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Date: 8/5/2022

Joshua D. Lambert

I DECLARE THE FOREGOING TRUE UNDER THE PENALTY OF PERJURY OF THE STATE OF WASHINGTON.

SUPREME COURT FOR THE STATE OF WASHINGTON

Supreme Court No. 100832-5

Court of Appeals No. 78621-1-I

Island County Superior Court No. 11-1-00181-5

State of Washington, Respondent/Plaintiff,

VS.

Joshua D. Lambert, Petitioner/Defendant.

MOTION FOR DISCRETIONARY REVIEW

Treated as a Petition for Review

Presented By:

Joshua D. Lambert. DOC #807036

Pro Se. Petitioner/Defendant.

Washington State Penitentiary, Cell BB212

1313 N. 13th Ave., Walla Walla, WA 99362

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I. IDENTITY OF PETITIONER.

The petitioner is a pro se defendant in the criminal matter, Island County Superior Court Cause No. 11-1-00181-5. He is an inmate at Washington State Penitentiary in Walla Walla, WA serving an 80 unlawful sentence.

II. DECISION BELOW.

I am seeking discretionary review of the Division One unpublished decision for No. 78621-1-I, which is my second direct appeal, and it was regarding my resentencing hearing in June 2018. I was pro se for this direct appeal, I am pro se now, and I was pro se for my resentencing hearing in 2018. The COA decision is date stamped 1/24/2022.

III. ISSUES PRESENTED FOR REVIEW.

1) Is remand appropriate when a defendant objects to the calculation of priors, calculation of points, calculation of consecutive sentences, and same criminal conduct, and requests an evidentiary hearing? Or which of tnese require an evidentiary hearing?

2) For a waiver of counsel to be valid, does the record have to reflect that the nature, classification, and maximum penalties of the charges were known to the defendant?

3) Does a waiver of counsel on 2 dismissed charges, waive 6 other charges that were not waived? And, does the record have to reflect the nature, classification, and maximum penalties of these 6 charges were known to the defendant at the time of the waiver?

4) Does a trial court have the authority under RAP 7.2(i) to rule on the merits of motions for litigation costs and expenses after a notice of appeal has been filed? And, is a record on review incomplete when omissions are not material, and the alleged omitted record does not even exist?

5) Should the restitution order be vacated for not providing defendant an evidentiary hearing when he requested one?

6) Should the Court of Appeals rule on the merits of insufficient charging document claims because the trial court revisited the issue post remand?

7) Did the Court of Appeals error on the other appeal claims?

IV. STATEMENT OF THE CASE.

I went to resentencing after my first appeal. I then got resentenced to 80 years for six charges: Murder 1; Kidnapping 1; Burglary 1; Taking a Motor Vehicle 2; Burglary 1; and Unlawful Possession of a Firearm. (See CP 1920, at 1-2).

V. ARGUMENT.

1) Issue One

Discretionary review should be accepted under RAP 13.4(b)(2) and (1) because it is in conflict with State v. Cobos, 178 Wn.2d 692, 699 (2013) (citing State v. Bergstrom, 162 Wn.2d 87 (2007)). Cobos, 178 Wn.App. at 699 states: "Our Supreme Court has held that a sentencing court must conduct an evidentiary hearing when a defendant objects to the State's calculation of the offender score[.]". (See Opening Brief at 22, Count 9).

Also, to prevail on review of this claim I must show: 1) [whether he specifically objected]; 2) whether the objected to facts were material to sentencing; and 3) whether the Trial Court considered those facts at sentencing. See Cobos, supra, 178 Wn.App. at 698; and RCW 9.94A.530(2). (See Opening Brief at

22, Count 9).

I had made specific objections in CP 1905, in defendant's "Motion To Strike Sentencing Hearing And Objections To State's Sentencing Memorandum". (See CP 1905 at pgs 3 of 12 through 4 of 12, where I stated verbatim:

"3) I object to the State's Calculation of prior convictions and move for an evidentiary hearing to prove them, which I'll need a continuance to get the relevant records.

4) I object to the State's calculation of the points for the charges I'm getting sentenced on now.

And I need more time to prepare to argue this.

5) I object to the State's calculation of consecutive sentences in all regards.

And I need more time to prepare to argue this.

6) I object to the State's criminal conduct not being applied in all regards.

And I need more time to argue this." [End of quote].

I did in deed cite this same CP 1905 in my Opening Brief in

Count 9, at pg 22 ("Count 9. Failure To Hold Evidentiary Hearing Regarding Points"). I stated: "The defendant objected to the calculation of prior convictions and moved for an evidentiary hearing. (See CP 1905, at 3-4 (also pg 766-67). Defendant had also objected specifically to the calculation of the points, calculation of consecutive sentences, and calculation in regards to 'same criminal conduct'. See Id..".

On pg 6 of the COA decision, in the section titled: "III. Offender Score", the COA found that I wasn't entitled to an evidentiary hearing or a remand.

But, an evidentiary hearing is mandatory for an objecting defendant. My objections met the standard in Cobos because 1) I objected specifically to the calculation of the points, calculation of consecutive sentences, and calculation of same criminal conduct; 2) these facts were material to sentencing because they were about sentencing matters because they were about points, consecutive sentences, and same criminal conduct; and 3) the trial court did consider these facts at sentencing because my Judgment and Sentence indicates my points, and also consecutive sentences that were not calculated as same criminal conduct. (See Judgment and Sentence, CP 1920).

It does not suffice if the prosecutor had prima facie

evidence or sufficient evidence. And because an evidentiary hearing is designed or available for me to challenge this evidence or put forth evidence of my own suffice that I had merely a sentencing hearing because the statute is entitling me to a full blown "evidentiary hearing" not just a sentencing hearing. And evidentiary hearings are a different type of process, and a sentencing hearing does not even have the Rules of Evidence.

The statute RCW 9.94A.530(2) and Cobos are mandatory, and remand is appropriate. I was prejudiced out of the benefits of the evidentiary hearing and its process type to determine and oppose these facts.

In CP 1909, "Order To Strike Sentencing Hearing And Objections To Sentencing Memorandum", the Trial Judge denied my motion for an evidentiary for points, consecutive sentences, and same criminal conduct. This was the order regarding my above cited motion CP 1905.

2) Issue Two

Discretionary review should be accepted under RAP 13.4(b)(1) because the COA's decision is in conflict with both State v. Deweese, 117 Wn.2d 369, 816 P.2d 1 (1991); and

Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984). These two cases were relied on in the case I used in my Opening Brief, Id at pg 33 (citing State v. Howard, 405 P.3d 1039 (2017)).

Additionally, discretionary review should be accepted under RAP 13.4(b)(2) because the decision is in conflict with appellate decisions. Both State v. Howard, 1 Wn.App.2d 420, 405 P.3d 1039 (2017); and, State v. Silva, 108 Wn.App. 536, 31 P.3d 729 (2001).

These cases support or stand for, the proposition that a valid and knowing waiver of counsel, the record must reflect - at a minimum - that the defendant knew both (1) the maximum penalties, and (2) nature and classification of the charges. It may also require other things to be valid, but these two prongs are what is in issue and relevant to my case.

But the COA in my case ruled otherwise. The COA erred by finding the waiver valid despite that the record did not reflect the maximum or potential penalties, nor the nature and classification for Counts 1; 3; 4; 5; 7; and, 8. (See CP 1920, at 1-2); (Opening Brief at 29-32). And this is when all other charges have been dismissed. (See CP 1925, Dismissal Order; and, Information at CP 1392). And I had brought these issues up

in my appeal.

Nowhere in the record does it state the penalties or the nature and classification of these said six counts. (See, VRP at 1/19/18, at 5:12-14:4; and, Opening Brief at 30-32). And neither did the COA find that the record relected the penalties, and nature and classification of these six counts. The COA's findings were solely of different facts and conclusions relevant to other prongs of the minimal requirements. (See COA Opinion, at pg 10). None of the COA findings include the record anywhere relflecting the penalties and nature and classification of these six charges.

State v. Deweese, 117 Wn.2d, supra, at 377 states: "A colloquy on the record is the preferred method; but in the absence of a colloquy, the record must reflect that the defendant understood the seriousness of the charge, the possible maximum penalty involved ...".

And, Bellevue v. Acrey, 103 Wn.2d, supra, at 211 states: "That colloquy, at a minimum, should consist of informing the defendant of tne nature and classification of the charge, tne maximum penalty upon conviction ...". And farther below at 211 it states: "In the absence of a colloquy, the record must somehow otherwise show that the defendant understood the

seriousness of the charges and knew the possible maximum penalty.".

And in State v. Howard, 405 P.3d, supra, at 1044 states: "The maximum penalty for the charged crime is essential information that a defendant needs in deciding whether to represent himself or herself. ... Therefore, if a defendant does not know the maximum penalty for the charged crime, we cannot say that the defendant is making the decision to represent himself of herself knowingly.".

And in State v. Silva, 108 Wn.App., supra, at 539 states: "the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved ...". And then at 540 it states: "Moreover, it failed to include critical information concerning the nature of the charges in this case and the maximum possible penalties Silva faced in this case. Absent a colloquy, a waiver may still be valid if a reviewing court determines from the record that the accused was fully apprised of these factors and other risks associated with self-representation that would indicate that he made his decision with his "eyes open."".

Nowhere in the record does it show the maximum possible penalties, nor does it state the said six charges nature and

classification, and because it simply does not state these things. The colloquy does not state these, and even more so because both the defendant and the trial judge affirmatively stated only 2 charges and their penalties. But, this is not the charges and possible penalties that exist.

Also this violated my Right to a valid waiver under Gideon v Wainwright, 372 U.S. 335, 339 (1963) and Von Moltke v. Gilies, 332 U.S. 708, 723-24 (1948).

3) Issue Three

I incorporate my argument and caselaw from Issue Two above, and request that discretionary review be granted under RAP 13.4(b)(1), and (2). And it violates my right to a valid and knowing waiver under Gideon v Wainwright, supra, and Von Moltke v Gillies, supra.

In my Opening Brief at Count 12, Id at pgs 29-32, I showed how I only waived counsel for 2 of the 8 charges. At the trial transcript VRP 1/19/12, pgs 12:5-14:4, the waiver only included 2 charges (Count 2, Murder 1; and, Count 6, Burglary 1). But my Judgment and Sentence states six other and different charges, which are: Count 1, Murder 1; Count 3, Kidnapping 1; Count 4, Burglary 1; Count 5, Taking a Motor Vehicle 2; Count 7,

Burglary 1; and Count 8, Unlawful Possession of a Firearm 2. The Information is at 1392.

Therefore the Court of Appeals should of remanded based on the waiver not including all the charges, and the charges it did include ended up actually getting dismissed, as you can see on the Judgment and Sentence CP 1920. It states six charges and is missing one of the murders and one of the burglaries.

The Court of Appeals decisions lists several bases for its decision on this issue, but none of these bases are relevant to my knowledge of the nature, classification, or maximum penalties of the other six charges. See Id Opinion at 10. These bases the COA relied on are more relevant to other different prongs of waivers of counsel. Such as, being unequivical, knowing procedures, or competence to waive, or knowledge of hearings. But, none of the COA's bases address anything about whether or not I was advised of or knew the nature, classification, and maximum penalties of the other six charges I was charged with and was sentenced on. "Knowledge" is a mandatory element of a valid waiver of counsel.

Additionally, this should be granted review on the significant Constitutional issue of whether waiving some charges validly extends to other charges not waived. Under RAP

13.4(b)(3). And, also under RAP 13.4(b)(4) because it affects the public because what constitutes waiving counsel on some charges when not addressing other charges, could lead to inconsistent application of waivers and colloquies. Although, I personally think it already established that the defendant needs to be aware of all the charges and their maximum penalties at the time of the waiver of counsel, under the cases I cited above in Issue Two.

4) Issue Four

Discretionary review should be accepted under RAP 13.4(b)(1) because it is in conflict with State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012). And under RAP 13.4(b)(2) because it is in conflict with Deep Water Brewing, LLC v. Fairway Res. Ltd., 170 Wn.App. 1, 282 P.3d 146 (2012). And under RAP 13.4(b)(4) because RAP 7.2(i) does not have sufficient caselaw regarding the trial court's authority to rule on motions for costs and expenses, and it is important for this to be determined and interpreted by this Court because parties need to be able to know when they are required to file motions for litigation expenses because if they have to file them at certain times they could get left with large bills or expenses that they would not be required to pay if the time frame for filing them was clear and specified. Also, this will

leave open likelihoods of inconsistent application of RAP 7.2(i), and thus resulting in some people getting there expenses and others not getting them when their situations are similar.

Sisouvanh, supra, 175 Wn.2d at 619 states: "Although this court may seek to supplement the record on its own initiative when appropriate, we may instead "decline to address a claimed error when faced with a material omission in the record"".

The Sisouvanh Court said that a reviewing court may decline to address a claimed error when faced with a "material omission" in the record. In my case, the COA declined to address a claimed error because they said I did not provide a particular transcript of a hearing. (See Opinion at 10-11, in section "VII. Motion for Funding").

But this COA decision is in conflict with Sisouvanh because this alleged transcript was not a "material omission". The transcript is not a material omission because the transcript never existed. The ruling was an ex-parte motion and order, there was no oral argument. And there was no hearing.

This can be verified by simply looking at the Docket for this case 11-1-00181-5. It is in Odessy Portal, and the COA has

a copy of this Docket. The COA had access to this Docket for the relevant time period, which is after my resentencing hearing, which therefore is after 6/15/18. You can see on the Docket that every other time there was a hearing, the hearing is noted on the Docket. (See, Opening Brief at 38; and see CP 1941 (the motion) and CP 1943 (the order denying to rule on the merits).

Additionally, the COA found that the trial court did not have authority to act under RAP 7.2. This is error because the trial court does in deed have authority to act under RAP 7.2(i). Deep Water Brewing, LLC v. Fairway Res. Ltd., 170 Wn.App. 1, n. 1, 282 P.3d 146 (2012), states at fn. 1: "... to the trial court under the authority of RAP 7.2(i) (recognizing trial courts' authority to "act on" fee claims) ...".

I had sent the trial court a motion for litigation expenses but I did this after I filed my notice of appeal. The trial court had refused to rule on its merits because I had already filed my notice of appeal. But this was error and the trial court should have exercised it's discretion. I had argued this error on appeal. (See Opening Brief at 10-11).

RAP 7.2(i) states: "The trial court has authority to act on claims for attorney fees, costs and litigation expenses." Thus,

when the trial court declined to rule on the merits because I had already filed my notice of appeal, the trial court erred. It erred because it did have the authority to rule on this motion. The trial court should be directed to hear and rule on the merits of this motion.

5) **Issue Five**

Discretionary review should be accepted under RAP 13.4(b)(1) because the COA's decision is in conflict with State v. Barbee, 193 Wn.2d 581, 588, 444 P.3d 10 (2019), and State v. Gray, 174 Wn.2d 920, 925, 280 P.3d 1110 (2012). And, under RAP 13.4(b)(2) because the COA decision is in conflict with State v. Ryan, 78 Wn.App. 758, 762 (1995). This is regarding, "COUNT 7. Failure to Conduct an Evidentiary Hearing within 180 Days", (See Opening Brief at pg 19).

In my Opening Brief at pg 19, I cited CP 1915, and its notations 2); 6); and, 7). Which would be its pages 3-4, and this CP 1915 states:

"2) I wish to be present at the restitution hearing.

And to have an evidentiary hearing and to cross examine, and to compel and call my witness and evidence.

I wish for a jury too on this.

...

6) I object to the prosecutor setting the restitution hearing without my agrreeance and input.

7) I don't have access to sufficient caselaw to challenge the restitution." [End of quote].

In notation 7) it clearly states I want to challenge restitution. And in notation 2) I state I want an evidentiary hearing and to call witnesses and present evidence, and to cross-examine witnesses. This indicates that I wish to challenge restitution and its amount. When I said I wanted to challenge restitution in n. 7), that means I wanted to challenge its amount, what else could that mean. I when I said I wanted to have a hearing and call and examine witnesses and evidence, what else could that be referring to besides the amount of restitution. This clearly put the prosecution on notice that I wanted to challenge the amount of restitution, and of course, what I should be charged restitution for.

The words restitution contains the import and meaning of "amount of restitution". And why else would I want to have witnesses, evidence, and cross examine them, if I did not want

to challenge the restitution. I have the right to hold the state to proving its burden on the merits of restitution, and that is what I asked for, and the trial court did not hold a hearing that I was requesting to determine the restitution.

I explicitly did not acknowledge the restitution or amount, by stating I wanted to challenge the restitution, and have a hearing with witnesses and evidence.

This put the state on notice that I wanted to put him to his evidentiary burden of proving the restitution. My request to challenge the restitution, have an evidentiary hearing for witnesses and evidence, and my refusal to stipulate to the state's restitution amount and calculation, required the trial court to have an evidentiary hearing on restitution. See, e.g., State v. Pockert, 53 Wn.App. 491, 498-99, 768 P.2d 504 (1989) ("Mr. Pockert agreed to a figure before the hearing; when he came before the court, he declined to stipulate to it. Because of the prior agreement, the State did not have its witnesses to present its testimony. Consequently, a remand is necessary to hold the requisite evidentiary hearing to accurately determine the amount of restitution.").

Additionally, this is regarding my "resentencing" hearing in June 2018. So the 180 day, and my right to a hearing for

restitution starts with this resentencing hearing and not merely my first prior sentencing in 2013. See, State v. Barbee, 193 Wn.2d 581, 588, 444 P.3d 10 (2019) ("that resentencing hearing is "the sentencing hearing" for purposes of RCW 9.94A.753(1)."). (See Opening Brief at 19).

Also, the restitution order is invalid and should be vacated. The restitution order is in the Judgment and Sentence CP 1920, at 8-9. This should be vacated with prejudice. "The time limit is mandatory unless extended for good cause" State v. Gray, 174 Wn.2d 920, 925, 280 P.3d 1110 (2012). "Restitution is not "determined" ... until an objecting defendant receives a hearing." State v. Ryan, 78 Wn.App. 758, 762 (1995). There was no good cause finding, thus, the fact that the trial court did not hold an evidentiary hearing (because I am an objecting defendant), the order is past the 180 day deadline and I am entitled to the restitution order being vacated with prejudice.

6) Issue Six

This issue is regarding and focused on the COA not ruling on the merits of my insufficient charging documents. The COA did not rule on the merits because it was not brought up in my first appeal. But, this is error because the issue was revisited by the trial court post remand and the trial court

judge used judgment and ruled on its merits by denying, but not denying or striking it on procedural grounds. My RAP 2.5(c)(1) argument is at my (Opening Brief at pages 2-5). This is addressed by the COA at (See Opinion at pages 3-5).

Review should be accepted under RAP 13.4(b)(1) because the COA decision is in conflict with State v. Gregory, 192 Wn.2d 1, 30-31 (2016) and State v Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). Gregory, supra, 192 Wn.2d at 31 states: "An issue that could have been appealed in an earlier proceeding is reviewable under RAP 2.5(c)(1) in a later appeal following remand only if the trial court, on remand and in the exercise of its own independent judgment, considered and ruled on that issue." See Id.

I had written a motion regarding lack of notice. (See CP 1851, "Motion To Compel To State With Particularity The Underlying Facts To Support An Aggravated Sentence"). In this motion at pgs 1-2, I stated: "1) To state with particularity and the underlying facts he contends support the juries [sic] verdict and conclusions." And, "2) To state with specific particularity the reasons he contends that they justify an exceptional sentence." See Id.

The trial court heard and ruled on this motion at VRP

6/08/18, at 126:7-18. The VRP shows the prosecutor giving argument to the merits of my motion for particularity, the prosecutor argued on the merits by stating the "facts adhere in the verdicts of the jury". This is meaning and construable as the prosecutor arguing the merits and that my notice was sufficient because of what is stated in the verdicts. The prosecutor made no procedural objections, and the trial judge did not say anything about procedure, she just said "Denied". This was in response to argument on the merits and my motion, and constitutes a decision on the merits, her listening only to merits and processing this information, and the judge's denial in response without any mention whatsoever as to any procedural related statements. Plus, the judge had said "denied", it was not stricken, nor was it ruled to not consider it. This constitutes the trial judge "exercising its own independent judgment, and considering and ruling on this issue'.

The COA should be directed to rule on the merits of my many claims of insufficient charging documents. (See Opening Brief Counts 1-6, at pages 6-18).

7) Issue Seven

The COA decision also erred for my other appeal claims, Counts 10; 11; and 14. And also on failure to remand for

invalid factors and points. And violating equal protection in all rulings against me, see Beck v. Washington, 369 U.S. 541, 554-555 (1962); and Little v Crawford, 449 F.3d 1075 (9th Cir. 2005). And also, see Opening Brief at 23, for an evidentiary hearing being required for points as an unqualified right under Hicks v Oklahoma, 447 U.S. 343 (1980). Also, my right to a hearing for restitution is also unqualified under Hicks v Oklahoma because I had requested and objected. Also, my right to be advised of the maximum penalties and nature and classification of all the charges is an unqualified right under Hicks v Oklahoma, and equal protection under Beck v Washington, and Little v Crawford.

VI. CONCLUSION.

The Court of Appeals decision should be overruled for the above stated reasons. Remand should be made to the Trial Court, and remand to the Court of Appeals should be ordered for the claims they did not decide on the merits.

Date 8/5/2022

Joshua Lambert, Petitioner, Pro Se.

SUPREME COURT FOR THE STATE OF WASHINGTON

No. 100832-5

State of Washington, Respondent/Plaintiff,

VS.

Joshua D. Lambert, Petitioner/Defendant.

APPENDIX

For Motion for Discretionary Review

Presented by Joshua D. Lambert, Petitioner/Defendant.

COVER PAGE FOR APPENDIX

FILED
1/24/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA DAVID LAMBERT,

Appellant.

No. 78621-1-I

DIVISION ONE

UNPUBLISHED OPINION

APPELWICK, J. — A jury convicted Lambert of eight offenses, including murder, kidnapping, and burglary. This court reversed two of Lambert's convictions on appeal. On remand, the trial court resentenced Lambert on his six remaining convictions. Lambert now appeals from the resentencing. He contends the charging document failed to adequately apprise him of the elements of the charged crimes. Lambert also raises claims related to restitution, his offender score, exceptional sentence, waiver of counsel on remand, and a motion for funding. We remand for correction of Lambert's offender score consistent with State v. Blake, but otherwise affirm his judgment and sentence.[1]

FACTS

During a crime spree that took place on a single day in October 2011, Joshua Lambert murdered both of his grandfathers at their respective homes, attacked and tied up his great-aunt, and committed a number of other crimes.

[1] 197 Wn.2d 170, 481 P.3d 521 (2021).

State v. Lambert, 199 Wn. App. 51, 56-58, 395 P. 3d 1080 (2017). The State charged Lambert with two counts of murder in the first degree, kidnapping in the first degree, three counts of burglary in the first degree, taking a motor vehicle without permission, and unlawful possession of a firearm. Id. at 58. The State asserted that Lambert was armed with a deadly weapon when he committed several of the charged crimes and alleged a number of aggravating factors under RCW 9.94A.535(3). Id.

Based on the evidence presented at trial, the trial court rejected Lambert's motion for acquittal because he did not meet his burden to prove he was not guilty by reason of insanity. Id. at 68. The jury returned verdicts finding Lambert guilty of all charged crimes and found that he was armed with a deadly weapon as to five counts. Id. at 68-69. The jury also found aggravating factors as to both counts of murder, kidnapping, and one of the burglary counts. Specifically, the jury found particular vulnerability of victims (three counts); use of a position of trust to facilitate crimes (three counts); deliberate cruelty (one count); destructive and foreseeable impact of the crime on individuals other than the victim (one count); and commission of burglary in the presence of a victim (one count). See RCW 9.94A.535(3)(a), (b), (n), (r), (u). Based on these findings, the court imposed an exceptional sentence of 1,200 months (100 years). Id. at 69.

Lambert appealed his convictions and sentence. We determined there was insufficient evidence to support Lambert's conviction of felony murder of Lambert's maternal grandfather predicated on the burglary of Lambert's mother's home—one of the alternative charged means of first degree murder. Id. at 55. As a result, we

reversed two convictions: Lambert's murder conviction (of his maternal grandfather) and his burglary conviction (of his mother's home), and held that the State could retry Lambert on only premeditated murder and burglary based on the deadly weapon prong. Id.

The State ultimately elected not to retry Lambert and the trial court dismissed the two reversed charges on the State's motion. In June 2018, the trial court resentenced Lambert on the remaining convictions. Lambert represented himself, as he had during most of the initial trial proceedings, and presented exhibits and the testimony of several witnesses at the resentencing hearing. Based on the 2013 jury findings of aggravating factors related to three counts that were unaffected by our decision on appeal (murder, kidnapping, and burglary), the trial court again imposed an exceptional sentence, but reduced the length of the sentence to 80 years. Lambert appeals.

DISCUSSION

I. Charging Document

Lambert argues that five of his six convictions must be reversed because the amended information failed to adequately allege the elements of the charged crimes. He further contends that he can raise these issues in his appeal from resentencing although he did not challenge the sufficiency of the charging document at trial or in his first appeal.

"The general rule is that a defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal." State v. Mandanas, 163 Wn. App. 712, 716, 262 P.3d 522 (2011). Even if the issue raised

is "critical," appellate courts "do not permit a party to ignore an issue on the first appeal only to raise the issue on remand." State v. Fort, 190 Wn. App. 202, 228, 360 P.3d 820 (2015). As our Supreme Court has explained, "[F]inality and reviewability are intrinsically bound . . . '[o]nce an appellate decision is final, review as a matter of right is exhausted.'" State v. Kilgore, 167 Wn.2d 28, 36-38, 216 P.3d 393 (2009) (quoting State v. Hanson, 151 Wn.2d 783, 790, 91 P.3d 888 (2004)).

RAP 2.5 provides exceptions to this rule. Under RAP 2.5(c)(1), an 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." But, "'[t]his rule does not revive automatically every issue or decision which was not raised in an earlier appeal.'" State v. Gregory, 192 Wn.2d 1, 31, 427 P.3d 621 (2018) (quoting State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993)). RAP 2.5(c)(1) applies "only if the trial court, on remand and in the exercise of its own independent judgment, considered and ruled again on that issue." Id. (citing Barberio, 121 Wn.2d at 50).

According to Lambert, this exception applies because he filed a motion before resentencing to "Compel [the] State to State with Particularity the Underlying Facts to Support an Aggravating Sentence" and the trial court denied his motion. Lambert claims the court thereby exercised independent judgment to decide the same issue on remand that he raises on appeal. Lambert's motion, however, sought to compel the State to identify facts supporting the jury's findings of aggravating factors and to provide the reasons why those facts justified an

exceptional sentence. This has nothing to do with Lambert's arguments on appeal, which challenge the adequacy of the charging document to apprise him of the elements of the crimes of murder, kidnapping, burglary, and taking a motor vehicle without permission. Furthermore, there is nothing in the record to suggest that the court "considered and ruled" on the issue Lambert raised in his motion, and did not simply deny it as untimely.

The trial court on remand did not address the issues to which Lambert now assigns error. RAP 2.5(c)(1) does not apply. The alleged inadequacies of the charging language are no longer reviewable on direct appeal, and we decline to address them. See Hanson, 151 Wn.2d at 790 ("Once an appellate decision is final, review as a matter of right is exhausted.").

II. Restitution

Lambert claims the trial court erred by failing to conduct a hearing on restitution within the 180 day statutory period. RCW 9.94A.753(1) requires the trial court to set the amount of restitution at the sentencing hearing or within 180 days of that hearing. Here, the court imposed restitution at the 2013 sentencing hearing and then reduced the amount of restitution at the 2018 resentencing hearing.[2] Although Lambert indicated before resentencing that he wished to be present for an "evidentiary hearing" on restitution, he did not raise specific objections or mention evidence he intended to present. When the court imposed restitution in 2013 and again at the 2018 resentencing, Lambert did not challenge the imposition

[2] The 2018 judgment and sentence reduced Lambert's restitution by $5,750, based on the removal of a crime victim's compensation claim presumably related to the dismissed counts.

or amount of restitution and presented no evidence relevant to restitution. Lambert fails to establish any error with respect to restitution.

III. Offender Score

In a similar vein, Lambert contends that he was deprived of the right to challenge the State's evidence supporting its calculation of his offender score. Not so. The State filed and served a sentencing memorandum before the 2018 resentencing hearing and provided certified copies of the prior judgments and sentences that were included in the offender score.[3] Lambert requested an "evidentiary hearing." But, again, he raised no specific objection to the State's calculation or the sufficiency of its proof either before or during the resentencing hearing. He did not contend that any prior convictions encompassed the same criminal conduct. The court did not prevent Lambert from challenging his offender score on any basis or from presenting any evidence with regard to the issue.

IV. Prior Convictions Affected by *State v. Blake*

While this appeal was pending, the Washington Supreme Court decided Blake, and held that former RCW 69.50.4013(1) (2017), Washington's felony drug possession statute, violated the due process clauses of the state and federal constitutions and was therefore void. 197 Wn.2d at 195. As Lambert agues, and the State concedes, as a result of this decision, Lambert's 2001 (Oregon) and 2002 (Washington) convictions of drug possession must be excluded from his offender

[3] The State acknowledges that it is unclear from the single-sided copy included in the clerk's papers whether the copy of Lambert's Lane County, Oregon judgment and sentence is certified. Nevertheless, as discussed infra, because that conviction must be excluded from Lambert's offender score for other reasons, we need not address the sufficiency of the proof of the conviction.

score. See State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986) (prior conviction that is determined to be constitutionally invalid may not be included in an offender score).

Lambert's offender score was 12 for the most serious charge, murder in the first degree.[4] A reduction of two points would not affect the standard range for this crime, or for any of Lambert's other crimes. See RCW 9.94A.510 (sentencing grid extends to an offender score of "9 or more"). Resentencing is not required where the court miscalculates the standard range but "'the record clearly indicates the sentencing court would have imposed the same sentence anyway.'" State v. Chambers, 176 Wn.2d 573, 589, 293 P.3d 1185 (2013) (quoting State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

Here, a change in the law since Lambert was resentenced mandates a reduction of his offender score, but the trial court nevertheless correctly calculated the standard range. And, the sentencing court imposed a sentence above the standard range based on the presence of aggravating factors. The court determined that 80 years was an appropriate sentence due to the severity of Lambert's crimes of conviction, without regard to his offender score. The findings of fact supporting the exceptional sentence expressly state that the seven aggravating factors found by the jury, "taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the same sentence if only one of the grounds [found by the jury] is valid."

[4] Lambert's offender scores for all six crimes ranged from 11 to 14, so after a reduction of two points, his standard range would remain nine or above for all crimes.

In view of the record, we are convinced that the court would impose the same exceptional sentence notwithstanding a two point reduction in Lambert's offender score.[5] Accordingly, we remand for correction of Lambert's offender score.

V. Legal Basis for Exceptional Sentence

Lambert claims the sentencing court unlawfully imposed an exceptional sentence based on the court's own findings of future dangerousness and lack of remorse, and not on findings made by the jury. See Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (any fact that increases the penalty above the standard range must also be found by a unanimous jury beyond a reasonable doubt). But, the legal basis for the exceptional sentence is clearly set forth in the court's findings and conclusions, and does not include future dangerousness or lack of remorse.

The sentencing court had discretion, upon the jury's findings of multiple aggravating factors, to impose a sentence up to the statutory maximum, so long as the sentence is not "clearly excessive." RCW 9.94A.537(6); RCW 9.94A.585(4). In fixing the duration of Lambert's sentence, the court considered the brutal and senseless nature of Lambert's crimes, his obvious dangerousness, and his refusal to accept responsibility for his acts. While none of these factors constituted the legal basis for the exceptional sentence, they were relevant to the court's discretionary determination of the length of the sentence. The court did not

[5] Likewise, even if we assume that, in view of Lambert's reduced offender score, the court would not find that the "Free Crimes Aggravator" under RCW 9.94A.535(2)(c) applies, we are confident the sentencing court would impose the same exceptional sentence because of its express finding that any one of the aggravating factors was sufficient to support the sentence.

violate Lambert's right to a jury trial or impose an exceptional sentence on an unlawful basis.

VI. Waiver of Counsel

Next, Lambert claims resentencing is required because he did not validly waive his right to counsel on resentencing.

Criminal defendants have the right to self-representation under both the state and federal constitutions. WASH. CONST. art. I, § 22; Faretta v. California, 422 U.S. 806, 807, 955 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The right is not absolute and the trial court must determine whether a defendant's request for self-representation is voluntary, knowing, and intelligent. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). This court reviews decisions on a defendant's request for self-representation for an abuse of discretion. State v. Coley, 180 Wn.2d 543, 559, 326 P.3d 702 (2014). Waiver of counsel is an "'ad hoc,'" fact specific analysis best suited for trial courts. Id. (quoting State v. Hahn, 106 Wn.2d 885, 900-01, 726 P.2d 25 (1986)).

At the first hearing after this court issued its mandate, the State asked the trial court to (1) set a hearing to resentence Lambert on the remaining counts unaffected by this court's decision on appeal, and (2) set an omnibus hearing and tentative trial date for retrial on charges of murder and burglary. The State indicated that Lambert had filed a motion before the mandate issued indicating his intent to waive counsel, as he had in the initial 2013 proceeding.[6] The court took

[6] Lambert's written motion does not appear to be included in the record on appeal.

up the motion and after conducting a thorough colloquy addressing the risks of self-representation, found that Lambert's waiver of counsel on remand was voluntary, knowing, and intelligent.

Lambert now asserts that he sought only to represent himself at trial, but not at resentencing. The record does not support his claim. Despite ample opportunity to do so, Lambert did not place any limitations or parameters on his request to represent himself. He declined to be screened for eligibility for court-appointed counsel for any purpose. The record reflects that, when he waived his right to counsel, Lambert understood that the remand proceedings would include a certain and imminent resentencing hearing and potentially, a later retrial on two charges. Later, when the resentencing was tentatively scheduled, Lambert informed the court of his intent to move for a presentence investigation report and seek a mitigated sentence due to mental illness. Having represented himself throughout most of the first trial, Lambert demonstrated awareness of the procedural posture. Lambert at no time prior to sentencing expressed to the trial court that he had changed his mind and wanted counsel. The trial court had firm and tenable grounds for allowing Lambert to represent himself for all purposes on remand.

VII. Motion for Funding

Finally, Lambert challenges the trial court's denial of a motion for funding. Lambert does not elaborate on the nature of funding he requested but argues that the court should have addressed the merits, instead of denying the motion on procedural grounds. Lambert provides no citations to the record that correspond

to a motion for funding. Accordingly, Lambert, who has the burden of perfecting the record, has not provided all of the evidence necessary to review this issue. See RAP 9.2(b) (party must provide the portions of the verbatim proceeding "necessary to present the issues raised on review."); State v. Sisouvanh, 175 Wn.2d 607, 619, 290 P.3d 942 (2012) (appellate court may decline to address issues where record is incomplete). In any event, it appears that the court denied his motion because the case had not yet been remanded to the trial court. The trial court's authority to act is limited while appellate review is pending. See RAP 7.2(b) (enumerating issues trial court may address after appellate review has been accepted). And, Lambert does not allege prejudice. The record indicates that he was able to file subsequent requests and the court later ordered funding for some expenses.

We remand for correction of Lambert's offender score consistent with Blake, but otherwise affirm his judgment and sentence.

Leach, J.

WE CONCUR:

INMATE

August 9, 2022 - 4:15 PM

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