Supreme Court No: 97095-5
Court of Appeals Div. III No: 357821

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Tyler Scott Fife,

Petitioner.

PETITION FOR REVIEW

Kenneth J. Miller, WSBA #46666
Andrew J. Chase, WSBA #47529
Attorneys for Respondent

PO Box 978
Okanogan, WA 98840
509-861-0815 (P)
509-557-6280 (F)
Ken@MillerChaseLaw.com
Andy@MillerChaseLaw.com

Table of Contents

Table of Authorities

Washington State Supreme Court Cases

Washington State Appellate Cases

Constitutional Provisions

Statutes

Court Rules

A. IDENTITY OF PETITIONER

Mr. Tyler Scott Fife was the Respondent in Division III of the Court of Appeals Cause 357821.

B. COURT OF APPEALS DECISION

The Court of Appeals issued its decision in Mr. Fife's case on March 21, 2019, affirming the Okanogan County Superior Court. *See Appendix A.*

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in refusing to consider Mr. Fife's Constitutional claims regarding the sentencing statutes; and
2. Whether it is Constitutional to force a criminal defendant to make a Hobson's choice between the Fifth and Sixth Amendment rights and the analogous Washington Constitutional provisions.

D. STATEMENT OF THE CASE

Mr. Fife was charged and convicted by jury verdict of several property crimes. At trial and at sentencing, Mr. Fife argued that he had been subject to duress at the hands of Mr. Dahlquist.

In closing arguments at trial, the Prosecutor argued:

> The third element [of Burglary 1st Degree] is that while in the building or in immediate flight from the building – meaning while somebody was inside or while they were leaving – one of them – was in possession of a deadly weapon. Now what we're talking about is Dale Crandall's pistol. One of them had it. There was testimony that Dahlquist was the one that had it, but he obviously took it

> from the house… So no doubt that the firearm that was found on Sean Dahlquist was Mr. Crandall's…

Report of Proceedings ("RP1[1]") at 388:20-389:2 & 397:3-4 (State's closing argument at trial; [Bracketed] material added for clarity). This argument sets the stage for Mr. Fife's appeal.

Mr. Dahlquist, Mr. Fife, Ms. Mendivil, and Ms. Garcia were driving in rural Okanogan County; with Mr. Dahlquist at the wheel, they followed some deer and found themselves at a residence. *See Id.* at 274:10 *et seq.* They stopped and got out of the truck, looking around; Mr. Fife heard a window break, and realized that Mr. Dahlquist was breaking into the residence. *Id.* at 284-86. Mr. Fife and Ms. Garcia got back into the truck. *Id.* Mr. Dahlquist began inviting them to assist in the burglary. *Id.* at 290. When they did not, Mr. Dahlquist approached the truck, armed with a knife. *Id.*

Mr. Fife testified that he did not want to take part and that Mr. Dahlquist "[came] around the passenger side of the truck and opened the door and he said that 'If you don't get out I'm going to fuckin' stab you 'cause I'm not going down for this if you're' – you know, 'I'm not going to have you snitch on me." *Id.* at 291:22-25. Paralyzed, Mr. Fife did nothing at first. Mr. Fife "was so scared and felt so threatened that – [Dahlquist] just kind of had grabbed me by my arm, and said 'Come on, you're helping,'

[1] As below, Mr. Fife refers to the record of the initial trial proceedings as RP1 and CP1; the record of proceedings following the first appeal is denominated RP2 and CP2.

and just forced me. Cause I just sat there in shock." *Id.* at 292:12-15. After this threat, Mr. Fife "got out, and – [inaudible] get out so that, you know, no one would get hurt. That's all I was really thinking about at the moment." *Id.* at 293:10-12.

At some point, Mr. Dahlquist armed himself with a pistol he discovered in the residence. *Id.* at 298. Further testimony indicated that Mr. Dahlquist threatened Mr. Fife with the pistol following the burglary. *See, e.g, Id.* at 298:8-11; 309:12-25; 331:4-7.

As relevant here, the only distinction between Residential Burglary, RCW 9A.52.025 and Burglary 1st Degree, RCW 9A.52.020 is whether another participant in the crime is armed with a deadly weapon. The critical language in the Burglary statute is "another *participant*." This language becomes harshly uncompromising in the context of a duress defense predicated on the threat or use of a deadly weapon – which defense a defendant must establish by a preponderance burden. *See* RCW 9A.16.060; WPIC 18.01. Thus, this specific kind of duress defense becomes an all-or-nothing gamble that begins with a Hobson's choice between Constitutional rights.

If it fails, the result is as in Mr. Fife's case: instead of sentencing on Residential Burglary, the defendant is sentenced on Burglary 1st Degree. At zero points, the range on these charges is 6-9 months and 15-20 months.

With Mr. Fife's offender score of eight, the respective ranges were 53-70 and 77-102; but the real difference is between the midpoints – 28 months.

Mr. Fife requested an exceptional downward departure at sentencing; the nature of the request was to sentence Mr. Fife as though he had been convicted of residential burglary. *RP1* at 474-75. This request was denied, and he successfully appealed. *See State v. Fife*, No. 34442-8-III (Wn. Ct. App. Sept. 14, 2017). In *Fife I*, the Court of Appeals determined the Trial Court erred at sentencing by using the wrong legal standard to consider the request for a downward departure, relied on the jury verdict rather than the sentencing statutes, and did not consider the separate basis of lack of predisposition. *Id.* The case was remanded to Okanogan County Superior Court for resentencing.

Upon resentencing, Mr. Fife made the same request for an exceptional sentence; it was again denied and he appealed. But this time, he raised two new challenges – sufficiency of the evidence and the constitutionality of the duress scheme discussed above. The Court of Appeals declined to review either issue because it was Mr. Fife's second appeal. *See Appendix A*.

Mr. Fife seeks review in the Supreme Court, arguing that the Court of Appeals should have reviewed these issues. The Court of Appeals did not reach the merits of Mr. Fife's contentions because the arguments were not

raised in his first appeal. *See Id.* at 8-10. But the crux of this issue was, perhaps inartfully, preserved in the trial court, both at the original sentencing *and* on resentencing. *See RP1* at 474-75 (sentencing); *CP* at 71-72 (sentencing brief); *RP2* at 20 (resentencing); *CP* at 19 (resentencing brief requesting 29 month sentence).

The Court considered this issue at resentencing, too. Counsel argued to the trial court the same fundamental argument raised here:

> ...[T]he burglary in the first, the charge that's before the Court today, was before... an opportunity to flee was presented to Mr. Fife and we're asking the Court to acknowledge the distinction and to consider that distinction today because the sentencing charge today is the burglary in the first... and that is where the duress standard should be applied by the Court.

RP2 at 21:18-22:1. Trial counsel made a similar argument at sentencing:

> ...[W]e are asking the Court to consider that at least the first part of these activities at the Crandalls' house was – the motivation, the idea for it and what Mr. Dahlquist did, with his threatening and – the armed – threatening behavior, there was duress present at that time.

RP1 at 470:17-22. At both sentencing and resentencing, the parties requested a sentence of 29 months – the high end of sentencing range for Residential Burglary at *five* points, not eight. Herein lies the nexus to the sufficiency of the evidence argument.

On second appeal, Mr. Fife argued that the conviction could not stand because there was insufficient evidence of Mr. Fife's intent to commit

a crime inside the Crandall residence. *See Appellant's Brief* at 22. The thrust of this argument was that even without evidence of duress, there was no evidence of Mr. Fife's mental state other than his own testimony, and the testimony showed he was not an accomplice, either. *Id.* This argument – the notion that Mr. Fife should be sentenced as though he were found not guilty of the crimes occurring at the Crandall residence – was the basis at both sentencing and resentencing for the request of 29 months.

Fundamentally, Mr. Fife argues that the Court of Appeals should have exercised its discretion under RAP 2.5(a) and (c). He now asks this Court to exercise its discretion under RAP 13.4.

E. ARGUMENT

1. Significant Constitutional Questions are at Issue:

This Court should accept review under RAP 13.4(b)(3) – two significant constitutional questions of law are at issue. First, whether the evidence was sufficient to permit an inference of intent as described in *State v. Kilponen*, 47 Wn.App. 912, 919, 737 P.2d 1024 (1987) and whether Mr. Fife's conviction is the result of due process of law. This is a straightforward challenge to the existence of the elements of the offense, and we do not belabor the Court with extensive details thereof.

Mr. Fife's second constitutional question is much more in depth and appears to be an issue of first impression. Under the harshly

uncompromising wording of the Burglary statute, when another *participant* is armed, the crime is elevated from Residential Burglary to Burglary 1st Degree. Where this is the case, a defendant, like Mr. Fife, who has a duress defense must either testify or forgo the defense.

The 6th Amendment to the U.S. Constitution guarantees a defendant a meaningful opportunity to present a complete defense. *See, e.g., State v. Lizarraga*, 191 Wn.App. 530, 551, 364 P.3d 810 (2015); *State v. Jones,* 168 Wn.2d 713, 230 P.3d 576 (2010); *U.S. Const. Amend. VI.* The 5th Amendment to the U.S. Constitution guarantees a right against self-incrimination. *See U.S. Const. Amend. V.* When combined with the language of RCW 9A.52.020 in the context of a duress defense predicated on the use of a deadly weapon[2], a defendant is impermissibly and unconstitutionally forced into waiving one of these rights. *See also WA Const. Art. 1 §3, 9, and 22.*

To present a duress defense, the defendant must show (1) a threat or use of force; (2) his apprehension of grievous harm; (3) and that he would not have participated but for the threat. RCW 9A.16.060(1). Two of these three factors involve the defendant's own mental state and could only be proved by other witnesses in unusual circumstances (e.g. where they are

[2] The same argument would also apply to the actual use of force – i.e. if the defendant is physically forced to comply with a residential burglary, then "another participant" has assaulted "any person" and the residential burglary is elevated to burglary first degree.

present *and* the ER 803(a)(3) exception applies). If no one else can testify to the mental state of the defendant, he must take the stand in order to assert the defense.

If the threat is from a deadly weapon, however, the defendant cannot avoid testifying directly (or admitting on cross, despite ER 611) that "another participant" was armed with a deadly weapon. The defendant must waive his right against self-incrimination and testify to a fact that elevates Residential Burglary (a class B felony) to Burglary 1st Degree (class A). The very essence of duress is that it is an affirmative defense arguing that the defendant was an *unwilling* participant.

In order to assert duress, the Defendant admits to all underlying elements, including the intent to commit a crime inside the building. *See State v. Mannering*, 150 Wn.2d 277, 286-87, 75 P.3d 961 (2003) (citing *State v. Riker*, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994)). But in a case like Mr. Fife's, the admission goes no further than the elements of residential burglary.

Our sentencing statutes provide the penal interest required for a constitutional nexus to due process rights. Even though a defendant who asserts an affirmative defense admits the elements and risks the failure of the defense, the *increased* penalties for asserting the defense here are unconstitutional. In short, the heightened penal stakes applicable in light of

the deadly weapon duress defense deprive a defendant of due process in this context.

Mr. Fife faced a Hobson's choice – waive his right to present a complete defense and remain silent; or waive his right to remain silent to present a complete defense. He chose the latter, but the jury did not agree. Forcing this choice, however, violated his rights.

2. These Issues may be Considered on a Second Appeal:

The Court of Appeals relied on *Mandanas* and *Sauve,* as well as a discussion of *Barberio* in deciding to decline review because the issues were not raised in the first appeal. *See Appendix A* at 8 (citing *State v. Mandanas,* 163 Wn.App. 712, 262 P.3d 522 (2011); *State v. Sauve*, 100 Wn.2d 84, 666 P.2d 894 (1983); *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993)). Mr. Fife argues that the arguments were sufficiently preserved to afford review, but additionally that the intertwined nature of the questions present reveal that this issue has been constantly under review, though not labeled with the talismanic terms "sufficiency of the evidence" and "significant question of law."

Mr. Fife's first request at sentencing for a downward departure was twofold: First, an argument that he should be sentenced as though he had been convicted of residential burglary; and Second, an argument that his offender score should be reduced as though duress substituted for intent –

effectively not scoring the events at the Crandall residence. The Court exercised independent judgment and declined to accept this argument. The same argument was repeated to the Court at resentencing. Again, the Court exercised independent judgment and declined to accept this argument.

This falls within the rule in *Barberio* – "[t]he deciding fact then is whether the trial court in this case did in fact independently review, on remand, the exceptional sentence imposed..." *Barberio*, 121 Wn.2d at 51. The Court there concluded that the trial court was making clerical amendments, rather than reconsidering the sentence. *Id.* But here, the Court was required to consider Mr. Fife's request for an exceptional sentence anew. This is sufficient to resurrect his appeal even under *State v. Kilgore*, 167 Wn.2d 28, 43, 216 P.3d 393 (2009). Unlike *Barberio* and *Kilgore*, the trial court here was *required* to resentence Mr. Fife on the Burglary 1st conviction.

Mandanas cites to *State v. Sauve*, 100 Wn.2d 84, 666 P.2d 894 (1983); and *State v. Jacobsen*, 78 Wn.2d 491, 477 P.2d 1 (1970). In *Sauve*, the Court cited no authority for the pronouncement that the appeal process must stop at some point and pointed out that the Defendant had the alternative remedy of a Personal Restraint Petition. *Sauve*, 100 Wn.2d at 87. Mr. Fife does not have the alternate PRP remedy available due to the passage of time.

Jacobsen cites to *State v. Bauers*, 25 Wn.2d 825, 172 P.2d 279 (1946), which in turn cites to *Davis v. Davis*, 16 Wn.2d 607, 134 P.2d 467 (1943). The *Davis* case collects prior sources to the effect that new issues are barred, but the prior sources are exclusively civil. *Davis*, 16 Wn.2d at 609-10[3].

Mr. Fife's case is highly fact bound because of the unusual circumstance where the argued deadly weapon (the gun) is the fruit of the *target offense* used to establish burglary, and not a tool for the commission of *either* offense. Where this deadly weapon is *also* a mechanism of duress, *and* the statutory language elevating residential burglary to burglary first degree makes no distinction between accomplice and duressee, there is no good way to place a label on the issues for review. While clearly dicta as applied to this case, this Court recently cautioned against the need for talismanic words. *Reyes v. Yakima Health District*, 191 Wn.2d 79, 419 P.3d 819 (2018). The interplay of the facts above has always been what is at issue here – Mr. Fife should not be denied relief because his claim is difficult to characterize.

---

[3] *Wilkes v. Davies*, 8 Wash. 112, 35 P. 611, 23 L.R.A. 103; *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 62 Wash. 436, 113 P. 1104; *Perrault v. Emporium Department Store Co.*, 83 Wash. 578, 145 P. 438; Co*llins v. Terminal Transfer Co.*, 98 Wash. 597, 168 P. 174; *McGill v. Baker*, 157 Wash. 414, 288 P. 1062; *Fleming v. Buerkli*, 164 Wash. 136, 1 P.2d 915; *Peabody v. Pioneer Sand & Gravel Co.*, 172 Wash. 313, 20 P.2d 15; *Baxter v. Ford Motor Co.*, 179 Wash. 123, 35 P.2d 1090; *Miller v. Sisters of St. Francis*, 5 Wash.2d 204, 105 P.2d 32.

Mr. Fife is cognizant of the Court's reasons against endless appeals. Indeed, they make good sense. However, Mr. Fife argues that this should not insulate review in all cases, and certainly not all criminal cases, consistent with the discretionary nature of RAP 2.5 and RAP 13.4.

F. CONCLUSION

Mr. Fife argues his rights were violated when he was convicted of Burglary 1st Degree. He had the right to be free from self-incrimination and the right to present a complete defense to the charges against him, but he was forced to waive one of these rights in this case. This Hobson's choice only arises because of unconstitutional language ("another participant") that deprived Mr. Fife and similarly situated defendants of due process both at trial and sentencing. This language ignores the distinction between accomplice and duressee, partially relieving the State of its burden and heightening the defendant's preponderance burden for this defense; and subjects a defendant to a heightened penalty at sentencing by elevating Class B conduct to a Class A offense.

Mr. Fife argues that these issues were adequately preserved through his first appeal to be raised in the second, however inartfully labeled below. Regardless, the Court of Appeals had discretion to consider these issues, and should have done so because of the exercise of independent judgment upon resentencing. Unlike other cases where new issues have arisen on

second appeal, Mr. Fife has no other remedy than to petition this Court for relief.

Finally, there is another reason justifying relief not precisely within RAP 13.4(b)(4). This issue is complicated enough that all parties would benefit from a determination from the Washington Supreme Court as to how to address this issue at the trial court level – i.e whether it is a matter of law to be decided pretrial; an issue of jury instructions; or whether the statute is unconstitutional.

Mr. Fife respectfully requests that this Court grant review.

Respectfully submitted this 18th of April, 2019.

Kenneth J. Miller, WSBA #46666
Attorney for Respondent

Andrew J. Chase, WSBA #47529
Attorney for Respondent

Appendix A

FILED
MARCH 21, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. TYLER SCOTT FIFE, Appellant.	)	No. 35782-1-III
	)	UNPUBLISHED OPINION

FEARING, J. — This court previously remanded the prosecution of Tyler Fife for resentencing and for the sentencing court to exercise discretion in determining whether to grant a downward exceptional sentence. Fife claims he should receive an exceptional sentence because he committed his crimes under duress and without a predisposition to commit the crimes. The resentencing court refused the downward exceptional sentence. Because the resentencing court exercised its discretion within the appropriate standards, we affirm.

FACTS

Tyler Fife confessed that he and three other individuals burglarized two homes and an attached garage to one home on December 1, 2014. He contends that he participated in the crimes because of duress imposed by Sean Dahlquist.

During trial, Tyler Fife testified that, because he resided in Okanogan County for a long time, he "kind of" knew Sean Dahlquist. RP[1] at 275. On cross-examination, Fife admitted knowing Dahlquist to be a troublemaker. He recounted that, on December 1, 2014, Dahlquist appeared at a mutual friend's home, they socialized for a while, and he, his girlfriend, Samantha Garcia, and Chantelle Mendivil agreed to go on a drive with Dahlquist.

At trial, Tyler Fife further testified that he and Samantha Garcia assisted with the burglaries from fear that Sean Dahlquist, the instigator of the crime spree, would physically harm them if either refused to abet. Fife testified that Dahlquist threatened both him and Garcia: "'If you guys don't get out [of the truck][,] I'm going to make you.'" RP[1] at 291. Later, according to Fife, Dahlquist threatened to stab him with a knife if he did not help burglarize the first home. When Fife did not comply, Dahlquist grabbed his arm and forced him out of the truck and into the home.

After ransacking the first home, the quartet retired to the Nicholas Motel in Omak to unload their bounty. Later that evening, Sean Dahlquist, Chantelle Mendivil, and Tyler Fife departed toward Tonasket to burglarize the second home. Fife testified that

Dahlquist did not trust him to stay behind with Samantha Garcia at the hotel and said, "'[y]ou're coming with me.'" RP[1] at 308. When demanding Fife's participation, Dalhquist played with a stolen pistol from the first home. Fife obeyed again. Garcia testified and confirmed Fife's testimony of threats from Dahlquist.

PROCEDURE

The State of Washington charged Tyler Fife with thirteen criminal counts, which included charges for burglary, theft, possession of stolen property, malicious mischief, and possession of controlled substances, all related to the December 1 crime spree. The charges included one count of first degree burglary based on Sean Dahlquist being armed with a gun that he stole from the first home. Fife asserted the defense of duress. A jury rejected Fife's duress defense and found him guilty of all thirteen counts.

During initial sentencing, Tyler Fife requested an exceptional sentence downward based on the mitigating factors of duress and a lack of criminal predisposition. The trial court rejected Fife's request for an exceptional sentence. Nevertheless, the court cited the standard for the exceptional sentence as "substantial and compelling evidence that there was duress" instead of "substantial and compelling reasons" for a departure shown by a preponderance of the evidence. The trial court also failed to address the request for an exceptional sentence on the basis that Fife lacked a predisposition for criminal behavior. The trial court sentenced Fife to standard range sentences on all counts. Tyler Fife appealed. In *State v. Fife*, No. 34442-8-III (Wash. Ct. App. Sept. 14, 2017),

(unpublished), https://www.courts.wa.gov/opinions/pdf/344428_unp.pdf, this court held that the trial court applied the wrong legal standard under RCW 9.94A.535 for mitigating factors and that the court failed to consider Fife's request for an exceptional sentence based on a lack of criminal predisposition. This court remanded for resentencing with instructions that the court consider whether to grant a downward sentence based on Fife's claim that he suffered duress and lacked a criminal predisposition.

During resentencing, Tyler Fife again requested an exceptional downward departure from the standard range sentence based on the mitigating factors of duress and lack of criminal predisposition. During the resentencing hearing, the trial court entertained comments from the State, defense counsel, Fife, and Fife's mother.

When resentencing Tyler Fife, the resentencing court discussed this court's opinion in *State v. Fife*, No. 34442-8-III, clarified the standard for a downward sentence, and addressed Fife's request for an exceptional sentence based on duress and lack of criminal predisposition. The court commented:

> [B]ut for those of you in the courtroom, and for the record, and for the sake of the Court of Appeals if there's ever any other appellate matter involving this case, I don't want anyone to feel that the Court today has disregarded any of the stated reasons for the defense's request for an exceptional sentence. In other words, be clear folks, that I am mindful of the defendant's claim of duress and—and that he lacked a pre-disposition for criminal behavior. And I truly hope that everyone in this courtroom feels like this Court has considered this matter at length because I have.

RP[2] at 40.

The resentencing court rejected Tyler Fife's request for an exceptional sentence downward on duress and lack of criminal predisposition. The court remarked:

> So, for purposes of re-sentencing, and for the record, and any future potential appellate review, the Court today, again, rejects the defendant's request for an exceptional sentence. Specifically, and regardless of the jury's verdicts, the Court finds that Mr. Fife's contention is arguable at best. He claims he refused or couldn't or didn't leave due to his fear that Mr. Dahlquist would hurt him or Ms. Garcia if he left or sought help. Yet, the evidence presented at trial showed opportunities when he might have left or ceased participation. The evidence is arguable and such that the Court cannot conclude by a preponderance that the defendant acted under duress or threat, even an amount less than necessary to establish the legal defense of duress.
>
> . . . .
>
> . . . Likewise, the Court today is denying an exceptional sentence based on a lack of predisposition to crime and/or that someone else induced him to commit the crimes.
>
> It may be true that the defendant has minimal criminal history. But, it's interesting, as counsel pointed out last week, that Mr. Fife had only been in Okanogan County for a very short period of time and in that time managed to become acquainted with, and apparently to some degree, befriended Mr. Dahlquist. I don't like the word disingenuous, but it is a contradiction to say really that on one hand Mr. Fife chose to hang out with this other person, befriending him to some degree or another, but at the same time, didn't know what was going on. So, I'm not satisfied that the evidence supports an exceptional sentence based on a lack of pre-disposition or that someone else is somehow responsible.
>
> We know Mr. Fife has some criminal history. We know he has other issues and so the Court today declines to impose an exceptional sentence.

RP[2] at 43-45. The resentencing court amended the sentence on the controlling first degree burglary charge to the low end of the standard range, 77 months.

At the conclusion of resentencing, the court commented:

> If you choose to appeal, you have the right to be represented by an attorney. If you cannot afford to hire your own attorney, the Court will appoint counsel to represent you and that's at public expense. If you choose to hire your own attorney, that's your business. Either way, if you choose to appeal, you must, within thirty days of today, file a notice of appeal that sets forth any errors of law that you feel the Court has committed. Again, at *any* stage of any of the proceedings at the trial Court level.

RP[2] at 47 (emphasis added).

LAW AND ANALYSIS

Tyler Fife asserts four contentions on appeal. First, insufficient evidence supported his conviction for first degree burglary. Second, the exceptional sentence sentencing statute is unconstitutional as applied to him. Third, the resentencing court abused its discretion when refusing to grant a downward exceptional sentence because of his duress. Fourth, the resentencing court abused its discretion when failing to grant a downward exceptional sentence because of his lack of a criminal predisposition. Fife raises the first two contentions for the first time on this second appeal.

Insufficient Evidence

Tyler Fife argues that he did not have the requisite mental state for the first degree burglary conviction. He emphasizes that the State presented no evidence to support an inference that he entered the residence with the *intent* to commit a crime therein, an element of first degree burglary under RCW 9A.52.020.

A claim of insufficient evidence in support of a conviction is an issue of constitutional magnitude that an appellant may raise for the first time on appeal. RAP 2.5(a)(3); *State v. Cardenas-Flores*, 194 Wn. App. 496, 508-09, 374 P.3d 1217 (2016), *aff'd*, 189 Wn.2d 243, 401 P.3d 19 (2017). Nevertheless, a defendant is generally prohibited from raising issues, including constitutional issues, on a second appeal that he could have raised on the first appeal. *State v. Sauve*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983); *State v. Mandanas*, 163 Wn. App. 712, 716-17, 262 P.3d 522 (2011).

The appeal now before this court is Tyler Fife's second appeal. Fife asserts, however, that he is entitled to raise any assignments of error from any portion of the proceedings against him because of the resentencing court's broad comment, at the conclusion of resentencing:

> if you choose to appeal, you must, within thirty days of today, file a notice of appeal that sets forth any errors of law that you feel the Court has committed. Again, at *any* stage of any of the proceedings at the trial Court level.

RP[2] at 47 (emphasis added). We do not read the trial court's statement as broad as Fife. The resentencing court did not promise Fife that this reviewing court would entertain any assignment of error from any stage of the prosecution. Instead, the resentencing court informed Fife that, assuming he wishes to appeal any ruling during any stage of the proceeding, he must file a notice of appeal within thirty days. Also, we know of no rule that permits the superior court to bind the Court of Appeals into an obligation to entertain

an assignment of error otherwise not reviewable.

Tyler Fife cites no authority, in his opening brief, establishing that a defendant may raise a contention not asserted in the first appeal. He instead cites RAP 2.5(a)(2) and (3) and RAP 2.5(c) in his reply brief. The applicable rule, RAP 2.5(c)(1), states:

> . . . If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5(c)(1) has its limits. The rule does not automatically revive every issue or decision not raised in an earlier appeal. *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). Rather, we will entertain a new issue on the second appeal only if the trial court, on remand, exercised independent judgment and reviewed and ruled again on the issue. *State v. Barberio*, 121 Wn.2d at 50. Tyler Fife's resentencing court did not consider the sufficiency of the evidence for any conviction. Therefore, we deny review of this assignment of error.

We deem *State v. Mandanas*, 163 Wn. App. 712 (2011) controlling. Bayani Mandanas appealed his sentence. This court found that the trial court abused its discretion in its determination of same or separate criminal conduct, and this court remanded for resentencing. In a second appeal, Mandanas raised a double jeopardy claim to challenge his convictions. This court held that the defendant's double jeopardy challenge was not timely since Mandanas never raised it in his first appeal. The court

observed that even an issue of constitutional import cannot be raised in a second appeal. At some point, the appellate process must stop.

Constitutionality of Sentencing Statute

At the time of the initial sentencing and the resentencing, Tyler Fife sought a downward exceptional sentence under RCW 9.94A.535. The statute permits the sentencing court to sentence below the standard range if, based on a preponderance of evidence, the sentencing court finds:

> The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

RCW 9.94A.535(1)(c). Fife argues that the statutory scheme is unfair to him under the context when the State charged him with first degree burglary. For the jury to convict him of first degree burglary, the jury must find that he or one of his accomplices armed himself with a firearm. The State presented testimony that Sean Dahlquist armed himself. Yet, Fife testified and argued that Dahlquist employed the firearm as a mechanism of the duress, coercion, threat or compulsion that Fife suffered. Thus, Fife asserts that he needed to either forgo his right to present a defense of duress or remain silent. Thus, the law and evidence coerced him into testifying against himself and interfered in his right to defend himself in violation of his Fifth and Sixth Amendment rights.

We applaud Tyler Fife's resourcefulness in asserting this contention.

Nevertheless, we decline to review the argument since Fife did not raise the contention during his first appeal or during trial. As stated before, a defendant may not raise even a constitutional argument for the first time on a second appeal. *State v. Sauve*, 100 Wn.2d at 87 (1983); *State v. Mandanas*, 163 Wn. App. at 717 (2011).

Duress

Tyler Fife contends that the trial court erred when refusing his request for a downward exceptional sentence based on duress because the trial court failed to employ the proper procedure in its consideration and denied the request on impermissible grounds. The State concedes that a defendant may appeal the procedure a trial court follows when considering an exceptional sentence. Nevertheless, the State argues that Fife does not present an appealable issue because no procedural errors occurred on resentencing. The State also contends that, even if the issue is appealable, the trial court thoroughly analyzed the issue of whether Fife established duress for the purpose of sentencing, and the court did not abuse its discretion.

Although a standard range sentence is generally not appealable due to the rigid language of RCW 9.94A.585, a defendant may appeal the procedure the trial court followed when imposing his sentence. *State v. Knight*, 176 Wn. App. 936, 957, 309 P.3d 776 (2013). While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and have the alternative actually considered. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d

1183 (2005). Failure to consider an exceptional sentence is reversible error. *State v. Grayson*, 154 Wn.2d at 342.

When a defendant requests an exceptional sentence downward, the denial of that request can be reviewed if the sentencing court either "refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A court refuses to exercise discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances. *State v. Garcia-Martinez*, 88 Wn. App. at 330. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range when, for example, the court determines that no drug dealer should get an exceptional sentence or it refuses to consider a request on the basis of the defendant's race, sex or religion. *State v. Garcia-Martinez*, 88 Wn. App. at 330. Conversely, when a court considers facts and finds no legal or factual basis for an exceptional sentence, the sentencing court has exercised its discretion, and the defendant cannot appeal that ruling. *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

The Sentencing Reform Act of 1981, chapter 9.94A RCW, allows trial courts to consider a "failed defense" as a mitigating factor justifying an exceptional sentence below the standard range even if the jury convicted the defendant and rejected the proffered defense. *State v. Jeannotte*, 133 Wn.2d 847, 858-59, 947 P.2d 1192 (1997). RCW 9.94A.535 reads, in relevant part:

> The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. . . .
>
> . . . .
>
> (1) Mitigating Circumstances—Court to Consider
>
> The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.
>
> . . . .
>
> (c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

Tyler Fife asserts that the trial court impermissibly focused only on duress and failed to address other statutory words such as coercion, threat, or compulsion. Fife also contends that the trial court erred in its inquiry because it focused solely on his ability or lack thereof to abandon the criminal enterprise and therefore the court employed an incorrect legal standard under RCW 9.94A.535(1)(c). We disagree.

The resentencing court properly exercised its discretion when it considered Tyler Fife's request for an exceptional sentence. The court understood its options and the appropriate standards and determined that an exceptional sentence downward was not appropriate for Fife. The court considered the evidence and did not find that Fife acted under duress or threat. The court did not use the words "compulsion or coercion," but we deem those words to bear the same meaning in this context to the words uttered by the court: "duress" and "threat."

The sentencing court likewise did not rely solely on an impermissible basis in denying his request for an exceptional sentence. At the resentencing hearing, the court entertained comments from the State, defense counsel, Tyler Fife's mother, and Fife himself. The court found that evidence presented at trial showed times when Fife could have refused to participate or ceased participation altogether and imposed a standard range sentence.

Tyler Fife complains that the trial court impermissibly based its decision on an incorrect legal standard because abandonment of the criminal enterprise is nowhere to be found under RCW 9.94A.535(1)(c). Nevertheless, a court's discussion regarding a defendant's opportunity to remove oneself from participating in the criminal activity relates to whether the defendant acted under coercion and duress.

Lack of Criminal Predisposition

Tyler Fife also contends the trial court improperly denied his request for a downward exceptional sentence because of his lack of a predisposition to commit criminal acts. RCW 9.94A.535(1)(d) allows an exceptional sentence when:

> The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

We employ the same analysis employed with regard to the factor of duress. A defendant may appeal the procedure the trial court followed when imposing a standard range sentence or in considering an exceptional sentence. *State v. Knight*, 176 Wn. App.

at 957. The reviewing court's inquiry is limited to whether the trial court refused to exercise discretion at all or relied on an impermissible basis for its refusal of an exceptional sentence. *State v. Garcia-Martinez*, 88 Wn. App. at 330.

Tyler Fife contends that the resentencing court erred because it relied on facts outside the record and such a "foray" is an impermissible basis for declining a downward exceptional sentence based on a lack of criminal predisposition. He takes exception to the trial court's comment regarding his "befriending" of Sean Dahlquist.

We agree with Tyler Fife that a sentencing court may not rely on extrajudicial information, but must rely on facts admitted, proved, or acknowledged when determining any sentence. *State v. Grayson*, 154 Wn.2d at 338-39 (2005). Nevertheless, trial testimony showed that Fife knew Sean Dahlquist and they spent time together. The court could draw a reasonable inference that Fife and Dahlquist were friends. Fife knew Dahlquist had a criminal past. Also, Fife possessed a criminal history.

CONCLUSION

We affirm the trial court's resentencing of Tyler Fife.

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

Fearing, J.

Fearing, J.

WE CONCUR:

Siddoway, J.

Siddoway, J.

Pennell, A.C.J.

MILLER & CHASE, PLLC

April 18, 2019 - 3:27 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington v. Tyler Scott Fife (357821)

The following documents have been uploaded:

- PRV_Petition_for_Review_20190418152623SC202773_4311.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review04182019.pdf

A copy of the uploaded files will be sent to:

- anoma@co.okanogan.wa.us
- ken@millerchaselaw.com
- sfield@co.okanogan.wa.us
- talia@millerchaselaw.com

Comments:

Sender Name: Talia Misner - Email: talia@millerchaselaw.com
Filing on Behalf of: Andrew Chase - Email: andy@millerchaselaw.com (Alternate Email:)

Address:
PO Box 978
217 Pine St
Okanogan, WA, 98840
Phone: (509) 861-0815

Note: The Filing Id is 20190418152623SC202773