NO. 43528-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

RICHARD LOUIS WALKSONTOP, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01863-6

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

I. Procedural History

Walksontop was tried on the Third Amended Information charging the following: Counts 1- Burglary in the First Degree; Counts 2 and 3- Robbery in the Second Degree: Counts 4 and 5- Harassment- death threats; Count 6- Unlawful Imprisonment: Counts 7 through 9- Assault in the Fourth Degree. CP 9-11. The Third Amended Information included the allegation Walksontop committed each offense in counts 1 through 6 while armed with a deadly weapon, to wit: a knife. CP 9-11. Walksontop proceeded to trial on the Third Amended information and during trial the Court dismissed the allegation he used a deadly weapon during the commission of the offenses. 3A RP at 574-608. Walksontop was convicted after a jury trial of Counts 1, 3, 4, 5, 6, 7, 8 and 9. CP 12-20. Walksontop was sentenced on May 30, 2012 in Clark County Superior Court before Judge Scott Collier. CP 21-39; 4 RP at 868-903. He was sentenced to a standard range sentence for all counts. 4 RP at 894-896; CP 21-39. The trial court found an aggravating factor under RCW 9.94A.525(2)(c) was established- that Walksontop had a high offender score that resulted in some of the current offenses going unpunished. CP 45. The trial court did not ask Walksontop if he wished to speak prior to

sentencing. 4 RP at 892-896. Throughout the sentencing hearing the defense attorney and prosecutor made several arguments regarding prior convictions, aggravating factors and the sentence recommendations. 4 RP at 868-894.

The trial court failed to check the box labeled concurrently or consecutively on the misdemeanor judgment and sentence. CP 22. The felony judgment and sentence has boxes checked that the crimes were committed with a deadly weapon. CP 31, 33. The trial court did not made a finding either orally or on the felony judgment and sentence that the defendant has the current or future ability to pay towards the legal financial obligations. CP 32; 4 RP at 868-903. The court imposed various legal financial obligations. CP 34-35.

II. Factual History

Tracy Wasserman was at her friend Gary's house on November 4, 2011 when Walksontop came by. RP 321. Ms. Wasserman observed Walksontop engaged in an "altercation" with a neighbor; she then persuaded Walkontop to leave the area with her. RP 324. Ms. Wasserman drove Walksontop home, picking up two of his friends at a gas station along the way. RP 324-25, 340. Once at his home, Walksontop told Ms. Wasserman that he had something to do in his home, but then wanted her to drive him back so he could finish what he started with the neighbor. RP

340. When Walksontop got out of the vehicle, Ms. Wasserman drove off because he had frightened her. RP 340-41. Ms. Wasserman returned to her friend Gary's house and soon after Walksontop arrived back. RP 344. Walksontop screamed at Ms. Wasserman and punched her in the face "very hard" causing her whole body to fly across the bed. RP 345. Ms. Wasserman sustained an injury to her jaw that made it difficult to open her mouth to eat, that caused pain and swelling to her jaw. RP 353.

On the same evening police were called to a burglary/home invasion in progress at 2817 Neals Lane, Apartment 5. RP 485. That apartment was home to Karah Bergh, Steven Irby and Kolton Irby. RP 199-201. That evening Savanah Connell was visiting the apartment as well. RP 235. Those in the apartment heard a loud crash, like the door being "kicked open." RP 201, 205, 240-41, 438. Kolton Irby ran to the balcony and jumped off the second story balcony, fleeing the apartment because he feared for his life. RP 205-06. Soon after the loud crash, Steven Irby saw Walksontop run from the front door into Karah Bergh's bedroom. RP 440. Walksontop was upset and started yelling at Ms. Bergh. RP 246-37. Walksontop grabbed Ms. Connell by the shoulder and forced her out of the bedroom and made her sit in a chair. RP 239. Steven Irby heard Walksontop threaten to kill Ms. Connell. RP 442. Walksontop

also told both Steven Irby and Ms. Connell that "if I get arrested tonight, you're dead, both of you are dead." RP 445.

Ms. Connell fled the apartment through the second story balcony, jumping off it. RP 239. Ms. Connell went to the apartment manager's apartment looking for help. Alberto Lalangen is the apartment manager. RP 262. He heard a knock at his door and asked three times who was there before he received a response. RP 264. The third time Mr. Lalangen called out he heard someone say, "I need help." He opened the door and observed a skinny, blonde female at his door. RP 265. She was scared and shaking and appeared hurt. RP 266, 272. She told Mr. Lalangen, "there's a guy... he hit me and tried to kill me. And he said—she said, I mean, he got—she got a gun." RP 266. The woman then called 911. RP 267. She also told Mr. Lalangen that she jumped from the balcony. RP 272. Mr. Lalangen saw that her pants were dirty and she was not wearing any shoes. RP 272.

When Officer Kelly Gibson contacted Ms. Connell she appeared "scared out of her mind." RP 286. Officer Gibson tried to calm her down in order to talk to her. RP 287. Ms. Connell said she was scared for her life so she fled the apartment through the second story balcony. RP 288-89. Ms. Connell identified Walksontop as the intruder into her friend's apartment. RP 292-93.

Ms. Bergh testified that she and Walksontop had an argument on November 4, 2011 and that he did not threaten to kill her. RP 378-79. Ms. Bergh admitted to making different statements during phone calls to her family members. RP 380. Officer Miranda Skeeter testified that Ms. Bergh told her that Walksontop kicked in the door to her apartment, made her leave with him and threatened to kill her. RP 423.

Police responded to the scene and observed Walksontop walking out of the apartment with Ms. Bergh, arguing with her. RP 487. Walksontop carried a bike out with him. RP 487. Police identified themselves and told Walksontop to stop. RP 487. Walksontop did not stop and took off running through the parking lot, away from police. RP 488-89. Police chased Walksontop for 50 yards before they caught up with him and he stopped and was arrested. RP 490.

B. ARGUMENT

I. THE STATE AGREES THE CURRENT HOLDING IN *JOHNSON* RENDERS THE CHARGING DOCUMENT DEFECTIVE AS TO COUNT 6, UNLAWFUL IMPRISONMENT

The State urges this Court to stay its decision in this matter pending any petition for review in the matter of *State v. Johnson*, 172 Wn. App. 112, 289 P.3d 662 (2012) as the holding in that matter is directly on point with Walksontop's case. As the case law stands now, the State

agrees with Walksontop that *Johnson* controls and the charging document is defective as it relates to the charge of Unlawful Imprisonment under the holding in *Johnson*.

A charging document must contain all "essential elements of the crime." *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). If the charging document does not contain those essential elements, it is constitutionally defective. *Id.* An 'essential element' is one that must be specified to establish the illegality of the act charged. *State v. Johnson*, 172 Wn. App. 112, 136, 289 P.3d 662 (2012) (citing *State v. Feeser*, 138 Wn. App. 737, 743, 158 P.3d 616 (2007). The Court in *Johnson* reviewed the charging language of an information that used the statutory language for Unlawful Imprisonment under RCW 9A.40.040. *Id.* at 137. The charging language used in the information in *Johnson* is identical to the charging language used in Walksontop's case. *Id*; CP 10-11. The Court in *Johnson* found that even with a liberal reading of the information, it did not contain all of the essential elements of the crime of unlawful imprisonment. *Johnson, supra*, at 137. Therefore, under *Johnson*, the charge in count 6, Unlawful Imprisonment, did not contain all of the essential elements of the crime for Walksontop.

In *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991), the Court set forth a two-prong test to determine if a defendant is entitled to relief

due to a defective charging document. *Kjorsvik*, 117 Wn.2d at 105-06. The first question is whether the necessary elements appear in any form, or by fair construction in the information. *Id.* The second question is if the elements do appear in the information, can the defendant show prejudice. *Id.* If the elements are not found or fairly implied, then the court presumes prejudice and reverse without reaching the question of prejudice. *Id*; *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Using the *Kjorsvik* test, this Court must presume prejudice since the 'essential elements of the crime,' as determined by *Johnson, supra*, are not present. Therefore the conviction for Unlawful Imprisonment in count 6 should be reversed and this case should be remanded for resentencing.

II. FAILURE TO GIVE A DEFENDANT THE OPPORTUNITY TO ALLOCUTE IS NOT A CONSTITUTIONAL ERROR WHICH CAN BE RAISED FOR THE FIRST TIME ON APPEAL

Allocution is the right of a criminal defendant to make a personal argument or statement to the court before pronouncement of sentence. *State v. Canfield*, 154 Wn. 2d 698, 701, 116 P.3d 391 (2005). RCW 9.94A.500(1) provides that the court shall conduct a sentencing hearing and at that hearing shall "allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." RCW

9.94A.500(1). A defendant's right to allocute has been codified in different forms throughout the years in the State of Washington. Under former RCW 10.64.040, the trial court was required to ask a defendant whether he have any legal cause to show why judgment should not be pronounced against him. Former RCW 10.64.040; *State v. Crider*, 78 Wn. App. 849, 855, 899 P.2d 24 (1995). This statute was superseded by former CrR 7.1(a)(1) which provided that the court "...shall ask the defendant if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment." *Crider*, 78 Wn. App. 855. CrR 7.1(a)(1) was rewritten in 1984 and recodified in CrR 7.2, with the allocution provision eliminated. *Id.* The right to allocution was once again found in former RCW 9.94A.110 which stated, "the court shall...allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." *Id.* (citing former RCW 9.94.110). Former RCW 9.94A.110 has been now transferred to RCW 9.94A.500(1), and contains the same language that the trial court shall allow arguments from the defendant prior to sentencing.

Walksontop cites to *Green v. United States*, 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961) and *State v. Happy*, 94 Wn.2d 791, 620

P.2d 97 (1980) to support his argument that denial of his right to allocution is reversible error. In *Green*, the right to allocution was derived from Federal Rules of Criminal Procedure, rules which do not apply in Washington State. *State v. Snow*, 110 Wn. App. 667, 669, 41 P.3d 1233 (2002). In *Happy*, the right was derived from former CrR 7.1(a)(1), which was replaced in 1984. *Id.* The reasoning under *Green* and *Happy* does not apply to Walksontop's case as the statutory basis from which the right to allocution was derived is now different. RCW 9.94A.500(1) provides the sole basis for the right to allocution in Washington. *See id*; RCW 9.94A.500(1).

The denial of the right to allocution is neither a constitutional nor a jurisdictional error and it is not a fundamental defect that inherently results in a complete miscarriage of justice. *Canfield*, 154 Wn.2d at 702. The failure to solicit a defendant's statement in allocution is a legal error. *State v. Ague-Masters*, 138 Wn. App. 86, 109, 156 P.3d 265 (2007) (citing *State v. Hughes*, 154 Wn.2d 118, 153, 110 P.3d 192 (2005), *overruled in part on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). A defendant may not raise the right to allocution for the first time on appeal because the right to allocution is derived from state law and is not constitutional in nature. *Id; State v. Hatchie*, 161 Wn.2d 390, 405-06, 166 P.3d 698 (2007). RAP 2.5(a)(3)

allows for review for the first time on appeal only those issues where constitute a "manifest error affecting a constitutional right." The Supreme Court in *Hatchie, supra,* recognizes the need for the defendant to object at the time of sentencing to preserve this issue for appeal, and denied review of this issue because Hatchie did not preserve it at the trial level. *Hatchie,* 161 Wn.2d 390.

Walksontop also cites to *State v. Roberson,* 118 Wn. App. 151, 74 P.3d 1208 (2003) for the proposition that a trial court's failure to ask a defendant if he wishes to speak at sentencing is reversible error. However, on the issue of allowing a defendant to raise this issue for the first time on appeal, *Roberson* has been effectively overruled by *Hughes, supra.*

Though the trial court did not ask Walksontop if he wished to speak, the record shows he felt free to interject and speak during the sentencing hearing. His attorney also argued multiple times on offender scoring issues, aggravators and sentence length. Neither Walksontop nor his attorney objected to the trial court pronouncing sentence without giving Walksontop the opportunity to allocute. As this is not a constitutional error, it should not be addressed for the first time on appeal.

III. THE COURT DID FAIL TO INDICATE CONCURRENT OR CONSECUTIVE ON THE MISDEMEANOR JUDGMENT AND SENTENCE

The State agrees with Walksontop that the trial court erroneously failed to indicate "concurrent" or "consecutive" on the misdemeanor Judgment and Sentence when imposing the sentence. As a court has the duty to correct an error in sentencing, this court should direct the trial court to correct the error by entering an amended judgment and sentence as to the misdemeanor convictions. *State v. Toney*, 149 Wn. App. 787, 795, 205 P.3d 944 (2009) (citing *In re Pers. Restraint of Call*, 144 Wn.2d 315, 334, 28 P.3d 709 (2001) *overruled on other grounds by In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002)). Walksontop's argument regarding the amount of time on probation is not yet ripe for review as he has not been sentenced to misdemeanor probation over 24 months.

IV. THE COURT DID NOT ERR IN IMPOSING LEGAL FINANCIAL OBLIGATIONS

Though Walksontop is correct that the trial court did not make a determination that he has the present or future ability to pay financial obligations, he is incorrect that the remedy is dismissal of the fines and fees.

In *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011), the Court of Appeals held the trial court's finding that the defendant had the ability to pay was clearly erroneous because the trial court did not "take into account the financial resources of the defendant and the nature of the burden" imposed by LFOs...." *Bertrand*, 165 Wn. App. at 404 (citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991)). However, even though it was erroneous for the trial court to make that finding, and the Court of Appeals reversed that finding, the Court of Appeals did not strike or reverse the imposition of legal financial obligations. *Id.* at 405. The Court held in *Bertrand, supra*, that the trial court must make a determination at a later time that the defendant is able to pay before any of the financial obligations may be collected. *Id.* at fn 16.

Clearly from the record and the judgment and sentence, the trial court did not make a determination of whether Walksontop has the present or future ability to pay legal financial obligations. Had the trial court made a determination that Walksontop had the ability to pay without any consideration in the record, it may have been erroneous. *See Bertrand*, 165 Wn. App. at 404. However, even in that situation, case law does not support striking the fines and fees as a remedy. The more appropriate and "meaningful time to examine the defendant's ability to pay is when the

government seeks to collect the obligation." *Baldwin*, 63 Wn. App at 310 (citing *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252 (1991)). Prior to attempts to collect on Walksontop's legal financial obligations, the trial court should make a determination of her ability to pay. *See Bertrand*, 165 Wn. App. at 405.

V. THE STATE AGREES WITH WALKSONTOP THAT THE FELONY JUDGMENT AND SENTENCE CONTAINS SCRIVENER'S ERRORS WHICH SHOULD BE CORRECTED

Walksontop accurately states in his brief that the felony judgment and sentence, CP 30-39 contains a scrivener's error in sections 2.1 and 4.1 wherein it indicates the defendant used a deadly weapon in committing the offenses. The Court dismissed the deadly weapon enhancements during trial. CP 608. No special verdict indicating use of a deadly weapon was returned. This scrivener's error should be corrected.

C. CONCLUSION

This case should be remanded for resentencing as *Johnson, supra* requires reversal of the Unlawful Imprisonment conviction in Count 6. Walksontop is not entitled to a sentencing before a different judge as he cannot raise the failure to offer allocution for the first time on appeal. Once this case is returned to the sentencing judge for resentencing in light

of the vacation of count 6, the court should correct the misdemeanor sentence and the scrivener's errors in the felony judgment and sentence.

DATED this ____ day of _____, 2013.

Respectfully submitted:

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March 15, 2013 - 3:07 PM

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