

In an omnibus report, Piccolo's defense counsel notified the trial court and the prosecutor that he planned to raise a self-defense claim if the case proceeded to trial. Piccolo entered an *Alford* plea in exchange for the State's reducing the charges to second degree murder (count I) and first degree murder (count II) with no firearm enhancements. Piccolo agreed that the trial court could review the probable cause statement to establish a factual basis for the plea.

The trial court accepted Piccolo's plea and set the sentencing hearing for September 11, 2006. But three days before he was to be sentenced by a different judge, Piccolo "formally request[ed] that the sentencing be continued and then [new defense counsel] be allowed to associate . . . for the limited purpose of litigating the motion to withdraw the plea." Report of Proceedings (RP) (Sept. 8, 2006) at 1. Associating defense counsel supported the motion to continue sentencing and allowing him to associate with a declaration setting out some of the

[2] Piccolo had recently become aware that his wife and DeBord were romantically involved.

factual background.[3] According to defense counsel's statements on the record, the declaration stated "that there may be a legitimate basis to withdraw the plea." RP (Sept. 8, 2006) at 11.

But when the State asked the defense to state the grounds for a motion to withdraw Piccolo's plea, the associating defense counsel indicated that he expected that the motion would be based on Piccolo's competency at the time he entered the plea. The associating defense counsel stated, "I haven't thoroughly evaluated the record of the transcript of the plea, but I don't foresee any additional basis at this point, but I don't want to be precluded from arguing one if I find one that's salient." RP (Sept. 8, 2006) at 5. The prosecutor acknowledged that the law required the defendant to be competent at the time he enters a guilty plea and stated, "If we're dealing with competency, then I think we need to send the defendant out to Western State Hospital to start [the competency evaluation]." RP (Sept. 8, 2006) at 7-8. Associating defense counsel objected on the ground that an evaluation was premature because he had not filed a formal motion to withdraw his guilty plea.

The trial court granted Piccolo's motion to allow associate counsel, continued the case for 30 days, and ordered a competency evaluation by Western State Hospital. The trial court also indicated that the original judge who had accepted Piccolo's guilty plea would decide any motion to withdraw that plea and both defense counsel agreed because that judge "was the one in the best position to evaluate [Piccolo] at the time of the plea." RP (Sept. 8, 2006) at 4.

The Western State Hospital doctors evaluated Piccolo and concluded that he had been competent at the time he entered his plea. A defense expert evaluated Piccolo and detailed some

[3] This declaration is referenced in the trial court transcript but not included in the record on appeal.

facts that might lead one to believe he was incompetent, although the expert concluded that he had insufficient facts to determine whether Piccolo was incompetent at the time he entered his *Alford* plea.

The original plea judge held a three-day hearing on the issue of Piccolo's competence at the time he entered his guilty plea. After reviewing all the evidence and recounting personal observations from the original plea colloquy, the trial court found that Piccolo was competent when he entered his plea and denied his motion to withdraw his plea. The trial court sentenced Piccolo to 123 months incarceration on count I and 240 months incarceration on count II, to run consecutively.

Piccolo appeals.

ANALYSIS

Competency Evaluation

Piccolo first argues that the trial court erred when it ordered a competency evaluation and that he received ineffective assistance of counsel regarding this evaluation. We disagree.

When the trial court signed the order for a competency evaluation, Piccolo had requested that his sentencing hearing be continued and that he be allowed to associate additional counsel "for the limited purpose of litigating the motion to withdraw the plea." RP (Sept. 8, 2006) at 1. When asked the basis for the withdrawal motion, associating counsel stated, "[W]ithout getting into detail, violating any privileges, I expect that the motion will be based on [Piccolo's] competency at the time the plea was entered." RP (Sept. 8, 2006) at 5. Associating counsel then qualified this statement saying, "I haven't thoroughly evaluated the record of the transcript of the plea, but I don't foresee any additional basis at this point, but I don't want to be precluded from

arguing one if I find one that's salient." RP (Sept. 8, 2006) at 5. Although Piccolo left open the possibility that he might argue additional grounds for withdrawal of the plea, he did not express any doubt regarding the incompetency grounds until the State requested that the trial court enter a competency evaluation order.

We review the trial court's decision about whether to order a competency evaluation for abuse of discretion. *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). A court abuses its discretion if its decision is "'manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

A competency hearing is required when there is reason to doubt a defendant's competency. RCW 10.77.060(1)(a). "'A reason to doubt' is not definitive, but vests a large measure of discretion in the trial judge." *City of Seattle v. Gordon*, 39 Wn. App. 437, 441, 693 P.2d 741, *review denied*, 103 Wn.2d 1031 (1985). If the trial court determines that there is reason to doubt the defendant's fitness, the court must hold a competency hearing in accordance with statutory procedures. *Lord*, 117 Wn.2d at 901 (citing *Gordon*, 39 Wn. App. at 441). But here, the issue differs.

The issue before the trial court was not whether there was reason to doubt Piccolo's competency to proceed to sentencing. Piccolo was not contending that he was presently incompetent. Rather, he was indicating that he would be filing a motion to withdraw his guilty plea because, according to his new defense counsel's statements to the court and reference to the declaration supporting the motion for continuance, there was reason to believe that Piccolo was

not competent at the time he entered the plea and that the sentencing should be continued to allow investigation into Piccolo's competency at that earlier time. Thus, a competency evaluation became mandatory[4] when Piccolo moved to withdraw his plea on the basis of his alleged prior incompetency. *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001) (citing *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001)); *Lord*, 117 Wn.2d at 900-01.

Defense counsel had also stated that he was requesting a 30-day continuance because he anticipated that he would order a private competency evaluation and, if the matter proceeded to sentencing and Piccolo was transported to the Department of Corrections, his access to his client would be much more difficult. Under these facts, we conclude that the trial court did not abuse its discretion when it ordered a competency evaluation.[5]

Piccolo also argues that his counsel's assistance was ineffective for failing to move for a continuance to research whether the trial court should grant the State's motion to order a competency evaluation. But Piccolo's counsel objected to entry of the evaluation order on numerous grounds. To demonstrate ineffective assistance of counsel, Piccolo must show that (1) his counsel's performance was deficient and (2) this deficient performance prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective.

---

[4] Accordingly, any error in prematurely ordering the competency evaluation is moot. *See State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (case is not moot when reviewing court can provide no effective relief).

[5] Piccolo also makes much of the fact that the written order states there "may" be reason to doubt his competency, rather than saying there "is" reason for doubt. Clerk's Papers (CP) at 35. In this context the distinction is purely semantic and has no bearing on our analysis.

McFarland, 127 Wn.2d at 335. Here, the record does not support Piccolo's claim that his counsel was ineffective.

Competency Hearing Procedures

Piccolo next argues that the trial court did not follow the mandatory statutory procedures for a competency hearing because it (1) did not hold a competency hearing; (2) did not require two expert reports, rather than one report encompassing two experts' opinions; (3) failed to enter written findings of fact and conclusions of law regarding competency; and (4) applied the incorrect burden of proof to its competency determination. Piccolo also argues that his trial counsel's assistance was ineffective in his handling of these matters. We disagree.

A. Hearing

Piccolo argues that the trial court did not hold a competency hearing. But the trial court held a three-day hearing on Piccolo's motion to withdraw his guilty plea and his competency at that time. The sole issue at the plea withdrawal hearing was not Piccolo's current competency but whether he was competent at the time he entered his plea. In making this determination, the judge who had accepted Piccolo's plea heard expert and lay testimony and considered documentary evidence from both parties. That trial court considered three expert opinions, two concluding that Piccolo was competent, and Piccolo's expert stated that he lacked sufficient basis to render an opinion. Piccolo does not clarify why this hearing was inadequate. Piccolo was not challenging his current competency and we see no basis for requiring a second hearing when there was no basis on which to question Piccolo's competence on the date he entered his guilty plea. *See* RCW 10.77.060; CrR 4.2(c).

Piccolo relies on *Marshall*, in which our Supreme Court held that a trial court must hold a

statutory competency hearing if the defendant moves to withdraw his guilty plea on the basis of competence and *evidence supports the conclusion that there is reason to doubt competence*. 144 Wn.2d at 281. *Marshall* is distinguishable. Although in *Marshall*, the trial court heard expert testimony on the competence issue, it did not comply with RCW 10.77.060 requirements to order at least two *court-appointed* experts to examine the defendant and prepare a report on his mental condition. 144 Wn.2d at 278. The trial court denied Marshall's motion to withdraw based largely on its own observations rather than on a statutory competency report or expert testimony, which, contrary to the circumstances here, strongly called into question Marshall's competency at the time he entered his plea. *Marshall*, 144 Wn.2d at 280.

Although the Supreme Court held that the trial court erred when it found Marshall competent without the benefit of a "statutory competency hearing," a more accurate reading of the *Marshall* rationale is that the trial court erred when it found Marshall competent without ordering the statutory competency evaluation. 144 Wn.2d at 280. The trial court obviously held a hearing on the issue of competency in *Marshall*; it erred not because it failed to follow the form of the hearing, but because it did not follow the mandatory procedures in RCW 10.77.060, which required the trial court to order a competency report and elicit two *court-appointed* expert opinions.

Here, after ordering that Piccolo undergo the statutory competency evaluation, the trial court held a three-day hearing on Piccolo's competency at the time he entered his guilty plea. At issue in this case, therefore, is whether that hearing complied with the procedural requirements for such hearings. We examine Piccolo's arguments about these requirements in turn.

B. Expert Report

Piccolo argues that the trial court's decision to allow two court-appointed experts to file a joint report, rather than two separate reports, violated RCW 10.77.060. That statute provides in pertinent part:

> (1)(a) Whenever . . . there is reason to doubt [the defendant's] competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons . . . to examine and report upon the mental condition of the defendant. . . . Upon agreement of the parties, the court may designate one expert or professional person to conduct the examination and report on the mental condition of the defendant. . . .
>
> . . . .
>
> (3) The report of the examination shall include the following.

RCW 10.77.060. The legislature also provided that "[t]he facility conducting the evaluation shall provide its report and recommendation to the court in which the criminal proceeding is pending." Former RCW 10.77.065(1)(a)(i) (2000).

The statutes clearly allow a single report. RCW 10.77.060 provides that at least two qualified experts shall examine and "report upon" the defendant's mental condition but does not specify that two reports are required. The specific language in the statutes both use singular language to refer to "[t]he report" and "[the facility's] report and recommendation." RCW 10.77.060(3); former RCW 10.77.065(1)(a)(i). In other words there must be two evaluators, but they may file a single report.

Here, two experts at Western State Hospital, "Nitin Karnik, M.D., Staff Psychiatrist, and Julie A. Gallagher, Psy.D., Staff Psychologist, comprised the sanity commission." CP at 130. Each expert evaluated Piccolo and Gallagher issued a report that incorporated both of their findings. This is sufficient to satisfy the statutory requirement.

C. Written Findings of Fact and Conclusions of Law

Piccolo also argues that the trial court failed to enter written findings of fact and conclusions of law following the competency hearing. Piccolo is correct. But the trial court entered a detailed oral ruling that is sufficient to permit appellate review. *See State v. Dahl*, 139 Wn.2d 678, 689, 990 P.2d 396 (1999) (courts are encouraged to enter written findings, but we may review oral findings if they are sufficiently detailed). Moreover, Piccolo does not argue that we should remand for entry of written findings and conclusions and, on this record, we see no reason to do so.

D. Burden of Proof

Next, Piccolo argues that the trial court applied the incorrect burden of proof for withdrawal of a guilty plea, rather than the competency burden. We disagree.

First, we note that Piccolo did not raise the burden of proof issue at the trial court. More important, Piccolo was not challenging his current competence; instead, he filed a motion to withdraw his plea based on his alleged prior incompetency at the time he entered his plea. Although his trial counsel explained that the defense carried the burden of proof for its guilty plea withdrawal motion, our record on appeal contains no discussion of the issue Piccolo raises here.

Generally, we will not consider issues raised for the first time on appeal. *McFarland*, 127 Wn.2d at 332-33. We will, however, review a manifest error that affects a constitutional right. RAP 2.5(a)(3). An error is "manifest" only if the defendant can show actual prejudice, i.e., practical and identifiable consequences in the trial. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007); *McFarland*, 127 Wn.2d at 333. Further, an error is "manifest" only if the record is adequate to allow us to review the alleged error. *State v. Contreras*, 92 Wn. App. 307,

314, 966 P.2d 915 (1998).

Piccolo argues that the trial court record demonstrates error, stating, "[T]he judge applied a kind of *presumption* of competency, saying *Piccolo* had not presented 'any evidence of particular significance that would *carry the burden of showing that he was not competent* at the time he entered' the pleas." Br. of Appellant at 39 (second emphasis added) (quoting RP (March 26, 2007) at 395). But Piccolo misstates the record in the above quotation. Instead of placing the burden on Piccolo to prove competence, as he states in his brief, the trial court's oral ruling finds, "I really don't see *any evidence of any particular significance* that would carry the burden of showing that he was not competent at the time he entered the plea." RP (March 26, 2007) at 395 (emphasis added). This oral ruling does not suggest that the court applied any presumption of competence and does not indicate which party bore the burden of proving Piccolo's competence at the time he entered his guilty plea. Thus, no error is manifest.[6] *See Contreras*, 92 Wn. App. at 314.

In addition, Piccolo does not cite any law for his premise that a trial court errs if it presumes competency and places the burden of proof on the defense to prove incompetence at the

[6]Although the defense bears the burden of demonstrating a prima facia case of incompetence to warrant a competency evaluation, it is not clear whether the defense maintains that burden or, rather, it shifts to the State during a competency hearing. *State v. Benn*, 120 Wn.2d 631, 661, 845 P.2d 289 (1993) (declining to decide which party holds the burden of proving competence or incompetence), *cert. denied*, 510 U.S. 944 (1993); *Lord*, 117 Wn.2d at 903-04 (defense bears the threshold burden of establishing a reasonable question of competence).

Piccolo correctly asserts that Washington law is unclear on this point and explains that different states have different rules regarding which party bears the burden of proof in this context. But Piccolo's argument is purely theoretical. The trial court never specified which party bore the burden. As both parties presented evidence to support their arguments, any theoretical error caused no harm and thus is not manifest. *Kirkman*, 159 Wn.2d at 934-35. We decline to address the novel issue of which party bears the burden of proof to offer evidence in a competency hearing because a ruling on this issue would be mere dicta.

time of entry of the plea (as opposed to current competence). Treatise writers and civil case law suggest there is a presumption of competency.[7] And the United States Supreme Court has held that placing the burden of proving incompetency on the defendant is constitutionally permissible. *Cooper v. Oklahoma*, 517 U.S. 348, 335, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996). Under this law, which Piccolo does not challenge, there is no error.

The trial court's ruling also demonstrates that no error is manifest because *no* significant evidence supported Piccolo's claim, while persuasive evidence supported the State's claim that Piccolo's guilty plea was knowingly and voluntarily made. When no significant evidence supports a claim, it necessarily fails under the preponderance of evidence standard that Piccolo asserts is correct for competency hearings.[8] It is the sole province of the fact finder, here the trial court, to

---

[7] *See Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967) ("It is well settled that the law will presume sanity rather than insanity, competency rather than incompetency; it will presume that every man is sane and fully competent until satisfactory proof to the contrary is presented."); 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice & Procedure § 907, at 178 (3d ed. 2004) ("An accused has the burden of showing that he or she is incompetent to stand trial by a preponderance of the evidence. This proof requirement is based upon the presumption of sanity.") (footnote omitted).

[8] The quantum of proof necessary to demonstrate incompetency is a novel issue of law in Washington, but United States Supreme Court jurisprudence requires a preponderance of evidence standard of proof. In the slightly different context of extended orders of commitment, our legislature provides that such extensions are proper "[i]f the court finds by a preponderance of the evidence that [the] defendant charged with a felony is incompetent." RCW 10.77.086(3). In all other contexts, the statutes do not specify a standard of proof and we find no case law addressing the issue. *See* RCW 10.77.060, .086.

The United States Supreme Court held that the Due Process Clause permits a state to require a defendant claiming incompetency to bear the burden of proving so by a preponderance of evidence. *Medina v. California*, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). But the Court held that requiring the defendant to prove incompetence by a higher, clear, and convincing standard violates due process. *Cooper*, 517 U.S. 348. Under this United States Supreme Court jurisprudence, the only constitutionally permissible standard of proof is preponderance of evidence. *Medina*, 505 U.S. 437; *Cooper*, 517 U.S. 348; *see also* 12 Washington Practice, *supra*, at 178 ("[a]n accused has the burden of showing that he or she is incompetent to stand trial by a preponderance of the evidence").

weigh evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999) (citing *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967)). Here, the trial court found the State's evidence, together with its observation of Piccolo during the guilty plea colloquy, persuasive. We do not redetermine the weight or persuasiveness of evidence. But we note that no expert testimony supported Piccolo's claimed incompetence, there is no manifest error on the record before us on appeal, and he has failed to show a reasoned basis to allow withdrawal of his guilty plea.

E. Ineffective Assistance of Counsel

Piccolo next argues that his counsel's assistance was ineffective regarding his plea withdrawal for two reasons. Piccolo asserts that counsel "acted as if the [Western State Hospital competency] report was sufficient, by itself, to answer the question of competency" and declined to move for a competency hearing. Br. of Appellant at 52 (citing RP (Dec. 8, 2006) at 1-4). The record does not support this assertion. Counsel wrote a trial brief in support of the motion to withdraw the guilty plea based on incompetency; employed an expert witness to examine Piccolo and testify on the issue; and engaged in a three-day, adversarial evidentiary hearing on the issue of Piccolo's incompetence at the time he entered his guilty plea. Counsel did not, as Piccolo asserts, simply concede that the Western State Hospital report answered the competency question in the State's favor. Thus, Piccolo's argument has no basis in the record and no merit.

Piccolo also argues that his counsel advocated for an incorrectly high standard of proof for the proceedings. When the trial court asked what standard of proof applied to the plea withdrawal hearing, counsel stated: "We, as the moving party, bear the burden. Essentially under

CrR 4.2, we bear the burden of showing that withdrawal of the plea is necessary to correct a manifest injustice." RP (Jan. 26, 2007) at 4. And in his brief, defense counsel explained to the court:

> A defendant's claim that he was not competent to enter his plea is equivalent to claiming the plea was not voluntary. *State v. Osborne*, 102 Wn.2d 87, 98, 684 P.2d 683 (1984). A person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of rationally assisting in his own defense. *State v. Harris*, 114 Wn.2d 419, 427-28, 789 P.2d 60 (1990). The competency standard for standing trial is the same as the standard required for pleading guilty. *Godinez v. Moran*, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). . . . The two-part test for legal competency for a criminal defendant in Washington is as follows: (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense. *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986); *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985)[, *cert. denied*, 476 U.S. 1144 (1986)].

CP at 50-51. This is a correct statement of law. Further, it does not conflict with the law regarding present competency determinations, such as the preponderance of evidence standard of proof or the acceptability of placing the burden of production and proof of past alleged incompetency on the defendant. *Medina v. California*, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). Piccolo has not demonstrated that his counsel provided ineffective assistance.

Knowledge of Self-Defense Claim

Piccolo also argues that his *Alford* plea was involuntary because the trial court did not inform him that the facts of the case presented a self-defense claim. He further contends that his trial counsel was ineffective for not raising this argument during his plea withdrawal proceedings. Because awareness of the nature of the offenses charged is a constitutional element of a valid guilty plea, we address this issue for the first time on appeal. RAP 2.5(a)(3). We hold that no evidence suggested that Piccolo acted in self-defense, that the trial court had no duty to inform

Piccolo of that possible defense, and that his trial counsel was not ineffective for failing to raise the argument.

"The basic standard for determining the validity of an *Alford* plea is whether it 'represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 280, 744 P.2d 340 (1987) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)). "If a defendant 'intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt,' such a plea is valid." *Montoya*, 109 Wn.2d at 280-81 (quoting *Alford*, 400 U.S. at 37).

Piccolo cites no case directly requiring the trial court[9] to inform him of the State's burden to disprove self-defense beyond a reasonable doubt. In *Montoya*, our Supreme Court rejected this argument where no evidence supported a self-defense claim. 109 Wn.2d at 280. The court stated, "The trial court certainly had no obligation to inform Montoya of the burden of proof on a purely hypothetical claim." *Montoya*, 109 Wn.2d at 280. Similarly, in *State v. Haydel*, 122 Wn. App. 365, 371, 95 P.3d 760 (2004), Division One of this court held that the State had no obligation to inform the defendant of its burden to disprove self-defense when he presented no evidence of self-defense.

[9] Piccolo also seems to believe that there must be some affirmative evidence in the record that he knew of his self-defense claim before he entered the plea agreement. We find no law to support such a contention and Piccolo cites none. A guilty plea may be involuntary if a defendant enters it based on misinformation by his defense counsel, including, theoretically, misinformation that he had no defenses available if he went to trial. *See In re Pers. Restraint of Reise*, 146 Wn. App. 772, 787-88, 192 P.3d 949 (2008). But nothing in the record demonstrates that Piccolo's counsel misinformed him of the availability of a self-defense claim and, to the contrary, the omnibus order indicates that counsel planned to assert self-defense if the case went to trial.

Here, the only mention of self-defense is contained in an omnibus order and the probable cause statement. The omnibus order states that the defendant must state the general nature of his self-defense claim. But "[t]he statement in the omnibus order regarding the general nature of [Piccolo's] defense is not evidence." *Haydel*, 122 Wn. App. at 371. Piccolo pleaded to the factual basis for his *Alford* plea, authorizing the trial court to determine a factual basis for the charges from the probable cause statement. In the probable cause statement, the State explained that Piccolo gave three different accounts of the circumstances behind the homicides:

> [Piccolo] claimed that his wife was seated in the middle [of his pickup truck] between both men and that [Piccolo] was driving. He claimed that while his wife was sitting casually, with her feet up on the dashboard, she pulled out a gun that she had inside of her sweatshirt and wanted to rob [Piccolo] of his truck. [Piccolo] first claimed that while still driving he grabbed the gun and struggled for its control. He said that while Mrs. Piccolo still held the gun and with her feet still up on the dashboard the gun discharged multiple times, shooting both victims.
>
> . . . .
>
> When police confronted [Piccolo] with the implausibility of his story [based on forensic evidence], [Piccolo] then acquiesced in the suggestion that he must have taken the gun away from Mrs. Piccolo. He said that in fact he alone held the gun and shot the victims because of the supposed attempted robbery.
>
> [Piccolo] later told a third party in describing [the events] that he killed because "he snapped" after learning that Mrs. Piccolo and Mr. DeBord had planned on going on a "Bonnie and Clyde" crime spree to include robberies.

CP at 3. This is not sufficient evidence to raise a self-defense claim requiring the trial court to discuss self-defense during the plea colloquy to ensure that Piccolo's plea is knowing and voluntary.

A criminal defendant bears the initial burden of providing some evidence of self-defense, then the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Homicide is justifiable when committed "[i]n the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or

upon or in a dwelling, or other place of abode, in which he is." RCW 9A.16.050(2). But homicide is justifiable in response to an attempted felony only if the defendant used "such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to [the defendant] at the time [of] the incident." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 16.03, at 239 (3d ed. 2008). This probable cause statement includes facts from which Piccolo could argue that he had killed his wife and her lover because she tried to steal his truck, a felony,[10] but it contains no facts to show that using deadly force was reasonable or in self-defense.

On a similar record, our Supreme Court has held that such facts are insufficient to support a self-defense claim. *See Montoya*, 109 Wn.2d at 279-80. In *Montoya*, evidence from police reports indicated that the defendant and a third party were in a knife fight, the victim approached the defendant, and the defendant then stabbed the victim. 109 Wn.2d at 279-80. The defendant said he stabbed the victim in order to defend himself. *Montoya*, 109 Wn.2d at 279-80. But our Supreme Court noted that there was no evidence that the victim "engaged in any threatening behavior which would make a credible self-defense claim available to Montoya" and that Montoya's "bare assertion that he was defending himself" was inadequate. *Montoya*, 109 Wn.2d at 280. The facts here are very similar to those in *Montoya*—Piccolo made a bare assertion that he was defending himself, but he did not claim that his wife threatened him with violence, that he felt he had to protect himself from her, or that his shooting her and DeBord was reasonable in light of the circumstances. Thus, Piccolo's assertions are insufficient to raise a self-defense claim.

[10] RCW 9A.56.200(2), .210(2).

The trial court did not err by failing to inform Piccolo about a hypothetical self-defense claim and counsel was not ineffective for failing to raise this argument during his plea withdrawal motion.

Statement of Additional Grounds Issues

Piccolo offers two additional arguments in his statement of additional grounds for relief (SAG). RAP 10.10. Neither has merit.

Piccolo first argues that relevant mental health records were withheld from the competency hearing. He cites portions of the record indicating that the Department of Social and Health Services (DSHS) tried to get records from Nicholson's Pharmacy, but the pharmacy did not respond; and that DSHS tried to obtain records from Piccolo's hospitalization in the 1970s at Puget Sound Hospital, but Puget Sound Hospital reported it did not have any such records. He also argues that additional medical records should have been admitted in his plea withdrawal hearing. Piccolo does not argue that the prosecutor had access to these materials but failed to disclose them to his attorney or that his attorney had the materials but provided ineffective assistance of counsel by failing to introduce them in the hearing. Nothing in the appellate record supports such claims. *See State v. Benn*, 120 Wn.2d 631, 650, 845 P.2d 289 (discussing prosecution's duty to turn over evidence in its possession or knowledge that is favorable to the defendant and material to guilt or punishment), *cert. denied*, 510 U.S. 944 (1993); *State v. Sherwood*, 71 Wn. App. 481, 483-84, 860 P.2d 407 (1993) (discussing ineffective assistance of counsel claim in light of failure to present specific evidence at trial), *review denied*, 123 Wn.2d 1022 (1994). Piccolo has not demonstrated error.

Piccolo further argues that evidence regarding his behavior at Western State Hospital and

the Pierce County Jail is faulty because it is incomplete or taken out of context. He says that he was tearful at the time, but hid this behavior from observers, and his behavior of eating other inmates' food does not indicate that he was incompetent. He also states that mental health professionals misunderstood his characterization of his bipolar illness. Piccolo testified at length about his mental health problems and does not explain how this evidence is legally erroneous. This argument fails.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

HUNT, J.