NO. 30466-3-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOE ANTHONY MATA,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES (continued)

PAGE

Rules and Statutes

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

Assignments of Error

1. Double jeopardy was violated.
2. The trial court erred when it allowed amendment of the Information after the close of the State's case.
3. The imposition of a consecutive sentence is err.
4. Appellant's offender score was improperly calculated.
5. The "free crimes" doctrine is inapplicable in this case.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Double jeopardy was not violated.
2. The trial court did not err when it allowed the State to amend the Information.
3. The sentence was proper.
4. Appellant's offender score was properly calculated.
5. The "free crimes" doctrine is applicable herein.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

RESPONSE TO ISSUE ONE - DOUBLE JEOPARDY WAS NOT VIOLATED.

The allegation is that Mata would be punished twice for the same criminal act if this conviction were allowed to stand. The error in this analysis is that it in essence makes the weapon the sole element in this charge. The fact is this defendant was in another county when he committed the other count of Unlawful Possession of a Firearm. (UPF) The jury in the Pierce County case made a determination based not just on this weapon but on the other elements of this charge. It is easy see how a jury could acquit Mata based on the factual scenario as was set forth in the Yakima trial. In Pierce county Mata was charged with the same "crime" using the same gun, but factually it can be seen that by the time Mata was arrested he was not in the vehicle and had in fact fled on foot some ways from the place where he abandon the van.

> Q. Why was that photographed?
> A. The suspect was supposed to have run up that berm and either over the gate or through the gate. The gate, the actual fencing there, has the -- the fencing of the gate has it pulled aside so someone actually could fit through there.
> (RP 377)
>
> Q. Did he describe what the deputy was doing behind him?
> A. He described the deputy as following behind him for sometime on the road before activating his emergency equipment.
> Q. Did he indicate to you whether he stopped when seeing the emergency lights?
> A. He said he made the decision not to stop. The

next thing he knew, he hit two rocks and got out and ran.

Q. Did he describe to you where he ran to?

A. He described jumping a chain link fence and a barbed wire fence and running into a business. He said he was running at the business when he was tackled by transit workers that worked at the business and taken into custody by the deputy.

(RP 435-6)

Q. How do you recognize them?

A. This is the area where the pursuit ended and the shots were fired and where Mr. Mata jumped over the fence and fled from where he left the van.

Q. Are those fair and accurate to your recollection?

A. Yes, they are.

To convict a person of this crime the State must prove that the defendant was in "possession or control of any firearm". The instruction given in the Yakima trial was:

> A person commits the crime of First Degree Unlawful Possession of a Firearm when he has previously been convicted of a serious offense and he knowingly owns or has in his possession or control any firearm. (CP 490-519)

RCW 9.41.040. Unlawful possession of firearms - Ownership, possession by certain persons - Restoration of right to possess – Penalties;

(1) (a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

It is obvious in the Pierce county case that it would be difficult to show that Mata was in possession or control of the gun later found inside the van. He was not seen with it and the theory, as was also set forth in the Yakima case, was that the gun could have been anywhere in the van and moved when it was towed.

Q. Okay. And 65.
A. That's a closer view of the gun on the floor in front of the driver's seat of the van.
Q. Okay. And 66.
A. An even closer view.
Q. Okay. Of the firearm?
A. Yup.
(RP 381)

Q. Was it picked up by the back end or the front end when it was towed?
A. It was picked up by the back end, I believe.
Q. So anything in the car would have fallen forward when it was picked up?
A . I don't think you could say that because I think things could -- no things could have moved. There could have been some things that moved. There could have been, you know,
everything could have moved, a whole gambit.
Q. Well, I'm just looking at the --
MR. CLEMENTS: Objection. It's a question that just calls for speculation. If he knows that happened, it happened. If he doesn't, he doesn't.
MR. DOLD: I'll ask the question.
THE COURT: Sustained.
Q. (By Mr. Dold) Do you know where the items found in the front seat were located at the time the vehicle came to a stop?

A. Say that again.
Q. Do you know where the items photographed on the floor of the vehicle, driver's side, were located when the vehicle came to a stop?
A. The photos that were taken at night?
Q. Yes.
A. When the vehicle stopped, I wouldn't have known where They were. I know where they were when I was there.

(RP 388-9)

The court in State v. Alvarez, 105 Wn. App. 215, - P.3d - (2001) found; "Evidence of temporary residence or the mere presence of personal possessions on the premises is, however, not enough." Therefore based on the specific facts, the separation of time, place and victim, clearly there was no double jeopardy. Mata could easily have argued that State v. May, 100 Wn. App. 477, 997 P.2d 956 (2000) was applicable in the Pierce County case, not a defense he would be able to avail himself of in this case:

> A person is not guilty of unlawful possession of a firearm if the possession is unwitting. Possession of a firearm is unwitting if a person did not know that the firearm was in his possession.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the firearm was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

In re Fletcher, 113 Wn.2d 42, 47, 776 P.2d 114 (1989):

> The double jeopardy clause does not prohibit the imposition of separate punishments for *different* offenses.

> State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983) held that:
> In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.
> The test set forth in Vladovic involves two components. First, the offenses must be factually the same. If "proof of one offense would not necessarily also prove the other", double jeopardy would not protect against multiple punishments. Vladovic, at 423. In State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981) the defendant was charged with first degree assault, second degree burglary, and first degree theft. The burglary and theft charges also included special allegations that the defendant was armed with a deadly weapon. The charges arose out of an incident in which the defendant and two accomplices broke into a tool shop and stole tools and a truck. A jury found the defendant guilty on all three counts and also found that he had been armed with a deadly weapon on the burglary and theft counts. Claborn, at 631.

Here there are completely separate facts which had to be proven for a conviction to result for the crime of UPF. See, State v. Reed, 84 Wn. App. 379, 928 P.2d 469 (1997), proof of predicate offense a necessary element, State v. Russell, 84 Wn. App. 1, 925 P.2d 633 (1996) Old statute only allowed one conviction even though more than weapons possessed. New codification allows for multiple convictions if multiple guns.

The following cases set forth what the State must prove and how that proof may come about in a possession case.

State v. Echeverria, 85 Wn. App. 777, 934 P.2d 1214 (1997).

> Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found. See State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); State v. Callahan, 77 Wn.2d 27, 29-30, 459 P.2d 400 (1969). The ability to reduce an object to actual possession is an aspect of dominion and control. State v. Hagen, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). Given the unchallenged finding the gun was in plain sight at Mr. Echeverria's feet and the reasonable inference that he therefore knew it was there, a rational trier of fact could find Mr. Echeverria possessed or controlled the gun that was within his reach.

State v. Krajeski, 104 Wn. App. 377, 16 P.3d 69 (2001);

> After Krajeski filed his appeal, our Supreme Court held that knowledge is an essential element of unlawful possession of a firearm. State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). Krajeski retained new counsel and we granted his motion to file an amended brief raising for the first time the issue of knowledge based on Anderson.
>
> "All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). "Knowing" possession of a firearm is an essential element of the crime of unlawful possession of a firearm. Anderson, 141 Wn.2d at 359.

The gun is only one element of that crime. The State had to, and did, prove that in Yakima County that Mata was in possession of the weapon. This is also readily seen from testimony by the various witnesses who testified that was the person who had in his possession or

control a gun and that he used it in the commission of the crimes for which he was charged.

The testimony of Mr. Zachary Sisneros, a military veteran and gun owner who was robbed by Mr. Mata identified the gun and Mr. Mata. (RP 274-284) The State then properly submitted the agreement regarding the defendant's previous criminal history and the jury could then find him guilty as charge with regard to the UPF. (CP 44, RP 771-2)

As was recently stated by this court in State v. Gatlin, 241 P.3d 443, 447 (2010):

> At issue in any double jeopardy analysis is whether the legislature intended to impose multiple punishments for the same event. In the Pers. Restraint of Orange, 152 Wash.2d 795, 815, 100 P.3d 291 (2004). Courts may discern the legislature's purpose by applying the tests set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) ("same elements test"). Under Blockburger, " [t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304, 52 S.Ct. 180. Under the Washington rule, double jeopardy attaches only if the offenses are identical in both law and fact, which is demonstrated when "'the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.' "State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896) (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)). The "same elements" test and the " same evidence" test are largely indistinguishable. Orange, 152 Wash.2d at 816, 100 P.3d 291.

Without a doubt these two very distinct criminal acts in two different counties, with two separate crime scenes demonstrate that the State had to charge and prove two completely distinct acts.

There is the commonality of the 1) gun and 2)the defendant but there is no proof or information within the record before this court that there was anything other than those two elements were the same. Even if those two had been the same the fact still remains that the charged crime in Pierce County was factually such that the jury could easily, and did, find that the elements were not met. The distinguishing facts being that at the time of his arrest in Pierce county Mata was not near the gun and there had been another person in the van, the van was stolen and no person, in the record before this court, could state that Mata had the gun in his physical possession during the time he was in that van.

State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000);

> As Turner asserts, close proximity alone is not enough to establish constructive possession; other facts must enable the trier of fact to infer dominion and control. State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990). But the ability to reduce an object to actual possession is an aspect of dominion and control. Echeverria, 85 Wn. App. at 783. No single factor, however, is dispositive in determining dominion and control. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016 (1995). The totality of the circumstances must be considered. Collins, 76 Wn. App. at 501.

> This case is similar to Echeverria, where the court found that a rational trier of fact could reasonably infer that the defendant possessed or controlled a gun that was within his reach. The gun was in plain sight, sticking out from underneath the defendant's driver's seat. Echeverria, 85 Wn. App. 777 at 783.

The initial ruling by the court was on point:

> THE COURT: They're completely separate issues.
> ...
> THE COURT: Well, I didn't know, didn't know anything about it. I wondered for no particular reason, just to what's going on.
> They are completely separate issues. I'm not aware of any double jeopardy issue. The fact that you have facts that justify different crimes in different jurisdictions is not double jeopardy. (RP 180)

The subsequent more in depth ruling supports this too. (RP 806-811) The fact is that this was the same gun but the proof of the crime does not end there. The acts of the defendant in two locations at two times as well as the factual "possession" portion of the proof were specific to those times and locations.

RESPONSE TO ISSUE TWO – AMENDED INFORMATION.

Appellant claims that he was unfairly prejudiced by the Court allowing the State to amend the information after the close of the State's case.

The original information included the language that was almost identical to that later allowed in the "amended" information. In fact the

original information included the phrase "you displayed what appeared to be a firearm or other deadly weapon." That information was filed on July 31, 2009 and included only one count of Robbery 1 and one count of First degree Unlawful Possession of a Firearm. (CP 1) The defendant was placed on notice at that time.

The first amendment added two additional counts of Robbery in the First degree, this included the terminology "you were armed with a firearm and /or you displayed what appeared to be a firearm or other deadly weapon." (CP 26-7)(Emphasis mine.)

The second amended information changed count three from Robbery First degree to an Attempt. (CP 33) All three counts change the language back to "you displayed what appeared to be a firearm." The language "you were armed with a firearm and/or" was not in this amendment.

The final amendment allowed on October 20, 2011 reverted to language that was similar to the original information, "**you were armed with a firearm and**/or you displayed what appeared to be a firearm."

Throughout this entire trial the defendant knew that the State had to prove that he was armed or appeared to be armed at the time he committed these crimes with a firearm or deadly weapon. The evidence throughout this case was that Mata used a firearm. There is nothing

"new" that was added in any of the amended informations and specifically not in the final amended information. The only difference would be whether or not the State had to have someone testify that they had test fired the weapon.

The fact is the State did not have to prove that this gun was operable. Mata has not challenged the sufficiency of the evidence presented in this case. He did not at trail and does not in this appeal indicate that because of this amendment he was not able to present a defense. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are reserved to the trier of fact. State v. Mines, 163 Wn.2d 387, 179 P.3d 835 (2008). In sum, evidence is sufficient if, after viewing it in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. Salinas, 119 Wn.2d at 201. It is difficult to perceive how Mata can raise the issue that this amendment was error when he has not challenged the fact that the State proved these crimes beyond a reasonable doubt.

RCW 9.41.010(1) defines a "firearm" as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." This language has been interpreted to require a gun to be operable at some point in order to qualify as a firearm, but not necessarily during commission of the crime. See, e.g., State v. Padilla, 95 Wn.App. 531, 535, 978 P.2d 1113 (1999) (disassembled pistol qualified as a firearm because it "may be fired" if reassembled); State v. Anderson, 94 Wn.App. 151, 159, 971 P.2d 585 (1999) (noting that unloaded guns are considered firearms even though they are not immediately operable), rev'd on other grounds, 141 Wn.2d 357, 5 P.3d 1247 (2000); State v. Faust, 93 Wn.App. 373, 376, 967 P.2d 1284 (1998) (malfunctioning gun was still a firearm).

This final amendment uses the exact terminology that was used when this matter was originally filed. There is nothing that was added and the appellant knew from the State's witness list that there was no on who was to be called to state that the gun had been test-fired.

It would appear from reading the statements by defense counsel that the objection was not that with regard to the use phrase "or other deadly weapon." The defense attorney states "I don't think that the amendment should be permitted. The only evidence is that there was a firearm. That's the only evidence we have. Nobody said that they thought it might be a firearm. They all said it was the gun." (RP 815) That is

exactly what the final amendment says. There was no inclusion of the phrase “or other deadly weapon.” It would appear from reading the record in totality that the defendant/appellant got what he wanted when he objected to the amendment. There is nothing in this record to support an argument that Mata objected to the totality of the amendment. His only objection appears to be that the State should not be allowed to include the “or other deadly weapon” wording. He argued that this was never argued or proven.

"A trial court's decision to allow amendment is reviewed for abuse of discretion." State v. Guttierrez, 92 Wn. App. 343, 346, 961 P.2d 974 (1998) (citing State v. Haner, 95 Wn.2d 858, 864, 631 P.2d 381 (1981)).

CrR 2.1(d) provides for amendment of an information 'at any time before verdict or finding if substantial rights of the defendant are not prejudiced.' In circumstances where an amendment to the information is proper, the burden is upon the defendant to show that he will be prejudiced by the amendment. State v. Gosser, 33 Wn. App. 428, 434-35, 656 P.2d 514 (1982). Here, the amendment does not add a new charge; it merely adds language that was apparently inadvertently omitted after the original Information was charged. The amendment is based on the original charges and facts available and known to Mr. Mata. Accordingly, Mata

has failed to show he was prejudiced by the amendment or that the court abused its discretion when it allowed the correction of this error.

Because appellant was successful in convincing the court that the "or other deadly weapon" language was should not be allowed in the amendment and he did not object to the final version that reinserted the phrase "you were armed with a firearm and" it would be the State's position that there can be no claim of error now; Appellant got what he wanted in the trial court. The "error" was not preserved because it was not in fact raised in the trial court.

State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008):

> In general, an error raised for the first time on appeal will not be reviewed. State v. Kirkman, 159 Wash.2d 918, 926, 155 P.3d 125 (2007). An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This is a "`narrow'" exception. Kirkman, 159 Wash.2d at 934, 155 P.3d 125 (quoting State v. Scott, 110 Wash.2d 682, 687, 757 P.2d 492 (1988)). A "`manifest'" error is an error that is "unmistakable, evident or indisputable." State v. Lynn, 67 Wash.App. 339, 345, 835 P.2d 251 (1992). An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "`plausible showing'" "`that the asserted error had practical and identifiable consequences in the trial of the case.'" State v. WWJ Corp., 138 Wash.2d 595, 602-03, 980 P.2d 1257 (1999) (quoting Lynn, 67 Wash.App. at 345, 835 P.2d 251). "The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001) (citing WWJ Corp., 138 Wash.2d at 603, 980 P.2d 1257).

RESPONSE TO ISSUE THREE – SENTENCING ISSUES.

Consecutive Sentence.

The State pointed out to the court that it had the power to run the sentence in this case consecutively with the sentence Mata was serving from his conviction in Pierce County. He was in fact serving that sentence while this trial was proceeding, The Deputy Prosecutor stated to the court that it could impose a consecutive sentence pursuant to RCW 9.94A.589(3) (RP Steinmetz pg. 94) The deputy prosecutor accurately explained the statute to the court and indicated that the court should not in essence give Mata "free crimes" by allowing the sentence in both matters to run concurrent. The court stated "I am going to order that it be consecutive." There need be no more than that to support this sentence. The trail court had the authority to impose this sentence. This Court decided this issue in State v. King, 149 Wn.App. 96, 101, 202 P.3d 351 (Wash.App. Div. 3 2009), review denied, 166 Wn.2d 1026, 217 P.3d 337 (2009);

> RCW 9.94A.589(3) gives a sentencing judge the discretion to impose either a concurrent or consecutive sentence for a crime that the defendant committed before he started to serve a felony sentence for a different crime. The imposition of a consecutive sentence is not, then, an exceptional sentence that would require a finding of aggravating factors. State v. Jones, 137 Wash.App. 119, 126, 151 P.3d 1056 (2007). "The judge need only order

> that the sentences be served consecutively; no reason for the decision is required." State v. Mathers, 77 Wash.App. 487, 494, 891 P.2d 738 (1995). RCW 9.94A.589(3), therefore, authorized the court here to order Mr. King to serve his standard range sentence for witness intimidation consecutively to the sentence he was already serving for drug possession.

This court will reverse a sentencing court for abusing its discretion if the decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" State v. McCormick, 166 Wn.2d 689, 706, 213 P.3d 32 (2009) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A court abuses its discretion if it misapplies the law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

There was no misapplication of the law; the court did not abuse its discretion in this case. Appellant has not demonstrated that there was abuse. Once again the court need not set forth a basis for running these sentences consecutively, but reading the courts statements at the time of sentencing makes it clear that the court believed that Mata deserved a very significant sentence.

Free Crimes.

The appellant argues that the use of the free crimes doctrine may or may not apply. Apparently based on the hope that this court will determine that there was in fact double jeopardy in this case and thereby negate some of the points that the appellant and these points would be

further reduced if this court were to determine that the two counts of Robbery Mata was convicted of were improperly scored thereby once again reduce his point total to a level where apparently he point total would be reduced to a level where there would be no “free crime” analysis which would be applicable.

It is the position of the State that the court properly applied this doctrine and that there is no err. There is no basis for this court to find that double jeopardy was violated as set forth above and the points calculated were accurate as set forth below.

Because both of Appellant’s theories are incorrect the offender scores determined and adopted by the court are correct and because this are significantly above the maximum of nine points the “free crime” doctrine is applicable to this case. This court will review an exceptional sentence using the "abuse of discretion" standard applies to our review of whether an exceptional sentence is clearly excessive. State v. Kolesnik, 146 Wn.App. 790, 805, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009). A "'clearly excessive'" sentence is one that is clearly unreasonable, "'i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.'" Kolesnik, 146 Wn.App. at 805 (quoting State v. Ritchie, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995)

If a trial court does not impose an exceptional sentence in these circumstances, then a defendant with an offender score higher than 9 (the highest score that RCW 9.94A.510 contemplates), like Mata, whose offender scores were 17 and 15 respectively, does not receive any greater punishment than a defendant with an offender score of exactly 9. A standard-range sentence in this instance "would not be proportionate to the seriousness of the offense, promote respect for the law, or be commensurate with the punishment imposed on others committing similar offenses." State v. Garnier, 52 Wn.App. 657, 664, 763 P.2d 209 (1988), overruled on other grounds by State v. Stephens, 116 Wn.2d 238, 803 P.2d 319 (1991); see also State v. Brundage, 126 Wn.App. 55, 66-67, 107 P.3d 742 (2005), review denied, 157 Wn.2d 1017 (2006).

For a defendant like Mata with very high offender scores, the "presumption of concurrent sentencing" under RCW 9.94A.589(1)(a) results in a sentence that does not reflect the deserved punishment. State v. Vance, 168 Wn.2d 754, 760, 230 P.3d 1055 (2010); Stephens, 116 Wn.2d at 244-45. Therefore, "[s]omething more is required" to impose an appropriate sentence. Stephens, 116 Wn.2d at 243. The legislature has authorizing consecutive sentences under RCW 9.94A.589(1)(a), the imposition of which is left to the "total discretion" of the trial court. State

v. Linderman, 54 Wn.App. 137, 139, 772 P.2d 1025 (1989), review denied, 113 Wn.2d 1004 (1989).

State v. Brundage, 126 Wn.App. 55, 66-67, 107 P.3d 742 (2005), review denied, 157 Wn.2d 1017 (2006) supports the State's position;

> The trial court may impose a sentence outside the standard range only if there are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A. 535. The legislature created a nonexclusive list of illustrative factors that support an exceptional sentence. RCW 9.94A. 535. One such aggravating circumstance exists if "[t]he operation of the multiple offense policy of RCW 9.94A. 589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A. 010." RCW 9.94A. 535(2)(i).
> ...
> Under the "free crimes" doctrine, then, a trial court may impose an exceptional sentence where a defendant's current crimes would go unpunished through the imposition of a standard range sentence. Van Buren, 123 Wash.App. at 653, 98 P.3d 1235."

It must be noted that the "free crimes" exception used by the court is done so in conjunction with the unchallenged finding by the jury that the defendant had committed this crime after recently being released from jail. Both the "free crimes doctrine" and the "rapid recidivism" are valid reasons to impose an exceptional sentence. Each alone are sufficient to allow this court to uphold the sentence imposed.

Miscalculated Offender Score.

Appellant has mis-categorized First Degree Robbery. He cites, RCW 9.94A.589(1)(b) indicating that is crime is a "serious violent" offense. If this crime was in fact a "serious violent" offense he would be correct in his assertion but this crime is a defined as a "violent" offense, however he is incorrect.

This is a "violent offense." RCW 9.94A.030. Definitions (45) lists all of the offense that are defined as "serious violent" offenses, Robbery in the First degree is not listed. Subsection (54)"Violent offense" is where this crime is found categorized. Specifically (54)(i) is the section which states "Any felony defined under any law as a class A felony or an attempt to commit a class A felony;"

Therefore the analysis by appellant is incorrect and the score set forth by the State and adopted by the trail court in the Judgment and Sentence are correct. This case should be scored as set out in RCW 9.94A.589(1)(a);

"Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score:..."

IV. CONCLUSION

Based on the forgoing facts and law Mata's appeal should be denied and this appeal should be dismissed.

Dated this 20th day of November, 2012,

By: s/ David B. Trefry
DAVID B. TREFRY
Special Deputy Prosecuting Attorney
Yakima County
WSBA# 16050
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
Fax: 1-509-534-3505
E-mail: TrefryLaw@wegowireless.com

DECLARATION OF SERVICE

I, David B. Trefry state that on November 20, 2012, emailed a copy, by agreement of the parties, of the Respondent's Brief , to Dennis Morgan nodblspk@rcaletv.com and to Joe Anthony Mata, DOC# 845894, Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of November, 2012 at Spokane, Washington,

s/David B. Trefry
By: DAVID B. TREFRY
Special Deputy Prosecuting Attorney
Yakima County
WSBA# 16050
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
Fax: 1-509-534-3505
E-mail: TrefryLaw@wegowireless.com