NO. 30466-3-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOE ANTHONY MATA,

Defendant/Appellant.

APPELLANT'S BRIEF

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2. The trial court erroneously allowed the State to amend the Information, after it had rested its case-in-chief, by adding an uncharged alternative of committing first degree robbery (1°) to Counts 1 and 2. (CP 93).

3. The trial court's imposition of a sentence consecutive to Mr. Mata's Pierce County sentence cannot be justified under RCW 9.94A.589.

4. The trial court miscalculated the offender score and sentence on Mr. Mata's 1° degree robbery convictions.

5. The "free crimes" doctrine is inapplicable to Mr. Mata's case.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Does Mr. Mata's acquittal of UPF 1° in Pierce County, involving the same firearm which is the basis of his current conviction, invoke the prohibition against double jeopardy?

2. Does CrR 2.1(d) allow the State to amend an Information, after it has rested its case-in-chief, to include an alternative means of committing the offense?

3. Can the State justify the trial court's imposition of a sentence running consecutive to Mr. Mata's Pierce County sentence?

4. Did the trial court misinterpret the provisions of RCW 9.94A.589(1)(b) in calculating Mr. Mata's offender score for his 1° robbery convictions?

5. Does the "free crimes" doctrine apply if the UPF 1° is dismissed and Mr. Mata has correctly analyzed the trial court's sentencing authority under RCW 9.94A.589?

STATEMENT OF CASE

Deputy McIlrath of the Yakima Sheriff's Office responded to a complaint of a stolen 1993 Dodge Caravan, Washington license no. 864 ROW, on July 28, 2009 at 4:30 a.m. The van was stolen from the owner -- Luz Garcia. (Trial RP 108, ll. 14-22; RP 235, ll. 19-20; RP 236, l. 18 to RP 238, l. 5; RP 240, ll. 3-5).

Later that morning, Rigoberto Dominguez, the manager of the Union Gap Denny's, reported that a man and woman had left without paying. They both had tattoos. An older van was seen leaving the parking lot.

(Trial RP 196, ll. 1-24; RP 197, ll. 9-19; RP 204, ll. 3-8; RP 205, ll. 18-23; RP 229, ll. 18-21).

Shortly after the Denny's call, at 10:40 a.m., Deputy Jackson of the Yakima County Sheriff's Office received a robbery report involving a Dodge Caravan. Deputy Locati was dispatched to Thorpe Road where he contacted Zachary Sisneros. (Trial RP 114, ll. 12-13; RP 115, l. 21 to RP 116, l. 3; ll. 23-24; RP 244, ll. 17-18; RP 245, ll. 12-13; RP 246, ll. 2-6; RP 248, l. 21).

Mr. Sisneros is a water truck delivery driver for D.S. Waters Company which distributes Crystal Springs. He observed a maroon van tailgating him for approximately one mile. As he entered a customer's driveway to make a delivery he saw the van stop on the roadway. (Trial RP 268, ll. 1-25; RP 271, ll. 2-14; RP 272, l. 18 to RP 273, l. 4).

After completing his delivery, and as he started down the driveway, he saw that the van had backed in at an angle so as to block his exit. A male occupant asked him for jumper cables. The male then pulled a gun and pointed it at him stating "...[G]ive me the fucking keys to the truck. I ain't fucking around." (RP 273, ll. 15-19; RP 274, ll. 7-22; ll. 24-25).

The individual demanded Mr. Sisneros' money, wallet and cellphone. The cellphone number is (509) 728-0584. (Trial RP 275, ll. 12-15; RP 281, ll. 23-24).

Mr. Sisneros described the individual as 5'6" to 6' tall; 160 to 180 pounds; an Hispanic male wearing black shorts, a black and gray sweat-shirt, white tennis shoes, and a red ball cap. The individual had short black hair. (Trial RP 249, ll. 11-17).

The van was described as a maroon Dodge Caravan, Washington license no. 860 ROW. (Trial RP 250, ll. 2-10).

Mr. Sisneros believed that the gun was a .40 or .45 caliber semi-automatic. However, he could not later identify a gun which was found in a van. (Trial RP 251, ll. 20-25; RP 276, ll. 23-25; RP 281, ll. 12-15).

A second incident occurred in the Fred Meyer parking lot during the early evening of July 28. Shaun Kroeger and Jacob McDonald arrived in Mr. McDonald's pickup (PU). They exited the store and were returning to the PU when Mr. Kroeger was confronted by a male who approached him and demanded "everything you got." (Trial RP 537, ll. 6-14; ll. 19-22; RP 539, ll. 12-21).

Mr. McDonald had already climbed into the PU. He looked in the rearview mirror and saw Mr. Kroeger at the back end with the other male. He got out and went to the back of the PU. He saw a gun and Mr. Kroeger handing over his wallet. The gun was pointing at the ground. (Trial RP 671, l. 22 to RP 672, l. 3; RP 672, ll. 8-15; ll. 17-18).

Rebekah Elwell was in her car next to the PU. She looked in her rearview mirror before trying to back out. She saw Mr. Kroeger and the other individual behind her car. The other individual lifted his shirt and

showed a gun. She observed Mr. Kroeger hand over his wallet. The other individual ran off and jumped into a minivan. (Trial RP 539, ll. 8-11; RP 608, ll. 12-16; RP 610, ll. 2-8; RP 611, ll. 1-3).

Mr. Kroeger was initially reluctant to give the other person his wallet. However, after the gun was flashed he did so. Mr. Kroeger obtained the license number of the van. It was Washington license no. 864 ROW. (Trial RP 539, l. 23; RP 540, ll. 3-18; RP 542, ll. 12-16).

When Mr. McDonald went to the back of the PU the man also demanded his money. Mr. McDonald turned and walked away. (Trial RP 541, ll. 1-14; RP 673, ll. 6-14).

At 11:15 p.m. that same day Sergeant Carpenter of the Pierce County Sheriff's Office was running random routine license plate checks near 109th and Steel Streets as traffic exited SR 512. (Trial RP 496, ll. 23-24; RP 499, ll. 2-15).

Sergeant Carpenter ran a plate on a maroon Astro van as it exited the freeway. He got an NCI hit that it was stolen. The occupants were believed to be armed and dangerous. (Trial RP 501, ll. 12-24; RP 502, ll. 7-13).

When Sergeant Carpenter activated the lights on his patrol car the van sped away. A high speed chase ensued and resulted in Mr. Mata's arrest. A gun was later seized from the driver's side floorboard of the van. The van had Washington license 864 ROW. (Trail RP 372, ll. 8-12; RP 509, ll. 1-22; RP 517, ll. 12-14).

Also recovered from the van in Pierce County were two (2) wallets (one belonging to Mr. Kroeger), a cellphone with number (509) 728-0584; and ignition parts along with a screwdriver. The ignition area of the van had been jimmied. (Trial RP 145, ll. 1-3; RP 147, ll. 5-9; ll. 12-15; ll. 19-25; RP 153, l. 1).

A backpack with the name "Dreamer" written on it was found in the van along with various items of men's and women's clothing. Mr. Mata's nickname is "Dreamer." There were papers bearing the name of Christina Barrientes. These included love notes written in Spanish containing both Mr. Mata's name and Ms. Barrientes name. (Trial RP 153, ll. 10-19; RP 154, l. 17 to RP 155, l. 7; RP 155, l. 16 to RP 156, l. 1; RP 350, ll. 8-15).

The gun recovered from the van is a Hi-point.45. It was loaded and had one round in the chamber. The serial no. is X4118459P. (RP 149, ll. 14-22; RP 150, ll. 11-12).

When Mr. Mata was arrested in Pierce County, Ms. Barrientes was in the van. She was not observed during the various incidents that occurred on July 28, except in the Denny's video. (Trial RP 126, ll. 1-4).

Mr. Mata told Detective Benson of the Pierce County Sheriff's Office, that he and Ms. Barrientes were in Tacoma on the way to her mother's house in Auburn. He claimed that the van was borrowed from a friend named Jesus. (Trial RP 426, ll. 23-24; RP 433, ll. 14-15; RP 435, ll. 6-8).

Detective Jackson obtained a photograph of Ms. Barrientes. He then viewed a video from Denny's. It was his belief that Ms. Barrientes was the woman who left without paying. He was aware that Mr. Mata had a relationship Ms. Barrientes. He then obtained Mr. Mata's photo and compared it to the male in the video. (Trial RP 117, ll. 15-17; RP 118, l. 15 to RP 119, l. 18; RP 120, ll. 2-8).

A photomontage was prepared. It included six individual photographs. Mr. Mata's photograph was the only one with a teardrop tattoo. The neck area on each photograph had been blacked out to remove any evidence of Mr. Mata's neck tattoo. (Trial RP 128, ll. 9-22; RP 467, l. 12 to RP 468, l. 1).

Mr. Mata has a teardrop tattoo near his eye. He also has an obvious neck tattoo which says "Sureno." His arms are tattooed. Mr. Mata is 5'9" tall and weighs 160 pounds. (Trial RP 433, ll. 4-9).

When the photomontage was shown to the various witnesses the results were as follows:

Barbara Senger, the waitress at Denny's, could not identify anyone;

Rigoberto Dominguez, the manager, could not identify Ms. Barrientes; but did select Mr. Mata's photo.

Mr. Sisneros selected Mr. Mata.

Mr. Kroeger was 60% sure that Mr. Mata's photo matched the individual who robbed him.

Mr. McDonald was 100% sure that it was Mr. Mata.

(Trial RP 131, ll. 19-20; RP 133, ll. 19-25; RP 134, ll. 3-8; RP 137, ll. 12-25; RP 283, ll. 4-16; RP 298, ll. 14-15; RP 299, l. 14 to RP 300, l. 2; RP 469, ll. 4-16; RP 472, ll. 6-8; RP 473, ll. 22-23; RP 474, ll. 8-18; RP 676, ll. 1-12).

Ms. Garcia did not recognize either Mr. Mata's or Ms. Barrientes's photo. Neither of them had permission to have her van. Ms. Garcia has never owned a firearm. (Trial RP 109, ll. 5-14).

Ms. Elwell was not shown the montage. She testified that she never took her eyes off the individual with the gun once she saw what was happening. She identified that person as Mr. Mata. The gun remained in his waistband. (Trial RP 621, l. 24 to RP 624, l. 4; RP 624, ll. 11-13; RP 625, ll. 4-7).

Mr. Sisneros does not recall seeing a neck tattoo. He did observe a teardrop tattoo. (Trial RP 287, ll. 11-24; RP 288, ll. 9-20; RP 297, ll. 1-5).

Mr. Kroeger saw a teardrop tattoo on the person who robbed him. Mr. McDonald confirmed the presence of a teardrop tattoo. (Trial RP 549, ll. 2-4; RP 599, ll. 7-8; RP 599, l. 23 to RP 600, l. 1).

After Mr. Sisneros's cellphone was recovered it was discovered that it had phone numbers on it which were not recognized by Mr. Sisneros. One number belonged to Chelsea Kangas. The number was (509) 383-6022. (Trial RP 156, l. 18 to RP 157, l. 1; RP 158, ll. 6-7; RP 333, ll. 5-24; RP 335, ll. 12-21; RP 339, ll. 17-19).

When Ms. Kangas was contacted she indicated that there had been a call on her caller ID from D.S. Waters. The message on the phone was from "Dreamer." A second call was received from Ms. Barrientes. (Trial RP 349, ll. 5-6; RP 349, l. 24 to RP 350, l. 2; RP 350, ll. 8-15);

A records check was conducted on the gun recovered in Pierce County. It was purchased by Ms. Barrientes on June 5, 2009 at Bestway Pawn in Yakima. She picked it up on June 16, 2009. The serial no. is X4118459P. (Trial RP 322, ll. 1-3; RP 583, ll. 9-25; RP 584, ll. 13-22; RP 585, ll. 1-8; RP 586, ll. 1-3; RP 589, ll. 4-8).

An Information was filed on July 31, 2009. It charged Mr. Mata with one count of 1° robbery, including a firearm enhancement, and one count of UPF 1°. (CP 1).

Mr. Mata was held in Pierce County for trial on charges including a count of UPF 1°. He was acquitted of that charge. (CP 589; Steinmetz RP 5, ll. 3-12; RP 6, ll. 2-8; ll. 12-18).

Mr. Mata was arraigned on August 27, 2010. Various scheduling orders were entered along with time-for-trial waivers. Trial commenced on October 10, 2011. (CP 6; CP 7; CP 8; CP 9; CP 10; CP 11; CP 12; CP 13; CP 14; CP 15; CP 17; CP 18; CP 19; CP 20; CP 21; CP 22; CP 23; CP 24; CP 25; CP 28; CP 31).

An Amended Information was filed on August 8, 2011. It added two (2) additional counts of 1° robbery with firearm enhancements. It also

included a recent recidivism aggravating factor along with a "free crimes" aggravator. (CP 26).

Mr. Mata was in jail from June 1, 2009 to June 20, 2009 for a community custody violation. (Trial RP 1066, ll. 7-19).

A Second Amended Information was filed on October 10, 2011. It amended Count 3 to attempted 1° robbery. However, it omitted language as to the alternative means of committing 1° robbery in the respective counts. (CP 32).

Mr. Mata stipulated to a prior serious felony conviction for purposes of the UPF 1°. He also stipulated to a telephone number. (CP 44; CP 45).

During a pre-trial hearing on October 10, 2011 Mr. Mata raised an issue as to an expert witness. He wanted an expert witness on identification. He was advised that the Department of Assigned Counsel lacked funding. Defense counsel indicated that identification testimony was not likely to be critical under the facts and circumstances of the case. The prosecuting attorney agreed. (Trial RP 17, ll. 11-12; RP 35, ll. 1-21).

On October 13, 2011 Mr. Mata raised a double jeopardy issue involving his acquittal of UPF 1° in Pierce County. He also objected to the prosecuting attorney's use of the phrase "crime spree." The trial court denied the double jeopardy challenge, but cautioned the prosecuting attorney not to use the phrases "crime spree" or "dine-and-dash". (Trial RP 173, l. 1 to RP 184, l. 1).

Mr. Mata again spoke to the court on October 14, 2011. He stated that the prosecuting attorney made a threat to Ms. Barrientes that federal charges might be brought against her depending upon testimony she may give at trial. Ms. Barrientes was never called as a witness. She had been subpoenaed. (Trial RP 308, l. 3 to RP 313, l. 15).

The State sought to admit certain jail phone calls allegedly made by Mr. Mata. Following a hearing outside of the presence of the jury the trial court denied the State's motion to use the calls. (Trial RP 640, ll. 2-3; ll. 16-22; RP 641, ll. 11-24; RP 718, ll. 6-15; RP 719, ll. 1015; RP 733, l. 18 to RP 734, l. 25).

Mr. Mata made another motion to dismiss the UPF 1° on double jeopardy grounds. The trial court again denied it. (Trial RP 785, l. 10 to RP 786, l. 4; RP 796, l. 8 to RP 797, l. 8; RP 806, l. 16 to RP 808, l. 4; Exhibit 117; Exhibit 118, Exhibit 119).

Mr. Mata objected to his attorney's decision not to call Ms. Barrientes. (Trial RP 812, ll. 12-20).

After the State rested its case-in-chief Mr. Mata moved to dismiss the firearm enhancement because the State failed to prove that the gun was operable. The trial court denied the motion. (Trial RP 795, l. 8; RP 800, l. 9 to RP 801, l. 13; RP 806, ll. 6-10).

Defense counsel also moved to limit the firearm enhancement to a single enchantment under the rule of lenity. Only one firearm was in-

volved in the robberies. The trial court denied the motion. (Trial RP 823, ll. 1-15).

The State then moved to file an Amended Information involving Counts 1 and 2. The amendment was to add the following language: ... "or what appeared to be a firearm or other deadly weapon." The trial court allowed the amendment over Mr. Mata's objection. It limited the language to "or what appeared to be a firearm." (Trial RP 813, l. 13 to RP 819, l. 15; CP 93).

Mr. Mata elected to testify at trial. He denied robbing Mr. Sisneros. He denied the Fred Meyer robberies. He admitted what occurred in Pierce County. He denied being involved at the Denny's incident. He admitted driving the van and that Ms. Barrientes was with him. He denied asking Ms. Barrientes to purchase a gun for him. (Trial RP 831, ll. 12-13; ll. 20-22; RP 832, ll. 1-5; ll. 12-16; RP 835, l. 6 to RP 836, l. 9; RP 837, ll. 11-12; ll. 21-23; RP 838, ll. 6-8).

After the defense rested its case the State renewed its motion to introduce the jail calls. The trial court allowed limited testimony concerning one jail call which was then played for the jury. The call pertained to the discussion of a firearm purchase. (Trial RP 878, l. 15; RP 895, ll. 15-25; RP 897, l. 13 to RP 898, l. 5; RP 959, ll. 8-15; RP 965, ll. 1-4).

Instruction 14 defines the offense of UPF 1st°. Instruction 17 is the to-convict instruction on that offense. (CP 507; CP 510; Trial RP 986, ll. 2-6; RP 986, l. 25 to RP 987, l. 17; Appendix "A"; Appendix "B").

The jury found Mr. Mata guilty on Counts 1, 2 and 4. Special verdicts were returned that Mr. Mata was armed with a firearm on Counts 1 and 2. There was also a special verdict as to recent recidivism on Counts 1, 2 and 4. (CP 520; CP 521; CP 522; CP 523; CP 524; CP 525; CP 526; CP 527).

A sentencing hearing was conducted on December 5, 2011. The trial court entered Findings of Fact and Conclusions of Law supporting an exceptional sentence. Judgment and Sentence was also entered that date. (CP 760; CP 762).

The trial court imposed a sentence of one hundred and seventy one months (171) on Count 1. A sentence of 171 months was imposed on Count 2. The two counts were ordered to run consecutively. Additionally, each count carried a 60 month firearm enchancement for an additional one hundred and twenty (120) months running consecutive to the underlying sentence.

A one hundred and sixteen (116) month sentence was imposed on the UPF 1° to run concurrent with Counts 1 and 2. The sentence was ordered to run consecutive to Mr. Mata's Pierce County sentence. (Steinmetz RP 86, l. 4 to RP 95, l. 1).

A scrivener's error appears to exist in paragraph 4.A.2 of the Judgment and Sentence. The scrivener's error relates to the base sentence (342 months versus 458 months).

Mr. Mata filed his Notice of Appeal on December 13, 2011. (CP 771).

SUMMARY OF ARGUMENT

Mr. Mata's conviction of UPF 1° violates double jeopardy principles. His acquittal of the same offense in Pierce County precludes his conviction in Yakima County.

The amendment of the Information, allowing the State to charge an alternative means of committing 1° robbery, after the State rested its case-in-chief, violates Mr. Mata's constitutional right to notice of the charges(s) against him.

The trial court erroneously ordered a consecutive sentence with Pierce County, miscalculated Mr. Mata's offender score on the second count of 1° robbery, and misapplied the "free crimes" doctrine.

ARGUMENT

I. DOUBLE JEOPARDY

The Fifth Amendment to the United States Constitution provides, in part:

> No person shall be...subject for the same offense to be twice put in jeopardy of life or limb... .

Const. art. I, § 9 states: "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

The two constitutional provisions are identical as far as their thought, substance and purpose. *See: State v. Walters,* 146 Wn. App. 138, 188 P. 3d 540 (2008).

Mr. Mata's conviction for UPF 1° violates both constitutional provisions. He was acquitted of that offense in Pierce County. The charge in Pierce County involved the same firearm allegedly possessed on the same date.

> The double jeopardy clause protects individuals from three distinct governmental abuses: **a second prosecution for the same offense after acquittal,** a second prosecution for the same offense after conviction, and multiply punishments for the same offense.

State v. Wright, 165 Wn. 2d 763, 791, 203 P. 3d 1027 (2009). (Emphasis supplied.)

The trial court denied Mr. Mata's motion to dismiss on double jeopardy grounds. The trial court's reasoning was that since the offense occurred at a different time and in a different location double jeopardy did not apply. The trial court applied a same criminal conduct analysis instead of a double jeopardy analysis.

> That a person may not be retried for the same offense following an acquittal is "the most fundamental rule in the history of dou-

> ble jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977). **An acquittal is an absolute bar to retrial, regardless of how erroneous.** *Arizona v. Washington,* 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (citing *Fong Foo v. United States,* 369 U.S. 141, 143, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962)).

State v. Wright, supra, 791-92. (Emphasis supplied.)

"Claims of double jeopardy, which are questions of law, are reviewed de novo. [Citation omitted.] A double jeopardy claim may be raised for the first time on appeal." *State v. Jackman,* 156 Wn. 2d 736, 746, 132 P. 3d 136 (2006).

The trial court's analysis of the double jeopardy challenge is totally flawed. The trial court determined that the UPF 1° in Pierce County was a different offense from the UPF 1° in Yakima County based upon time and location.

The elements of the two offenses are exactly the same. They involve the same gun. Mr. Mata was acquitted of the offense in Pierce County. His retrial in Yakima County subjected him to double jeopardy.

> The double jeopardy clause does not prohibit the imposition of separate punishments for *different* offenses. *State v. Vladovic,* 99 Wn. 2d 413, 423, 662 P. 2d 853 (1883) held that:
>
> > In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one of-

> fense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

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

The only difference between the Pierce County offense and the Yakima County offense pertains to venue.

"Proper venue is not an element of a crime. Rather, it is a constitutional right that is waived if not asserted in a timely fashion." *State v. Rockl,* 130 Wn. App. 293, 297, 122 P. 3d 759 (2005).

Since venue is not an element of the offense of UPF 1°, the trial court's conclusion that two different locations were involved is without merit.

Further support for Mr. Mata's argument is based upon the language of Instruction 17. The instruction contains the following element: "(3) That the ownership, or possession or control of the firearm occurred **in the State of Washington.**" (Emphasis supplied.)

The foregoing instructional provision clearly implicates the double jeopardy provisions that protect Mr. Mata from being convicted of UPF 1° in Yakima County.

Moreover, the prosecuting attorney continually argued that *res gestae* applied to the State's case. The continuing, early references to "dash-and-dine" and "crime spree" clearly indicate that the prosecuting

attorney viewed the events of July 28, 2009 as a continuing series of events commencing in the early morning hours and ending near midnight.

There can be no doubt that UPF 1° is the same offense whether occurring in Pierce County or Yakima County. The elements of the offense are the same in either County. The facts are the same in either County.

> Double jeopardy questions frequently arise when a defendant is convicted on multiple, different crimes arising from the same set of events. [Citations omitted.] The question in that circumstance is whether the Legislature *intended* to authorize separate punishments. [Citations omitted.] These cases address whether the offenses are the same *in law*.
>
> Other cases address whether multiple offenses are the same *in fact*. [Citations omitted.] The question in these cases is whether the events are so related as to merge into a single offense. [Citation omitted.]
>
> ...[T]here is no question that ...[the] convictions are the same offense at law; they are based on violation of the same statute... .

State v. Lopez, 79 Wn. App. 755, 761, 904 P. 2d 1179 (1995).

The *Lopez* case involved a situation where the defendant possessed various amounts of cocaine over a limited period of time. The *Lopez* Court concluded at 763:

> ...Mr. Lopez possessed cocaine in a continuous, uninterrupted series of events that was the focus of the prosecution against him. ... Mr. Lopez possessed cocaine from multiple sources during a relatively short period of time. ...His possession was a single offense. ...

Finally, WPIC 133.02, which defines the elements of UPF 1°, limits the offense to "ownership or possession or control...in the State of Washington." There is no differentiation between counties.

Mr. Mata is entitled to have his conviction for UPF 1° reversed and dismissed. *See: Personal Restraint of Francis,* 170 Wn. 2d 517, 531, 242 P. 3d 866 (2010).

II. CrR 2.1(d)

CrR 2.1(d) states:

> The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

The trial court allowed the State to file a Third Amended Information after it rested its case-in-chief. The Third Amended Information added an alternative means of committing 1° robbery under Counts 1 and 2.

The amendment prejudices Mr. Mata because it violates the "essential elements" rule of the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

Even though the added alternative was included in an earlier Information, its omission from the Second Amended Information deleted the required notice to Mr. Mata of the charges he was facing.

Const. art. I, § 22 provides, in part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him [and] to have a copy thereof... .

The Sixth Amendment provides, in part: "in all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation... ."

The State's amendment did not relate to either a lesser included offense or a lesser degree offense. It incorporated an alternative means of committing the offense of 1° robbery.

A similar situation occurred in *State v. Laramie,* 141 Wn. App. 332, 343-44, 169 P. 3d 859 (2007):

> CrR 2.1(d) provides that a court may allow amendment of the information at any time before the verdict only "if substantial rights of the defendant are not prejudiced." Under this rule, "[a] criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." *Pelkey* [*State v. Pelkey,* 109 Wn. 2d 484, 745 P. 2d 854 (1987)], at 491. As the court observed in *Pelkey,* "[a]nything else is a violation of the defendant's article I, section 22 right to demand the nature and cause of the accusation against him or her." *Id.*
>
> ...[T]he State sought to amend the information to instruct the alternative means of second degree assault... . Because this post trial amendment contravened to Mr. Laramie's right to be informed of the charges against him, it is "reversible error per se even without a defense showing of preju-

> dice." *State v. Markle,* 118 Wn. 2d 424, 437, 823 P. 2d 1101 (1992).

Due to the erroneous amendment of the Information after the State rested its case-in-chief, the jury was given the opportunity to convict Mr. Mata of first degree robbery on a previously uncharged alternative means. Mr. Mata is entitled to have his convictions on Counts 1 and 2 reversed and the case remanded for a new trial.

III. SENTENCING ISSUES

A. Consecutive Sentence

The trial court imposed a consecutive sentence on Mr. Mata's Yakima County convictions with the Pierce County convictions. Mr. Mata contends that the consecutive sentences were erroneously imposed.

RCW 9.94A.589 governs consecutive and/or concurrent sentences.

RCW 9.94A.589(1)(a) provides, in part:

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

RCW 9.94.589(1)(b) pertains to sentencing involving two or more serious violent offenses. It will be addressed in a later portion of Mr. Mata's brief.

RCW 9.94A.589(1)(c) is inapplicable to Mr. Mata's case.

It appears that the State and trial court relied upon RCW 9.94A.589(3) to support the imposition of the consecutive sentence. RCW 9.94A.589(3) states:

> Subject to subsections (1) and (2) of this section, **whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony,** the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(Emphasis supplied.)

The limitations applicable to RCW 9.94A.589(3) include:

> subject to subsections (1) and (2); and
>
> not under sentence for conviction of a felony; and
>
> subsequent to the commission of the crime being
>
> sentenced.

The Yakima County offenses occurred prior to the Pierce County offenses.

RCW 9.94A.589(1) does not apply to sentences in different jurisdictions.

RCW 9.94A.589(2)(a) provides, in part:

> Except as provided in (b) of this subsection, **whenever a person while under sentence for conviction of a felony commits another felony** and is sentenced to another term of

> confinement, the latter term shall not begin until expiration of all prior terms.

(Emphasis supplied.)

RCW 9.94A.589(2)(b) only applies to community supervision. It is not applicable to the argument being presented.

Finally, it cannot be disputed that Mr. Mata was "under sentence for conviction of a felony" at the time he committed the Yakima County offenses. His Judgment and Sentence specifically states that he was on community supervision.

> We discern no logical reason for differentiating between a person under community supervision vis-à-vis his being "under sentence of felony" and the similar status of a parolee. ...A person under community supervision is clearly "under sentence of felony" within the meaning of that phrase in RCW 9.94A.400(2).

State v. Roberts, 76 Wn. App. 290, 292-93 (884 P. 2d 628 (1994), *reviewed denied,* 126 Wn. 2d 1018, 894 P. 2d 564.

Mr. Mata was on community supervision for an unrelated offense. The trial court would have authority to run his sentence consecutive to that offense; but not the Pierce County offenses.

Since RCW 9.94A.589(3) cannot be used to justify the trial court's sentence, the only possible support for that sentence derives from RCW 9.94A.589(1)(a) which provides, in part: "Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW

9.94A.535." *See: State v. Jones,* 137 Wn. App. 119, 123, 151 P. 3d 1056 (2007).

The State did not request exceptional consecutive sentences except as previously noted.

B. Exceptional Sentence

Challenges to exceptional sentences are reviewed de novo. *See: State v. Mutch,* 171 Wn. 2d 646, 656 (2011).

The jury determined that the aggravating factor of "rapid recidivism" applied in Mr. Mata's case. *See:* RCW 9.94A.535(3)(t).

The trial court also made a determination that Mr. Mata's high offender score required application of the "free crimes" doctrine.

> Under the "free crimes" doctrine...A trial court may impose an exceptional sentence where a defendant's current crimes would go unpunished through the imposition of a standard range sentence.

State v. Brundage, 126 Wn. App. 55, 67, 107 P. 3d 742 (2005).

Mr. Mata contends that the application of the "free crimes" doctrine, under the facts and circumstances of his case, and depending upon the decision made by the appellate court on the argument contained in his brief, may well be inapplicable.

If the Court of Appeals agrees that double jeopardy applies to the UPF 1° conviction, it is removed from the mix.

If the Court of Appeals also agrees with Mr. Mata's analysis of RCW 9.94A.589(1)(b), as set out in the following portion of his brief, then

his two convictions for 1° robbery are also accounted for in the trial court's sentence.

Therefore, there are no "free crimes" to be considered.

Thus, the only aggravating factor would be "rapid recidivism." However, if the 1° robbery convictions are reversed, then any concern over "rapid recidivism" is moot.

C. Miscalculated Offender Score

Mr. Mata contends that the trial court miscalculated his offender score on Count 2. The trial court imposed a one hundred and seventy one (171) month sentence on that count.

RCW 9.94A.589(1)(b) states, in part:

> Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and **the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero.** ... All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(Emphasis supplied.)

The trial court did not use an offender score of zero in imposing the sentence under Count 2. The standard range sentence for 1° robbery with a zero offender score is 31-41 months. (Appendix "C").

Mr. Mata contends that the language of RCW 9.94A.589(1)(b) is clear. The two 1° robbery convictions arise from "separate and distinct criminal conduct." They both have the same seriousness level. As to Count 1, the trial court correctly included Mr. Mata's prior convictions and other current convictions that were "not serious violent offenses." fn.[1]

Mr. Mata asserts that there is no ambiguity in RCW 9.94A.589(1)(b). The trial court was required to sentence him on Count 2 with an offender score of zero. *See: State v. Breaux,* 167 Wn. App. 166, 177 (2012).

> If ... language is plain and unambiguous, the meaning is derived from the wording of the statute itself. ...The "plain meaning" of a statute is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.

State v. Christman, 160 Wn. App. 741, 750, 249 P. 3d 680 (2011).

Mr. Mata is entitled to be resentenced on Count 2 to a standard range sentence.

[1] The judgment and sentence includes a conviction for UPF 1° in Pierce County even though Mr. Mata was acquitted of the offense.

CONCLUSION

Mr. Mata's conviction for UPF 1° must be reversed and dismissed. It violates the double jeopardy provisions of the Fifth Amendment to the United States Constitution and Const. art. I, § 9.

The erroneous amendment of the Information after the State rested its case-in-chief requires that Mr. Mata's convictions for 1° robbery be reversed and the case remanded for a new trial.

In the event that the Court of Appeals disagrees with Mr. Mata's analysis on the CrR 2.1(d) issue, the case needs to be remanded to the trial court for resentencing in accord with the provisions of RCW 9.94A.589(1)(b), removal of the consecutive sentence imposed with Pierce County and reconsideration of the "free crimes" doctrine.

DATED this 25th day of July, 2012.

Respectfully submitted,

s/ Dennis W. Morgan
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APPENDIX "A"

ORIGINAL

INSTRUCTION NO. 14

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

APPENDIX "B"

ORIGINAL

INSTRUCTION NO. 17

To convict the defendant of the crime of First Degree Unlawful Possession of a Firearm in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 28, 2009, the defendant knowingly owned a firearm or had a firearm in his possession or control; and

(2) That the defendant had previously been convicted of a serious offense; and

(3) That the ownership, or possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "C"

ROBBERY, FIRST DEGREE

(RCW 9A.56.200)

CLASS A - VIOLENT

I. OFFENDER SCORING (RCW 9.94A.525(8))

ADULT HISTORY:

Enter number of serious violent and violent felony convictions ..... _____ x 2 = _____

Enter number of nonviolent felony convictions ..... _____ x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions ..... _____ x 2 = _____

Enter number of nonviolent felony dispositions ..... _____ x ½ = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions ..... _____ x 2 = _____

Enter number of nonviolent felony convictions ..... _____ x 1 = _____

STATUS: Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = _____

Total the last column to get the **Offender Score**
(Round down to the nearest whole number)

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL IX)	31 - 41 months	36 - 48 months	41 - 54 months	46 - 61 months	51 - 68 months	57 - 75 months	77 - 102 months	87 - 116 months	108 - 144 months	129 - 171 months

B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.595).

C. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-8or III-9 to calculate the enhanced sentence.

D. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 18 to 36 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).

E. For a finding that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, see page III-10, Sexual Motivation Enhancement – Form C.

F. If the current offense was a gang-related felony and the court found the offender involved a minor in the commission of the offense by threat or by compensation (RCW 9.94A.833), the standard sentencing range for the current offense is multiplied by 125%. See RCW 9.94A.533(10).

- *Statutory maximum is a term of life imprisonment in a state correctional institution (RCW 9A.20.021(1)).*

NO. 30466-3-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. JOE ANTHONY MATA, Defendant, Appellant.	YAKIMA COUNTY NO. 09 1 01475 8 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 25th day of July, 2012, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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