NO. 31857-5-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS PARKER

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
Prosecuting Attorney

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2. **SHOULD THE TRIAL COURT HAVE DISMISSED THE CASE FOR INSUFFICIENT INFORMATION WHEN THE DEFENDANT RECEIVED ACTUAL NOTICE OF THE CHARGES HE FACED AND CHOSE TO WAIT UNTIL AFTER THE STATE RESTED TO BRING A MOTION FOR INSUFFICIENT INFORMATION?**

3. **IS RE-SENTENCING REQUIRED WHEN THE TRIAL COURT, USING AN INCORRECT OFFENDER SCORE, SENTENCES A DEFENDANT WITHIN THE CORRECT RANGE, BASED ON AN UNLAWFUL EXCEPTIONAL SENTENCE?**

B. RESPONSE TO STATEMENT OF THE CASE

On November 27, 2012, Samuel Farias and Zachariah Briggs were patrolling merchandise at the Rite Aid in Pasco, Washington. Although they were directed to try and prevent theft, the store's policy was not to physically engage shoplifters. RP 15-(6/13/12) 15-17.

Briggs witnessed the Appellant take two bottles of liquor and place them in his pants. He then left the store, setting off the alarm as he went. RP (6/13/12) 4. Briggs, who had previously walked

outside, tried to identify himself in order to ask that the merchandise be returned. The Appellant immediately lowered himself down and drove his shoulder into Briggs. Briggs was driven back four or five steps. During this action he had the merchandise still on his person. RP (6/13/2013) 4-6. Farias witnessed this from beside Briggs. RP (6/13/2013) 18-19. Briggs then began to struggle with the Appellant. At some point during the struggle the Appellant threw down the bottles. Farias joined the struggle and they both had difficulty controlling the Appellant. During that time period the Appellant struck Briggs in the face and Briggs called police. RP (6/13/2013) 6-8.

Officer Erickson of the Pasco Police responded to the scene within thirty seconds. He witnessed the Appellant struggling with the two Rite Aid employees and trying to escape. Off. Erickson detained the Appellant and identified him. After being read Miranda, the Appellant initially asked if he could be written a ticket instead of being arrested. When told no, he said he had been doing nothing wrong and the two men had grabbed him for no reason. RP (6/12/2012) 6-9.

The State charged the Appellant with Robbery in the Second Degree. CP 132. The Appellant was found guilty by jury verdict on

June 13, 2013. The Court determined he had an offender score of six, giving him a range of 33 to 43 months. The court gave him an exceptional sentence downward sentence to 29 months. CP 10-22. The court based the exceptional sentence on the fact that the court felt the change in the felony versus gross misdemeanor theft amounts from $250 to $750 was long overdue when the legislature decided to make that change. RP (8/6/13) 6.

Following his appeal being filed, the Appellant completed his sentence in the Department of Corrections and is currently awaiting extradition back to the State of Arkansas. CP (anticipated supplement to clerk's papers).

C. RESPONSE TO THE ARGUMENT

1. **THE TRIAL COURT PROPERTLY DENIED THE DEFENDANT'S MOTION FOR A LESSER INCLUDED INSTRUCTION AS THERE WAS NO FACTUAL BASIS FOR SUCH AN INSTRUCTION.**

RCW 10.61.006 allows the trial court to exercise its discretion in determining if there is a proper legal and factual basis to issue a lesser included instruction. In this case, the court properly denied the request because no evidence supported the inference that a lesser included offense was warranted. The Appellant improperly claims he has a "statutory right to have the

jury instructed on any lesser included offenses." Defendants are not automatically entitled to a lesser included offense instruction; they "may" be entitled to a lesser included offense instruction, if evidence in the case supports such an instruction. RCW 10.61.006. In this instance the evidence in the case did not support the lesser included instruction of Theft in the Third Degree and the court properly denied the motion.

The Workman test requires the defendant meet a legal and a factual prong to be entitled to a lesser included instruction. State v. Henderson, 108 Wash.App. 143-44, 138, 321 P.3d 298 (2014). The State concedes that the legal prong of the Workman test is satisfied because each element of the lesser included offense of Theft in the Third Degree is a necessary element of the crime of Robbery in the Second Degree. Karl Tegland, 13B Wash. Prac. Series, Criminal Law § 2305 (2013-14 ed.).

The Second prong of the Workman test requires the evidence presented in the case to support an inference that "only the lesser offense was committed to the exclusion of the charged offense." Henderson at 144 citing State v. Fernandez-Medina, 141 Wash.2d 448, 455, 6 P.3d 1150 (2000). The reviewing court views the evidence that purports to support a lesser included instruction in

a light most favorable to the party requesting the lesser included instruction, but the reviewing court reviews the trial's court's determination of the factual prong using an abuse of discretion standard. Id.

The only actual eye witnesses to the alleged crime, who testified, were Zachariah Briggs and Samuel Farias. Both of these witnesses testified to each element of the crime of Robbery in the Second Degree. Briggs and Farias said that the Appellant took a bottle of alcohol from Rite Aid in the Pasco, Washington, and then took the bottle outside the store without paying for it. Both said the Appellant was confronted by Briggs about the theft, and then chose to attempt to escape with the bottle by ramming into Briggs with his body and fighting his way free. Law enforcement witnesses arrived afterward and witnessed the Appellant struggling with Briggs and Farias and trying to escape. When detained by law enforcement, the Appellant initially did not deny the charges, he said he had people to take care of, and asked if law enforcement could write him a ticket instead of taking him to jail. When the officer refused, the Appellant said he went out the door and two men grabbed him for no reason. No witness testified that the Appellant stole the

bottle of alcohol, but did not assault Briggs when attempting to escape.

The Appellant relies on his second statement, that the two men grabbed him for no reason, as evidence supporting an inference he committed Theft in the Third Degree to the exclusion of Robbery in the Second Degree. Such an assertion ignores the context of the statement. The Appellant did not specifically deny that the scuffle between himself, Briggs, and Farias had occurred. Instead, he says they grabbed him for no reason. This is a denial of the theft of the alcohol, not the assault. The Appellant tried to paint Briggs and Farias as the aggressors, which would justify any force he used to escape. This makes sense as a defense, because at point in the incident, the police have just arrived, the Appellant has already thrown down the bottle. It was his word against Briggs and Farias that he was a shoplifter.

The Appellant argues that Rite Aid policy only allows their staff to go hands on if a shoplifter initiates contact, therefore, the Appellant must have been denying the assault when he said they grabbed him for no reason. The record does not support this. There is no evidence that the Appellant knew Rite Aid's hands off policy for shoplifters. He had no way of knowing the physical

altercation had little to do with the shoplifting and everything to do with his choice to initiate contact with Briggs. When he states they grabbed him for no reason, he had to have been referring to the theft, not the assault.

In any event, even giving the Appellant every possible advantage, his statement is, at best, one of general denial. When considering whether this single general denial statement raises the necessary inference for a lesser included instruction, it is important to take into consideration the reasoning behind the Workman test:

> [t]he purpose of this test is to ensure that there is evidence to support the giving of the requested instruction. If interpreted too literally, though, the factual test would impose a redundant and unnecessary requirement because all jury instructions must be supported by sufficient evidence... Necessarily, then, the factual test includes a requirement that there be a factual showing more particularized than that required for other jury instructions. Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.

State v. Fernandez-Medina, 141 Wash.2d 448, 455, 6 P.3d 1150 (2000) (citations omitted) (emphasis in original). The Appellant does not specifically deny any elements of the offense of Robbery the Second Degree. Even if the statement is a denial of the assault on Briggs, it is still a denial of the theft of the alcohol also. In order

to receive his lesser included offense instruction, the Appellant would need to be able to infer the theft occurred to the exclusion of the assault. A general denial does not allow one to infer one crime to the exclusion of the other because if you believe such a denial, it would be to the exclusion of both charges.

In State v. Connell, the defendant argued his attorney should have asked for a lesser included instruction of the Theft in the First Degree on his Robbery charge. 137 Wash.App. 81, 95-96, 152 P.3d 349 (2007). In that case the victim accused him of threatening her and also physically assaulting her to carry out the robbery. Id. at 96. The Court pointed out that even if the victim had been discredited, the officer observed her injuries. Id. In this case, even if the Appellant successfully discredited Briggs in favor of the Appellant's general denial, the witness, Farias, still testified that the Appellant used force in trying to escape with his stolen merchandise. Id. Indeed, the only eye witnesses to testify that a robbery occurred, not merely a theft.

2. BECAUSE THE APPELLANT MADE HIS MOTION TO DISMISS FOR INSUFFICIENT INFORMATION AFTER THE STATE RESTED HE IS NOT ENTITLED TO STRICT SCRUTINY OF THE INFORMATION AND IN ANY EVENT, THE LANGUAGE OF THE INFORMATION WAS SUFFICIENT TO

PROVIDE THE APPELLANT NOTICE OF THE CHARGES UNDER A STRICT OR LIBERAL STANDARD.

The Information filed by the State in this case clearly informed the Appellant of the charges he faced. The State then offered evidence which clearly supported and proved those allegations during the course of the trial. The Appellant did not experience any confusion as to the charges he faced. The Appellant's ploy to seek dismissal based on an insufficient information, immediately after the State rested, is simply an attempt to manipulate the purpose of Article I, Section 22 of the Washington State Constitution to receive a dismissal.

The Appellant asks for strict construction of the charging document based dicta in State v. Johnson. 119 Wash.2d 143, 145, 829 P.2d 1078 (1992). That case involved a motion for insufficient information which was filed prior to trial or plea. Id. The dissent in that case aptly pointed out that in overturning convictions based on an insufficient information, "despite *actual notice* of the crime, the majority proceeds far beyond constitutional notice requirements and relies upon a purely technical error." Id. at 151 (emphasis in original). The Appellant in this case attempts to garner such a result by arguing what he deems are technical errors in the State's

Information. Such a result would not be just in this instance, because, looking at the trial record; the Appellant had clear notice of the charges and tailored his defense to refute those charges as best he could. The Appellant only brought his motion in an attempt to obtain a technical legal advantage.

During trial, the Appellant waited for the State to rest, then immediately made a motion for dismissal based on an insufficient information. Division Two recognized this trial tactic: "...what Professor LaFave has described as "sandbagging," a "defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in amendment of the pleading."" State v. Phillips, 98 Wash.App. 936, 940, 991 P.2d 1195 (2000). Allowing such a tactic "invites the defendant, aware of a constitutionally defective information, to wait until the State rests before raising his or her challenge." Id. at 941.

A more appropriate line to draw a distinction between strict and liberal scrutiny is the point where the State rests its case. After the State has rested a document may not be amended unless such an amendment is to a lesser included crime. State v. Grant, 104 Wash.App. 715, 720, 17 P.3d 674 (2001). This allows the State to

give a defendant additional notice, if in fact the defendant has not been given enough data in the Information to prepare their defense. Division Three acknowledges this by holding that the State faces a more liberal standard of review when a challenge to the Information occurs after they have rested their case: "[i]n such a case we ask whether the necessary facts appear in any form or can be found by fair construction in the document; and, if so, whether the defendant can show that he or she was actually prejudiced by the inartful language." Id. at 721.

In the State's Information, the State is required to allege facts supporting every element of an offense, in addition to adequately identify the crime charged. State v. Leach, 113 Wash.2d 679, 689, 782 P.2d 552 (1989). The goal of this process is to define the charge sufficiently for a defendant so that he or she may adequately prepare a defense and also be protected from a subsequent prosecution for the same offense. Id. at 688. When examining the Information in the current case, and the actual facts which came out at trial, it is clear the Appellant had notice of the allegations and had language sufficient to avoid any type of double prosecution.

The first objection to the Information by the Appellant is that it fails to include an essential element, that being "force or fear" was used to obtain or retain the property that was stolen. The Appellant then cites the Information which includes the language "did unlawfully take such personal... by use or threatened use of immediate force." It is unclear why the Appellant believes this is not the same element. "[A]n information need not state the statutory elements of an offense in the precise language of the statute, but may instead use words conveying the same meaning and import as the statutory language." State v. Nieblas-Duarte, 55 Wash.App. 376, 380, 777 P.2d 583 (1989). The language is certainly similar enough to satisfy the statutory elements of the offense, if one chooses to view the requirement in that manner. (Leach requires facts supporting every element of the offense, not exact statutory language. Id. at 689).

The second objection to the information alleges that insufficient specific facts are included in the Information describing the specific conduct which the defendant used the force. The State's charging language does not specifically state, "the defendant rammed his shoulder into Mr. Brigg's in an attempt to carry out the theft of the aforementioned bottles of tequila."

Instead, the Information paraphrases and expands the language of the statute by using the phrase "against such person's will by use or threatened use of immediate force, violence, or fear of injury to the person." The sufficiency of this language is viewed in the context of what notice it is providing the Appellant.

> Because statutory language may not necessarily define a charge sufficiently to apprise an accused with reasonable certainty of the nature of the accusation against that person, to the end that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense, mere recitation of the statutory language in the charging document *may* be inadequate.

Leach at 688 (emphasis added). The Leach court makes the point that if the statutory language doesn't give notice, additional factual language must be added.

In this instance, the State alleged in its charging document that the Appellant stole tequila and then used force or threat of force against a person to effectuate that theft. The State opted to utilize the statutory language to describe the charges as opposed the exact details of the Appellant's assault. The State did not need to include such facts because the statutory language provides ample notice. By stating the Appellant used force or threatened force to effectuate the theft the State refers to the incident between

the Appellant and Briggs. When reviewing the record, one can see that this is the only possible incident the State could be referring to in its Information. The Appellant fails to point out any ambiguity in this language that caused confusion. He seems to concede he faced no practical prejudice as a result of the statutory language used and does not State that he would have faced any double jeopardy issues as a result of the language. His objection is strictly one of form. Such a view is contrary to the cases cited above, which repeatedly hold that the substance of the charging document is more important than the specific wording of it.

CrR 2.1(a)(1) states "[t]he indictment or the information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged..." It is possible to file an information which includes all the statutory language, all the statutory definition language, and all individual facts which the State expects may come out at trial depending on what witnesses show up and what evidence is admitted. However, such a lengthy information does not keep with the spirit of the Article I, Section 22, of the Washington Constitution, and the plain language of CrR 2.1(a)(1). The language in the State Information gave the Appellant notice of the charges and as a result, he demonstrated no surprise

as to any aspect of the State's case during the trial. As such, he claim that the information is insufficient merely a tactic utilized by his attorney, not any violation of his rights.

3. ANY ISSUES RELATED TO THE APPELLANT'S OFFENDER SCORE ARE NOW MOOT AS HE HAS COMPLETED HIS SENTENCE, IS BEING EXTRADITED OUT OF STATE, AND CANNOT BE RE-SENTENCED, AND IN ANY EVENT, EVEN IF THE TRIAL COURT INCLUDED ONE ADDITIONAL POINT IN HIS OFFENDER SCORE THE JUDGE AUTHORIZED AN EXCEPTIONAL DOWNWARD SENTENCE WHICH PUT THE ACTUAL SENTENCE WITHIN THE CORRECT RANGE

The Appellant completed his sentence on July 8, 2014. It is likely that by the time this appeal is considered, he will have been extradited out of State. "A case is moot if a court can no longer provide effective relief." State v. Ross, 152 Wash.2d 220, 228, 197 P.3d 1206 (2008). The issue of offender score calculation is moot when an offender has completed his confinement and does not have a community custody term. State v. Harris, 148 Wash.App 22, 26, 197 P.3d 1206 (2008). Although the Appellant's sentence does include a community custody term, the Appellant is unable to complete that term as he is being extradited out of State.

In any event, even if the sentencing court erred in giving the Appellant a score of 6, that court still gave the Appellant a exceptional sentence downward which in effect, gave him an offender score of 5. Therefore, there was no error, especially since the sentencing court's findings for a downward departure was contrary to law and should not be applied upon resentencing.

Under RCW 9.94A.525 out of state convictions "will be classified according to the comparable offense definitions and sentences provided by Washington law." A two part inquiry is used to make the comparability determination:

> Washington law employs a two-part test to determine the comparability of a foreign offense. A court must first query whether the foreign offense is legally comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute. *State v. Morley,* 134 Wash.2d 588, 606, 952 P.2d 167 (1998).

State v. Thiefault, 160 Wash. 2d 409, 414-15, 158 P.3d 580, 583 (2007). When identifying which Washington statute to use the Court has found that when comparing an out-of-state crime with Washington elements, one must use the Washington statute in

effect at the time the defendant committed the out-of-state crime. State v. Weiand, 66 Wash.App. 29, 33-34 (1992). The best evidence of a prior conviction is a certified copy of the Judgment and Sentence, however, the State may supplement the record with other documents or an FBI rap sheet. State v. McCorkle, 88 Wash.App. 485, 493 (1997). The key to this inquiry being whether the defendant would have been convicted if he had committed the same conduct in Washington. Id.

The State concedes the Residential Burglary statute from the State of Arkansas may be slightly more broad then Washington's RCW 9A.52. However, the State of Arkansas's theft statute is not more broadly defined then theft statute in the State of Washington. A close reading of the statutes in question actually indicates the statutes are identical for legal purposes: "(a) A person commits theft of property if he or she knowingly: (1) [t]akes or exercises unauthorized control over or makes an unauthorized transfer of an interest in property of another person *with the purpose of depriving the owner of the property...*" Arkansas Code § 5-36-103 (emphasis added). The Washington Theft statute reads "(1) "Theft" means: (a) to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof,

with *intent to deprive him* or her of property or services." RCW 9A.56.020 (emphasis added). One says "purpose of depriving" and the other says "intent to deprive him." These two phrases have the exact same meaning. Both statutes rely and deliberately depriving someone of property.

The Appellant argues that the Arkansas statute uses the term "knowingly," while the Washington RCW utilizes an intentional mens rea standard. This is not an accurate reading of A.C. § 5-36-103. That statute uses the word "knowingly" and then immediately uses language which modifies the term "knowingly" and makes the crime one of an intentional nature. The subsequent use of the term "purpose" brings it directly in line with the Washington statute. Once the term "purpose" is used, the statute becomes just as narrow as the Washington theft statute. The use of the term "knowingly," which normally establishes a lesser mens rea, obviously is not utilized in the same manner in Arkansas, or even if it is used in such a manner, the Arkansas legislature chose to override it by making the theft statute require intentional action with the purpose of depriving a specific person. Under the language of the Arkansas theft statute, the State cannot merely show a defendant knew the taking would result in depriving someone of

property, the State must show it took that property with the purpose of depriving an individual. This is just as narrow and specific as the Washington version of theft. A conviction under the Arkansas statute would be a conviction under the Washington statute.

Taking these facts into consideration, the sentencing court likely should have utilized an offender score of five. This would have given the Appellant a range of 22 to 29 months. RCW 9.94A.510 and 9.94A.515. As the Appellant received a sentence within this range, a re-sentencing is not required. It should also be noted that such an exceptional downward sentence would not likely prevail at another sentencing as a trial court is normally not permitted to award an exceptional downward sentence because of their personal belief about a law.

At sentencing the trial court stated "I, for a long time, thought when they changed that statute from $250 to $750 that it was long overdue to change that, so I think that's an appropriate reason for exceptional sentence down." RP (8/6/2013) 6. Making a downward departure from the guidelines because of the legislature's decision to change a law did not come in time is not permissible. When applying the Court's two part test to the

statement made by the trial court one can see the downward departure was not legally justified:

> [f]irst, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range; second, the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from other the same category.

State v. Ha'mim, 132 Wash.2d 834, 840, 940 P.2d 633 (2005). In applying this test to the current case, one can see that he trial court's reasoning does not satisfy either prong. RCW 9A.56.030 and 9A.56.040 have always distinguished the degree of the theft by several factors, one of which is the fair market value of the item or currency stolen. As the legislature actually utilized dollar amount to distinguish the degree of theft, is impossible to argue that the legislature did not take this into account when establishing the standard range.

Secondly, the fact that the Appellant's prior felony theft conviction occurred when the theft statute only required an amount over $250 in value, does not distinguish the Appellant's crime to any other robbery or crime in the same category. Any defendant who has prior theft conviction, which occurred before 2009, could make the exact same argument for an exceptional sentence. 2009

Wash. Legis. Serv. Ch. 431 § 8 (West). This aspect of the Appellant's criminal history does not serve to put the Appellant in exceptional circumstances. Therefore, it can be used as a reason to deviate from the standard range.

When a sentencing court makes an error in calculating the offender score before imposing an exceptional sentence the remedy is normally remand for resentencing. State v. Parker, 132 Wash.2d 182, 189, 937 P.2d 182 (1997). But, if the record clearly shows the court would impose the same sentencing on remand should a remedy is not needed. Id. In this case, the court clearly felt the sentence of 29 months was appropriate. So much so that the court improperly ordered an exceptional sentence the 29 months. As the standard range in the case was properly 22 to 29 months there is no need for resentencing.

D. CONCLUSION

Although the Appellant seeks to find legal fault with the trial courts proceeding in his case, each of his objections ultimately fail because they did not prejudice his ability to exercise his rights and be sentenced to the proper range. On the basis of the arguments set forth above, it is respectfully requested that the conviction of

Thomas Parker for Robbery in the Second Degree be affirmed.

Dated this 11th of August 2014.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF WASHINGTON)

) SS.

County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 11th day of August, 2014, a copy of the foregoing was delivered to Thomas Parker DOC#358377, Appellant, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326, by depositing in the mail of the United States of America a properly stamped and addressed envelope and to Andrea Burkhart, opposing counsel, andrea@burkhartandburkhart.com by email per agreement of the parties pursuant to GR30(b)(4).

Allison Iracheta

Signed and sworn to before me this 11th day of August, 2014.

Deborah L. Ford

Notary Public in and for
the State of Washington,
residing at Kennewick.
My appointment expires:
May 19, 2018.