NO. 43528-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD WALKSONTOP,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The third amended information is defective because it omits essential elements of the crime of unlawful imprisonment (Count 6).

2. Because the third amended information was defective, the trial court erred in entering a judgment on the unlawful imprisonment conviction.

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5. The trial court imposed erroneous misdemeanor sentences when it failed to specify if the suspended sentences ran consecutive or concurrent to each other.

6. Felony Judgment and Sentence Sections 2.1 and 4.1 contain scrivener's errors by incorrectly noting that Mr. Walksontop used a deadly weapon in committing Counts 1, 3, 4, 5, and 6.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A charging document must properly notify a defendant of the charge by including all the essential elements of the crime. Essential elements of unlawful imprisonment include that the defendant knowingly

(1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with the person's liberty. As the Third Amended Information failed to notify Mr. Walksontop of any of these required elements is reversal of the unlawful imprisonment conviction required?

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3. Did the trial court err when it imposed LFOs on Mr. Walksontop without finding Mr. Walksontop has the ability or likely future ability to pay LFOs?

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D. STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

1. Procedural History.

Richard Walksontop was tried on the Third Amended Information charging the following crimes: Burglary in the First Degree[1] (Count 1); Robbery in the Second Degree[2] (Counts 2 and 3); Felony Harassment/Threats to Kill[3] (Counts 4 and 5); Unlawful Imprisonment[4] (Count 6); and Fourth Degree Assault[5] (Counts 7, 8, and 9). The Third Amended Information also charged Mr. Walksontop with having committed Counts 1-6 while armed with a deadly weapon, to wit, a knife.[6] CP 9-11.

Mr. Walksontop did not object to the content of the Third Amended information.

The jury found Mr. Walksontop guilty of all but Count 2, the Second Degree Robbery with Karah-Nicole Bergh as the alleged victim. 4 RP at 861-62; CP 9-10, 12-20. The court dismissed the deadly weapon enhancements for lack of sufficient evidence on Mr. Walksontop's motion to dismiss at the end of the State's case. 3A RP at 574-608.

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[1] RCW 9A.52.020
[2] RCW 9A.56.210
[3] RCW 9A.46.020(2)(b)
[4] RCW 9A.40.040
[5] RCW 9A.36.041
[6] RCW 9.94A.533(4)

Prior to sentencing Mr. Walksontop, the court never offered Mr. Walksontop his right to allocution. 4 RP at 874-94.

The court found a lawful basis to support an exceptional sentence in that Mr. Walksontop had a high offender score and several of his current offense did not receive any additional punishment. CP 32, 45. However, the court did not impose an exceptional sentence. Instead, the court imposed the top of the standard range sentences on Counts 3, 4, 5, and 6 and a 110 month sentence on Count 1. CP 32-33. Count 1, the burglary in the first degree, has the longest standard range, 87 to 116 months. CP 32.

As for the three gross misdemeanor fourth degree assault convictions, the court imposed the maximum 364 days on each[7] with all of the time suspended, plus 24 months of probation on each. CP 21-22. The court did not specify if the misdemeanor sentences are to be served concurrently or consecutively to each other. CP 22.

The court imposed legal financial obligations against Mr. Walksontop without inquiring into his present or future ability to pay them and without making any finding that he had the present or future ability to pay them. 4 RP at 874-87; CP 22-23, 32-35.

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[7] RCW 9A.20.020(2)

2. Trial Testimony.

Tracy Wasserman was at the home of her friend, Gary, when his friend, Mr. Walksontop, stopped by. She had never met Mr. Walksontop before. Her first impression was that he was engaging and funny. 2B RP at 322.

Wasserman was leaving. Mr. Walksontop needed a ride home. She agreed to give him a ride. Before they left, Mr. Walksontop had a confrontation with Gary's neighbor. 2B RP at 323-24.

On the way to Mr. Walksontop's apartment, they stopped at a convenience store so he could buy alcohol. Two of Mr. Walksontop's friends were at the convenience store. They got into Wasserman's car and she drove the three men to Mr. Walksontop's apartment. 2B RP at 325-27, 338-39.

Once at the apartment, Mr. Walksontop wanted Wasserman to wait for him while he went to his apartment for a moment. He wanted her to drive him back to Gary's home so he could continue his argument with the neighbor. 2B RP at 340. Wasserman did not feel comfortable with that so when Mr. Walksontop got out of the car, she left. Mr. Walksontop angrily chased her out of the apartment parking area. 2B RP at 340-41.

A few hours later, Wasserman returned to Gary's home. 2B RP at 343. While there, she heard a knock at the door. She asked who it was

but no one answered. Suddenly the door flew open, hitting the front of her body. Mr. Walksontop came into the home. He accused Wasserman of stealing things from him. Mr. Walksontop punched Wasserman in the face before abruptly leaving. 2B RP at 344-49.

Shortly thereafter, Wasserman heard sirens and saw police cars driving past. She noticed several police officers outside of a nearby apartment complex. She walked up to an officer and told the officer about being punched. 1 RP at 138-141; 2B RP at 351-52.

The police were at the apartment building investigating an alleged intrusion into a second-story apartment. 1RP at 150. Renters Steve Irby and Karah-Nicole Bergh, as well as Steve's son, Kolton Irby,[8] and a friend, Savanah Connell, had been inside the apartment. 2A RP at 201-05; 2B RP at 438-40. The apartment door crashed open. Kolton jumped off the balcony and called 911. 2A RP at 201, 205. Mr. Walksontop walked into the apartment and went into Bergh's bedroom where she was talking to Connell. 2A RP at 205; 2B RP at 440. Mr. Walksontop was very angry with Bergh. 2A RP at 237; 2B RP at 439-40. Mr. Walksontop grabbed Connell by the shoulder, forcefully removed her from Bergh's bedroom, and told Connell she had to stay in the living room. 2A RP at 238-39; 2B RP at 441. Connell did not follow the instructions. Instead, she jumped

[8] First names for Steve and Kolton Irby are used for clarity.

from the apartment balcony when Mr. Walksontop returned to Bergh's bedroom. 2A RP at 239; 2B RP at 441. Connell sought help and refuge in the apartment manager's first floor apartment. 2A RP at 242, 264.

Mr. Walksontop and Bergh argued for a half hour. 2B RP at 461. During that time, Steve went to Bergh's bedroom door. Mr. Walksontop grabbed Steve and pushed him into the wall. He threatened to kill Steve and told him he had to sit on a living room couch and not move. Given the degree of Mr. Walksontop's anger and the difference between the physically impressive Mr. Walksontop and his older, weaker, much less fit self, Steve believed Mr. Walksontop's threat. 2B RP at 440-44. Steve's fear was added to when Mr. Walksontop punched him hard in the face after discovering Connell had "escaped" from the apartment. At some point, Mr. Walksontop also took Steve's cell phone from him after knocking it from his hand. 2B RP at 443-44.

Bergh eventually left the apartment with Mr. Walksontop. 2B RP at 378. She and Mr. Walksontop were walking downstairs and talking loudly when the police arrived. 3A RP at 487, 503-06. Although Officer Bret Olson could not hear what was being said, he described Bergh's voice as "almost hysterical." 3A RP at 506.

Bergh testified that Mr. Walksontop did not kick in the door to the apartment. Instead, Mr. Walksontop was a welcome guest and had a key

to the apartment. Any damage to the door occurred a month earlier when the police kicked in the door looking for Bergh's then- boyfriend. Bergh agreed that Mr. Walksontop was angry with her. However, she and Mr. Walksontop are longtime friends and she knows he would never hurt her. 2B RP at 406-14.

Bergh was arrested on warrant. 2B RP at 379. Bergh told Officer Miranda Skeeter that she only left the apartment with Mr. Walksontop because he threatened to kill her if she did not do so. 2B RP at 423.

E. ARGUMENT

1. THE THIRD AMENDED INFORMATION IS DEFECTIVE IN FAILING TO INCLUDE ALL THE ESSENTIAL ELEMENTS OF UNLAWFUL IMPRISONMENT.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); U.S. Const. Amend VI; Wash. Const. Art, I § 22. "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." *State v. Feeser*, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). Mr. Walksontop's conviction for unlawful imprisonment must be reversed because the charging document does not set forth the essential elements that Mr.

Walksontop knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interfered with the person's liberty.

In order to establish the crime of unlawful imprisonment, the State must prove the defendant "knowingly restrain[ed] another person." RCW 9A.40.040. "Restrain" means to "restrict a person's movements without consent and without legal authority in a manner that interferes substantially with his or her liberty." RCW 9A.40.010(1).

The definition of "restrain" has four primary components: knowingly "(1) restrict another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with the person's liberty. *State v. Warfield*, 103 Wn. App. 152-154, 157, 5 P.3d 1280 (2000). *Warfield* held the statutory definition of unlawful imprisonment, to "knowingly restrain," causes the adverb "knowingly to modify all components of the statutory definition of "restrain." *Warfield*, 103 Wn. App. at 153-54, 157.

The State charged Mr. Walksontop by the Third Amended Information with the offense of Unlawful Imprisonment as follows:

> COUNT 6 – UNLAWFUL IMPRISONMENT – 9A.40.040
>
> That he, RICHARD LOUIS WALKSONTOP, AKA RICHARD LEWIS WALKSONTOP, in the County of Clark, State of Washington, on or about November 4, 2011 did knowingly restrain

> Stephen C. Irby, a human being; contrary to Revised Code of Washington 9A.40.040(1).

CP 10.

The Third Amended Information does not contain all the essential elements of the crime. It does not allege Mr. Walksontop knowingly "(1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with the person's liberty."

Although the Third Amended Information was the information upon which Mr. Walksontop was tried, it is worth noting that the Second Amended Information, the only other information charging unlawful imprisonment, contained the exact same language as the Third Amended Information. CP 8.

Where, as here, the adequacy of an information is challenged for the first time on appeal, the appellate court undertakes a two-prong inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and if so, (2) can the defendant show that he was nonetheless actually prejudiced by the inartful language which caused a lack of notice." *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court

presumes prejudice and reverses without further inquiry. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). A challenge to the sufficiency of the information is reviewed de novo. *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995).

The recent decision in *State v. Johnson* is exactly on point. *State v. Johnson*, __ Wn. App. __, 289 P.3d 662, 673 (2012). There the defendant challenged the information for the first time on appeal. The charge was unlawful imprisonment. Defendant argued that the mere use of the word "restrain" in the information failed to adequately notify the defendant of the much more nuanced and complex legal definition of "restrain." *Id.* at 674-75.

The charging language was, for comparability purposes, identical to that used in Mr. Walksontop's case. The *Johnson* information charged,

> That the defendant J.C. JOHNSON in King County, Washington, during a period of time intervening between May 4, 2009 through May 6, 2009, did knowingly restrain [J.J.], a human being.

Johnson, 289 P.3d at 673. To resolve the issue, the *Johnson* court compared the legal definition of restrain to the common dictionary definition of restrain to determine if the common definition would give a defendant adequate notice of the legal definition – and necessary elements - of restrain.

As noted above, under the law in Washington, the legal definition of "restrain" has four primary components: knowingly "(1) restricting another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with the person's liberty. *State v. Warfield*, 103 Wn. App. at 153-54, 157.

But the dictionary definition is something quite different.

> Because the information refers only to "restrain," we look to its plain meaning in a dictionary. The American Heritage Dictionary states the following definitions: (1) "To hold back or keep in check; control"; (2) "To prevent (a person or group) from doing something or acting in a certain way"; and (3) "To hold, fasten, or secure so as to prevent or limit movement."[9] Noticeably absent from these definitions is any mention of restricting "a person's movements without consent," "without legal authority," or by "interfer[ing] substantially with his or her liberty." Even if one could reasonably infer the first and last phrases, there is no way to reasonably concluded that the restraint must be "without legal authority." In short, the information is deficient in this respect.

Johnson, 289 P.3d at 674.

Given this comparison, the *Johnson* court held that the necessary facts defining restrain did not appear in any form or by fair construction could be found in the charging document. Consequently, the court reversed Johnson's unlawful imprisonment conviction.

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[9] The American Heritage Dictionary 1538 (5th ed 2011), http:// www. ahdictionary. com/ word/ search. html? q= restrain.

As *Johnson's* facts are indistinguishable from Mr. Walksontop's facts, the appropriate remedy is to vacate Mr. Walksontop's unlawful imprisonment conviction without prejudice. *McCarty*, 140 Wn. 2d at 428.

2. THE TRIAL COURT ERRED IN FAILING TO AFFORD MR. WALKSONTOP HIS RIGHT OF ALLOCUTION BEFORE IMPOSITION OF SENTENCE.

Mr. Walksontop is entitled to a new sentencing hearing before a different judge because he was denied his right of allocution before the trial court imposed sentence.

The right of allocution is deeply rooted in common law. As early as 1689, it was recognized that a court's failure to ask a defendant if he had anything to say before sentence was imposed required reversal. See Barrett, *Allocution*, 9 Missouri L.Rev. 115, 122 (1944). In *Green v. United States*, 365 U.S. 301, 304-05, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961), the United States Supreme Court held that under Federal Criminal Rule 32(a), which codified the common-law rule of allocution, a defendant must be personally afforded the opportunity to speak before imposition of sentence. The Court reasoned that "[t]he most persuasive counsel may not be able to speak for the defendant as the defendant might, with halting eloquence, speak for himself." *Id.* at 304.

In *State v. Happy*, 94 Wn.2d 791, 793, 620 P.2d 97 (1980), our State Supreme Court relied on *Green* in concluding that the defendant's right to speak must be clear. The Court emphasized that CrR 7.1(a)(1) required the trial court to "ask the defendant if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment." *Id.* The Court vacated Happy's sentence and remanded for resentencing because the trial court only asked Happy if he had "any legal cause why sentence should not be imposed." *Id.* at 792-94. The Court held that the trial court failed to strictly comply with the rule and consequently denied Happy his right to allocution. *Id.* at 794.

Criminal Rule 7.1(a)(1) was repealed and superseded by statute with the advent of the Sentencing Reform Act of 1981. *State v. Crider*, 78 Wn. App. 849, 855-59, 899 P.2d 24 (1995). In *Crider*, Division Three of this Court observed that there we no evidence of legislative intent to diminish the right of allocution and concluded that allowing allocation means soliciting a statement from the defendant prior to imposition of sentence just as it has for the past 300 years. *Id.* at 859. Accordingly, the Court vacated Crider's sentence and remanded for resentencing because the trial court extended Crider an opportunity to speak for the first time only after sentence had been imposed. *Id.* at 861. The Court concluded that allowing allocution after imposition of sentence is "a totally empty

gesture," even when the court stands ready and willing to alter the sentence because the defendant is arguing from a disadvantaged position. *Crider*, 78 Wn. App. at 861 (citing *State v. Chow*, 77 Hawaii 241, 883 P.2d 663, 668 (Ct App. 1994)). Furthermore, the Court held that "[h]armless error has no allure when the burden on a sentencing court in offering allocution is so minimal and the adverse effect on a defendant so potentially impactive." *Crider*, 78 Wn. App. at 861.

In *State v. Aguilar-Rivera*, 83 Wn. App. 199, 920 P.2d 623 (1996), after orally announcing Aguilar-Rivera's sentence, the trial court was reminded by defense counsel that Aguilar-Rivera had not yet been given his right of allocution. The court apologized and invited him to speak on his own behalf. *Id.* at 200. Division One of this Court concluded that "[a]lthough it is clear to us that the sentencing judge sincerely tried to listen to allocution with an open mind, the judge's oversight effectively left Aguilar-Rivera in the difficult position of asking the judge to reconsider an already-imposed sentence." *Id.* at 203. The Court held that the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court has orally announced the sentence it intends to impose, the remedy is to send the defendant before a different judge for a new sentencing hearing. *Id.*

In *State v. Roberson*, 118 Wn. App. 151, 74 P.3d 1208 (2003), this Court remanded for a new disposition hearing where although Roberson never requested an opportunity to address the court directly, "the trial court never asked Roberson if he wanted to speak." *Id.* at 160-62. This Court reasoned that it could not conclude that the trial court's failure to ask Roberson if he wished to speak was harmless error because he received a high manifest injustice disposition, unlike in *State v. Gonzales*, 90 Wn. App. 852, 854, 954 P.2d 360, *review denied*, 136 Wn. 2d 1024 (1998) (error harmless when Gonzales received the lowest possible standard range sentence) and *State v. Avila*, 102 Wn. App. 882, 898, 10 P.3d 486 (2000) (error harmless where sentence was well below the maximum prescribed under the statute). *Id.* at 161-62.

It is well settled that a criminal defendant in Washington has a statutory right of allocution. *In re Pers. Restaint of Echeverria*, 141 Wn.2d 323, 335, 6 P.3d 573 (2000). Under the current allocution statute, the trial court must allow argument from the defendant as to the sentence to be imposed. RCW 9.94A.500(1) (at sentencing, the court shall "allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.")

The record reflects that the trial court here failed to afford Mr. Walksontop an opportunity to speak on his own behalf.[10] At the beginning of the sentencing hearing, the trial court heard Mr. Walksontop's Motion for Arrest of Judgment and New Trial. 4 RP at 868-74. After the court denied the motion, the prosecutor and defense counsel argued back and forth about Mr. Walksontop criminal history. Occasionally, Mr. Walksontop would interject a comment: denying he committed a certain offense, 4 RP at 878, 891; giving his age as 47 years old, 4 RP at 884; concurring with information about a recent guilty plea, 4 RP at 889, 890; helping the court remember the name of a witness, 4 RP at 893; and assuring the court he knew what it was saying, 4 RP at 895.

After hearing from the prosecutor and defense counsel, the court immediately imposed sentence depriving Mr. Walksontop of his right of allocution. 4 RP at 894. Importantly, Mr. Walksontop was given no chance to object. *See State v. Hatchie*, 161 Wn.2d 390, 405-06, 166 P.3d 698 (2007) (absent an objection, no claim of error is preserved for review). The court sentenced Mr. Walksontop to 110 months of confinement on the first degree burglary (Count 1) with a standard range of 87-116 months. The court imposed the high end of the range on each of the remaining

[10] On the first page of the misdemeanor judgment and sentence, there is boilerplate language that reads, "having asked the defendant if he/she wished to make a statement in mitigation of punishment." CP 21. This language is in error as the trial judge never asked Mr. Walksontop if he wished to make a statement in mitigation of punishment.

counts: second degree robbery, 84 months (Count 3); felony harassment, 68 months (Counts 4 and 5); unlawful imprisonment, 68 months (Count 6); and 364 days each on the three fourth degree assaults (Counts 7, 8, 9). 4 RP at 894; CP 21-22; CP 32-33. The court, although it did not impose an exceptional sentence, found there was a factual basis to support an exceptional sentence upward on Counts 1, 3, 4, 5, and 6 because Mr. Walksontop has a high offender score resulting in some of the current offenses going unpunished. 4 RP at 875-76; CP 32, 45. See RCW 9.94A.535(2)(c). As in *Roberson*, 118 Wn. App. 151, this Court cannot conclude that the error was harmless because Mr. Walksontop did not receive the lowest possible standard range.

A remand is required because the trial court erred in denying Mr. Walksontop his right of allocution before imposition of sentence. Moreover, he is entitled to a new hearing before a different judge. *Roberson*, 118 Wn. App. at 162; *State v. Beer*, 93 Wn. App. 539, 546, 969 P.2d 506 (1999); *Aguillar-Rivera*, 83 Wn. App. at 203.

3. THE TRIAL COURT'S MISDEMEANOR SENTENCES ARE ERRONEOUS.

The trial court imposed erroneous misdemeanor sentences when it failed to specify if the three misdemeanor fourth degree assault convictions were sentenced concurrently or consecutively to each other.

This Court has a duty to correct an erroneous sentence. *In re Pers. Restraint of Call*, 144 Wn.2d 315, 334, 28 P.3d 709 (2001); *State v. Toney*, 149 Wn. App. 787, 794, 205 P.3d 944, 948 (2009). The sentencing on the misdemeanors assaults is erroneous because the trial court failed to specify if the three sentences run concurrently or consecutive to each other. CP 22. The misdemeanor Judgment and Sentence is marked clearly for the judge to make a choice. At Section III(1), there is a place for the judge to fill in the length for each sentence followed by a section to clarify whether they are consecutive or concurrent as follows:

Said sentence to run [ ] concurrent [ ] consecutively to each other. CP 22.

At sentencing, the court did not check the box or make any sort of oral ruling on this point. This court should remand for clarification of the misdemeanor sentences.

This is particularly important because if the trial court means to run the three sentences consecutively, the 24 months of probation on each cannot exceed 24 months of probation in total. *State v. Parent*, 164 Wn. App. 210, 267 P.3d 358 (2011).

4. THE TRIAL COURT ERRED WHEN IT IMPOSED LEGAL FINANCIAL OBLIGATIONS AGAINST MR. WALKSONTOP WHEN IT DID NOT FIND MR. WALKSONTOP HAD THE ABILITY OR FUTURE ABILITY TO PAY THEM.

To enter a finding regarding ability to pay LFOs, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012) (citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991)). This Court reviews the trial court's decision on ability to pay under the "clearly erroneous" standard. *Bertrand*, 165 Wn. App. at 403-04 (citing *Baldwin*, 63 Wn. App. at 312).

While formal findings are not required to survive appellate scrutiny, the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. *Bertrand*, 165 Wn. App. at 404 (citing *Baldwin*, 63 Wn. App. at 311-12); *See State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error).

Such error may be raised for the first time on appeal. See *Bertrand*, 165 Wn. App. at 395, 404 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's

unsupported findings); *See also State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

Even though the trial court consistently found Mr. Walksontop indigent, approving court-appointed representation at both the trial court and on appeal, the court imposed the following LFOs on the felony Judgment and Sentence for both the felony convictions and the misdemeanor convictions.

- $412.10 restitution
- $500 victim assessment
- $200 criminal filing fee
- $250 jury demand fee
- $1,500 fees for court appointed attorney
- $2,400 trial per diem
- $500 fine
- $100 DNA collection fee

CP 23, 34-35.

Although the trial court had an opportunity to do so, it did not find Mr. Walksontop has the ability or likely future ability to pay the LFOs. Section 2.5 of the preprinted felony Judgment and Sentence reads:

> **2.5 Ability to Pay Legal Financial Obligations**. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:
>
> [ ] That the defendant has the ability or likely ability to pay legal financial obligations, including the defendant's financial obligations imposed herein. RCW 9.94A.753.
>
> [ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): _____.
>
> [ ] The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

CP 8. The trial court did not check any of the boxes in Section 2.5.

Similarly, Section I(4) of the misdemeanor Judgment and Sentence reads:

> 4. ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The Court has considered the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant [ ] has [ ] does not have the ability to pay legal financial obligations as imposed below.

CP 22. But there too the trial court did not check any of the boxes in Section I(4).

As in *Bertrand,* this record reveals no evidence or analysis supporting the court's imposition of LFOs. The trial court said nothing about LFOs at sentencing other than, "I am entering various no – standard fines, fees, costs[.]" 4 RP at 895. The trial court's failure to check any box

under the felony Judgment and Sentence Section 2.5 or the misdemeanor Judgment and Sentence I(4) creates an unreviewable ambiguity.

Accordingly, the court's imposition of LFOs was clearly erroneous and should be stricken. *Bertrand*, 165 Wn. App. at 405.[11] The State cannot collect LFOs unless there is a properly supported, individualized judicial determination that Mr. Walksontop has the ability to pay.

5. THE FELONY JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO DELETE TWO SCRIVENER'S ERRORS.

Mr. Walksontop's felony judgment and sentence should be remanded to correct scrivener's errors in section 2.1 and 4.1.

Section 2.1 of the felony Judgment and Sentence reads:

> [X] The defendant used a deadly weapon other than a firearm in committing the offense in Count 01, 03, 04. 05, 06. RCW 9.94A.825, 9.94A.533.

Section 4.1 of the felony Judgment and Sentence reads:

> [X] The confinement time on Counts 01, 03, 04, 05, 06 includes __ months as enhancement for
> [ ] firearm [X] deadly weapon [ ] VUCSA in a protected zone

CP 31, 33.

[11] Mr. Walksontop does not challenge the imposition of these mandatory LFOs (See RCW 43.43.7541 (DNA collection fee); RCW 7.68.035 (Victim Penalty Assessment); RCW 36.18.020(2)(h) (Criminal Filing Fee); RCW 10.46.190 (Jury Demand Fee)), but rather the unsupported imposition of fees with implicit finding that Mr. Walksontop does not have the present and future ability to pay. CP 8.

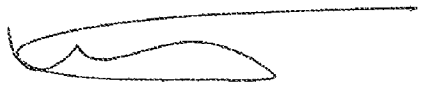
These are scrivener's errors. Although the State charged Mr. Walksontop with committing those counts with a deadly weapon, the trial court dismissed the deadly weapon enhancements for insufficient evidence at the end of the State's case. CP 9-10; 3A RP at 574-608.

This Court should therefore remand to correct the judgment and sentence. See *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence erroneously stating defendant stipulated to an exceptional sentence); *State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form.); see also *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal).

F. CONCLUSION

This Court should reverse and dismiss Mr. Walksontop's unlawful imprisonment conviction. On remand, Mr. Walksontop is entitled to sentencing before a different judge and to exercise his right of allocution. The non-mandatory LFOs should be stricken. The court should clarify whether the misdemeanor sentences are to be served concurrently or consecutively to each other. And finally, the scrivener's errors related to the deadly weapon enhancements should be corrected.

Respectfully submitted this 14th day of January 2013.



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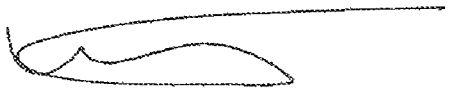
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Abigail Bartlett, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it Richard Walksontop, DOC#904190, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 14, 2013, in Longview, Washington.



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COWLITZ COUNTY ASSIGNED COUNSEL

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