90169-4

NO. 30466-3-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOE ANTHONY MATA,

Defendant/Appellant.

RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
Telephone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

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1. IDENTITY OF PETITIONER

JOE ANTHONY MATA requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Mata seeks review of the unpublished portion of an Opinion of Division III of the Court of Appeals dated March 18, 2014 (Appendix "A" 1-27)

3. ISSUES PRESENTED FOR REVIEW

A. Did the trial court improperly impose a sentence to run consecutive to Mr. Mata's Pierce County sentence?

B. Did the Court of Appeals failure to properly consider Mr. Mata's challenge to the firearm enhancements deprive him of his right to appeal under Const. art. I, § 22?

C. Did an amendment adding an uncharged alternative of committing 1° robbery, after the State had rested its case-in-chief, prejudice Mr. Mata and deprive him of his constitutional rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 22?

4. STATEMENT OF THE CASE

Deputy McIlrath of the Yakima Sheriff's Office responded to a complaint of a stolen 1993 Dodge Caravan, Washington license 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 cell phone. The cell phone 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 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 the 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; *i.e.,* 864 DOW. (Trial RP 539, l. 23; RP 540, ll. 3-18; RP 542, ll. 12-16)

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 NCIC 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. (Trial RP 372, ll. 8-12; RP 509, ll. 1-22; RP 517, ll. 12-14)

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)

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)

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

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)

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)

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 which was previously included in the respective counts. (CP 32)

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)

The State then moved to file a Third 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. Barrrientes 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)

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)

Defense counsel moved to limit the firearm enhancement to a single enhancement under the rule of lenity. Only one firearm was involved in the robberies. The trial court denied the motion. (Trial RP 823, ll. 1-15)

The trial court imposed a sentence of one hundred and seventy-one (171) months on Count 1. A sentence of one hundred and seventy-one (171) months was imposed on Count 2. The two (2) counts were ordered to run consecutively. Additionally, each count carried a sixty (60) month firearm enhancement 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 four hundred sixty-one (461) month sentence was ordered to run consecutive to Mr. Mata's Pierce County sentence. (Steinmetz RP 86, l. 4 to RP 95, l. 1)

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

The Court of Appeals entered a decision on March 18, 2014.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. CONSECUTIVE SENTENCE

The trial court imposed a consecutive sentence on Mr. Mata's Yakima County conviction with the Pierce County conviction. 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 9.94A.589(1)(b) pertains to sentencing involving two (2) or more serious violent offenses.

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

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

It appears that the State and the 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 felo-
>
> ny; and
>
> subsequent to the commission of the crime
>
> being sentenced.

The Yakima County offenses occurred prior to the Pierce County offenses. Therefore RCW 9.94A.589(3) is inapplicable.

However, 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.

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 a 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), *review denied,* 126 Wn.2d 1018, 894 P.2d 564)

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

The only possible support for Mr. Mata's consecutive sentence, as imposed, 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.

The Court of Appeals reliance upon RCW 9.94A.589(2)(a) to support its position in affirming the trial court's consecutive sentence is in error.

The misinterpretation of the statute by the Court of Appeals is confirmed by its reference to *State v. Mahone,* 164 Wn. App. 146, 152, 262 P.3d 165 (2011). The *Mahone* case pertains to consecutive terms of community custody as opposed to consecutive sentences.

Mr. Mata contends that the controlling authority is *In re Caley,* 56 Wn. App. 853, 856, 785 P.2d 1151 (1990):

> RCW 9.94A.400(2) [now RCW 9.94A. 589(2)] does require that both ... sentences run consecutively to the 1982 sentence. *See: In re Akridge,* 90 Wn.2d 350, 354, 581 P.2d 1050 (1978); *State v. Andrews,* 43 Wn. App. 49, 52, 715 P.2d 526 (1986), *abrogated on other grounds in State v. Vance,* 49 Wn. App. 847, 746 P.2d 349 (1987); *review denied,* 110 Wn.2d 1013 (1988). *Akridge* holds that persons on parole are "under sentence of felony" and must serve their terms for parole violation before commencement of the terms for subsequent felony convictions ....

As the Court of Appeals decision recognized, Mr. Mata was on community custody at the time he committed the offenses. Thus, his sentence can run consecutive to the underlying Judgment and Sentence for which he was serving a term of community custody. It cannot run consecutive to the Pierce County conviction due to the fact that the Yakima County offenses were committed prior to the Pierce County offenses.

B. FIREARM INOPERABILITY

Mr. Mata, in his Additional Statement of Grounds for Review, raised the issue of the lack of proof as to the operability of the firearm for

enhancement purposes. The Court of Appeals ruled, in the unpublished part of the opinion, that Mr. Mata did not provide sufficient support for this issue under RAP 10.3(a)(6).

RAP 10.10(a) states:

> A defendant/appellant in a review of a criminal case may file a pro se statement of additional grounds for review to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant's/appellant's counsel.

RAP 10.10(c) provides, in part:

> Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant's/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of the alleged errors.

Mr. Mata's original brief contains necessary citations to the record with regard to the issue of the firearm enhancement and the lack of proof of its operability. (RP 795, l. 8; RP 800, l. 9 to RP 801, l. 13; RP 806, ll. 6-10) Thus, the Court of Appeals ruling that there was an insufficient record is in error.

> It is clear from the language of RAP 1.2(a), and the cases decided by this court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. **This discretion, moreover, should normally be exercised unless there are compelling reasons**

> **not to do so.** In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). (Emphasis supplied.)

The need for the State to establish the operability of a firearm for purposes of a firearm enhancement has been a requirement since *State v. Tongate,* 93 Wn.2d 751, 613 P.2d 121 (1980).

The *Tongate* Court, analyzing former RCW 9.95.040, held at 755:

> [The statute] ... appears to require the appearance of a deadly weapon *in fact* in order for the sentence enhancement provision to operate. Without proper instruction on the standard of proof, a jury might very well enter an enhanced punishment special verdict ... if it finds beyond a reasonable doubt that an accused was armed with a gun-like but nondeadly object. This is sufficient for first degree robbery ... but does not meet the requirements ... for the imposition of enhanced punishment.

C. <u>CrR 2.1(d)</u>

CrR 2.1(d) states:

> The court may permit any information or bill of particulars to be amended at any time before verdict or findings 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 Mr. Laramie's right to be informed of the charges against him, it is "reversible error per se even without a defense showing of prejudice." *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.

The Court of Appeals concluded that Mr. Mata's challenge to the Third Amended Information involved constitutional error. However, the Court found the error harmless.

> Constitutional error is harmless when the conviction is supported by overwhelming evidence. *State v. Whelchel,* 115 Wn.2d

> 708, 728, 801 P.2d 948 (1990); *State v. Guloy,* 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied,* 475 U.S. 1020 (1986). Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *Whelchel,* at 728; *Guloy,* at 425.

State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994).

The State never proved that the gun was an actual firearm. Thus, even though the evidence established that Mr. Mata displayed what appeared to be a firearm, the jury was given the option of convicting him under either or both alternatives based upon the wording of the Third Amended Information and the jury instructions. (Appendices "B", "C", "D")

The Court of Appeals decision also seems to imply that the constitutional deficiency was remedied by the fact that a firearm enhancement was included in all of the Informations. However, the fact that an inoperable weapon will meet the criteria for the underlying offense, it has to be an actual operable firearm for purposes of the enhancement. This constitutes a significant difference.

The Court of Appeals recognized that *State v. Pelkey,* 109 Wn.2d 484, 745 P.2d 854 (1987) is the controlling authority in connection with an attempt by the State to amend an Information after it rests its case-in-chief.

> In *Pelkey,* our Supreme Court announced one of the constitutional limitations to CrR 2.1(d). Under *Pelkey,* the State cannot

> amend a charge after it has rested its case-in-chief unless the amended charge is a lesser included offense or a lesser degree of the same offense. *Pelkey,* 109 Wn.2d at 491; *see also State v. Vangerpen,* 125 Wn.2d 782, 789-91, 888 P.2d 1177 (1995) (citing *Pelkey,* 109 Wn.2d at 491); *State v. Markle,* 118 Wn.2d 424, 436-37, 823 P.2d 1101 (1992) (quoting *Pelkey,* 109 Wn.2d at 491). The *Pelkey* court held that because such late amendment "'necessarily prejudices'" a defendant's constitutional right to demand the nature and cause of the accusation against him, a trial court commits *per se* reversible error if it allows the State to amend the Information after the State has rested its case. *Markle,* 118 Wn.2d at 437 (emphasis omitted) (quoting *Pelkey,* 109 Wn.2d at 491).

State v. Hockaday, 144 Wn. App. 918, 925, 184 P.3d 1273 (2008).

6. CONCLUSION

RAP 13.4(b)(1), (2) and (3) are all implicated by the Court of Appeals decision.

The Court of Appeals analysis of the consecutive sentences is flawed and is contrary to RCW 9.94A.589(2)(a) and *In re Caley, supra.* RAP 13.4(b)(2).

State v. Tongate, supra, controls the issue of firearm inoperability for enhancement purposes. RAP 13.4(b)(1). The Court of Appeals failure to address the issue deprived Mr. Mata of his constitutional right to appeal under Const. art. I, § 22. RAP 13.4(b)(3); *State v. Olson, supra.*

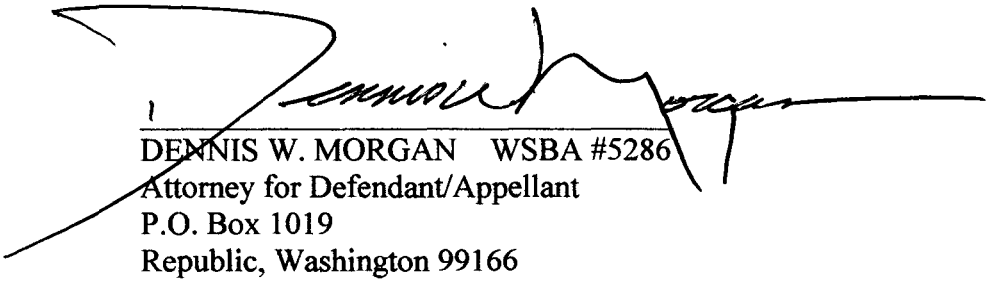
The amendment of the Information after the State rested its case-in-chief violates the essential elements rule. The Court of Appeals analy-

sis runs contrary to *State v. Pelkey, supra,* and the constitutional requirements of the Sixth Amendment and Const. art. I, § 22. RAP 13.4(b)(1), (3).

Mr. Mata respectfully requests that review be accepted.

DATED this 14TH day of April, 2014.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant
P.O. Box 1019
Republic, Washington 99166
Telephone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

APPENDIX "A"

FILED

March 18, 2014

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JOE ANTHONY MATA, Appellant.	)	No. 30466-3-III
	)	OPINION PUBLISHED IN PART

SIDDOWAY, A.C.J.—Joe Mata appeals his convictions of robbery, attempted robbery, and first degree unlawful possession of a firearm. We conclude that this second prosecution for unlawful possession of a .45 caliber handgun violates his right to be free of double jeopardy and reverse his conviction on that count. We find no other reversible error nor does Mr. Mata raise any viable issue in his pro se statement of additional grounds. We reverse his conviction of unlawful possession of a firearm and remand for resentencing.

FACTS AND PROCEDURAL BACKGROUND

On July 28, 2009, roughly six weeks after his release from custody on other charges, Joe Mata embarked on a one-day, multi-county crime spree. He was charged

with crimes in Yakima and Pierce Counties. The Yakima County charges and convictions are the subject matter of this appeal.

The crimes allegedly began with Mr. Mata's early morning theft, in Yakima, of a 1993 Dodge Caravan belonging to Luz Garcia, bearing the license plate 864-ROW. Mid-morning, the manager of a restaurant in Union Gap reported to the county sheriff that a man and woman left his restaurant without paying. Responding officers were told that the couple left in what a witness described as a Ford Aerostar van, license plate 664-ROD. At 10:40 a.m., a Yakima County sheriff's deputy responded to a robbery not far from the restaurant, reported by Zachary Sisneros. Mr. Sisneros had been working, delivering bottled water, when a maroon Dodge Caravan with the license plate 860-ROW blocked his truck in the driveway of a residence on his route. The driver of the van robbed him at gunpoint, taking his money, wallet, and his cell phone. Mr. Sisneros's description of the robber was similar to the description of the man who had left the restaurant without paying. Mr. Sisneros believed the gun was a .40 or .45 caliber semiautomatic pistol.

At around 6:30 p.m., another armed robbery was reported by Shaun Kroeger and Jacob McDonald. They had been shopping for groceries in Yakima and were returning to Mr. McDonald's pickup truck when a man confronted Mr. Kroeger as he was getting into the truck, demanding "everything you got." Report of Proceedings (RP) (Oct. 17, 2011) at 541. The man flashed a gun and threatened to kill Mr. Kroeger if he did not hand over

his wallet; Mr. Kroeger complied. As he did, Mr. McDonald, who had gotten out of the truck to see what was going on, saw Mr. Kroger hand over his wallet and saw a gun in the robber's hand, pointed to the ground. The robber demanded Mr. McDonald's money as well, but Mr. McDonald refused and walked away. After the robber ran off, the two men called the police and reported the incident, describing the robber's vehicle as a red van with the license plate 864-ROW. Mr. Kroeger's description of the man who robbed him was similar to Mr. Sisneros's description of the robber who confronted him earlier in the day.

Later that night, at 11:15 p.m., Deputy Robert Glen Carpenter of the Pierce County Sheriff's Office was running routine license plate checks of traffic leaving State Route 512. He ran a plate on a maroon van with license plate 864-ROW and received an NCIC[1] hit stating the vehicle was stolen and the subjects should be considered armed and dangerous.

Deputy Carpenter caught up with the van, which was being driven by Mr. Mata, with Christina Barrientes a passenger. As Deputy Carpenter and officers in another patrol car activated their lights, Mr. Mata ran a red light, sped away, and a high-speed chase ensued. It ended when Mr. Mata crashed through a fence on a dead-end road, got

[1] National Crime Information Center.

out of the van, and ran. Deputy Carpenter captured and arrested Mr. Mata with the help of employees in a building in which Mr. Mata attempted to hide.

A later search of the van led to the discovery of a loaded .45 caliber handgun, found on the driver's side floorboard. Also found were two wallets, one belonging to Mr. Kroeger; Mr. Sisneros's cell phone; and ignition parts along with a screwdriver.

A records check conducted on the .45 caliber handgun recovered revealed that it had been purchased by Ms. Barrientes on June 5 in Yakima. She picked it up on June 16, at a time when Mr. Mata was in jail for a community custody violation. During the Yakima trial, the State played an audio recording of a telephone call made to Ms. Barrientes by Mr. Mata on June 15, from the county jail, in which he spoke to Ms. Barrientes about purchasing a gun.

Mr. Mata was charged with crimes in both Pierce and Yakima Counties and was tried first in Pierce County. Mr. Mata was prohibited from owning or possessing a firearm in light of his prior conviction of a serious offense, and one of the charges prosecuted in Pierce County was first degree unlawful possession of the .45 caliber handgun found in the Dodge Caravan. The Pierce County jury found him not guilty of that crime.

In Yakima County, the State filed its first information against Mr. Mata on July 31, 2009, charging him with the following counts and enhancements:

Count 1: First degree robbery of Zack Sisneros, alleging that "in the commission of or immediate flight therefrom, you displayed what appeared to be a firearm or other deadly weapon." Clerk's Papers (CP) at 1.

Firearm enhancement.

Count 2: First degree unlawful possession of a firearm.

By amended information filed August 8, 2011, the State added additional charges and modified the manner in which it charged Mr. Mata with having displayed or used weapons, as follows:

Count 1: First degree robbery of Zack Sisneros, alleging that "in the commission of or immediate flight therefrom, you were armed with a firearm and/or you displayed what appeared to be a firearm or other deadly weapon." CP at 26.

Firearm enhancement.

Counts 2 and 3: First degree robbery of Shaun Kroeger (count 2) and Jake McDonald (count 3), with allegations of firearm or deadly weapon display or use identical to the allegation in Count One.

Firearm enhancement as to each.

Count 4: First degree unlawful possession of a firearm.

Plus rapid recidivism enhancement under RCW 9.94A.535(3)(t).

Plus exceptional sentence to adjust for "free crimes" under RCW 9.94A.535(2)(c).

By a second amended information filed on October 10, 2011, the day of the pretrial conference in Mr. Mata's Yakima County trial, the State further modified the charges. The prosecutor explained that the State was amending count 3 to attempted first

degree robbery, since Mr. Mata demanded Mr. McDonald's wallet but never took property from Mr. McDonald's person. The prosecutor also told the court that the third amended information "cleans up some of the language" to exclude the reference to displaying a deadly weapon. RP (Oct. 10, 2011) at 3. The amendment did more; it also (inadvertently, it appears) eliminated the alternative of Mr. Mata's having been "armed with" a firearm, alleging, in connection with counts 1, 2, and 3, only that

> in the commission of or immediate flight therefrom, you displayed what appeared to be a firearm.

CP at 32-33.

Trial began on October 12. On October 20, the State rested its case. It then asked to amend the information a third time. It explained that the robbery counts should have alleged that Mr. Mata was armed with a firearm "and/or" displayed what appeared to be a firearm or other deadly weapon. RP (Oct. 20, 2011) at 813. Mr. Mata objected. The trial court ultimately ruled that it would allow the amended information if it excluded the "or other deadly weapon" language. *Id.* at 819.

The third amended information therefore modified the manner in which it charged Mr. Mata with having displayed or used weapons by restoring the alternative of being armed, alleging in each of counts 1, 2, and 3 that

> in the commission of or immediate flight therefrom, you were armed with a firearm and/or you displayed what appeared to be a firearm.

CP at 93-94.

During trial, Mr. Mata asked the trial court to dismiss the unlawful possession of a firearm count, arguing that he could not be convicted of unlawfully possessing the same firearm that the Pierce County jury had acquitted him of possessing on the date in question. The trial court recognized it as a viable issue and one "wisely brought up by the defense," but concluded that there was a sufficient geographic and temporal gap between possession of the .45 caliber handgun in Yakima and Pierce Counties and denied the motion. RP (Oct. 20, 2011) at 806-07.

The jury found Mr. Mata guilty of the first degree robberies of Mr. Sisneros and Mr. Kroeger and unlawful possession of a firearm. It answered "yes" to the special verdict forms addressing the firearm and rapid recidivism aggravators.

The trial court imposed an exceptional sentence based on the jury's findings and on its own finding that Mr. Mata committed multiple current offenses and his high offender score that resulted in some of the current offenses going unpunished. At the State's request, which was based on RCW 9.94A.589(3), the court ordered that the sentence for the Yakima County crimes run consecutive to Mr. Mata's Pierce County sentence.

Mr. Mata appeals.

ANALYSIS

Mr. Mata makes four assignments of error[2]: (1) that his conviction of first degree unlawful possession of a firearm violates his constitutional right of protection against double jeopardy, (2) that the trial court violated CrR 2.1(d) and his constitutional right to notice of the charges against him in allowing the State to file the third amended information after resting its case-in-chief, (3) that the trial court erred in ordering that the sentences for his Yakima County convictions run consecutive with his Pierce County conviction, and (4) that the "free crimes" aggravator may not be warranted depending on the outcome of other issues on appeal. We address the assignments of error in turn.

Double Jeopardy

Mr. Mata first contends that his prosecution in Yakima County for unlawful possession of the firearm discovered in the van in Pierce County violated his right to be free of double jeopardy.

The Fifth Amendment and the Washington State Constitution provide that no person shall be twice put in jeopardy for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. Both constitutional guarantees include protection from being prosecuted a second time for the same offense after acquittal. *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006).

[2] He abandoned a fifth assignment of error, challenging his offender score.

The determination of whether or not a defendant faces multiple convictions for the same crime depends on the unit of prosecution. *State v. Hall*, 168 Wn.2d 726, 730, 230 P.3d 1048 (2010) (citing *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)). "The unit of prosecution for a crime may be an act or a course of conduct." *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225-26, 73 S. Ct. 227, 97 L. Ed. 260 (1952)). "The proper question is to determine what act or course of conduct the legislature has defined as the punishable act." *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). The statutory unit of prosecution is a question of law that we review de novo. *State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635 (2005).

The approach to determine the unit of prosecution is well settled:

> [T]he first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.

Varnell, 162 Wn.2d at 168 (citing *State v. Bobic*, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000)). If the statute is ambiguous as to the unit of prosecution, the rule of lenity applies and the ambiguity must be "'resolved against turning a single transaction into multiple offenses.'" *Tvedt*, 153 Wn.2d at 711 (internal quotation marks omitted) (quoting *State v. Adel*, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998)).

Mr. Mata was charged in both Pierce and Yakima Counties under RCW 9.41.040(1)(a), which defines the crime of first degree unlawful possession of a handgun as follows:

> A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense as defined in this chapter.

The charges in both counties were based on his possession on July 28, 2009 of the .45 caliber handgun found on the floorboard of the Dodge Caravan.

We first analyze the statute. Subsection (1)(a) makes it a crime for a person convicted of a serious offense to own or have possession of "any" firearm, without tying the commission of the crime to a particular duration of ownership or possession or to the location of the firearm. Subsection (7) of the statute provides, "Each firearm unlawfully possessed under this section shall be a separate offense." RCW 9.41.040(7). Each firearm therefore constitutes a separate unit of prosecution. *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 500, 158 P.3d 588 (2007).

Neither the parties nor we have identified any legislative history that would suggest that the unit of prosecution is anything other than the particular firearm.

The State's position that there might be separate "possessions" of the same firearm that support separate charges under the statute implicates the third, factual step of the analysis, in which we determine whether, despite the legislative focus, the facts reveal

that more than one "unit of prosecution" is present. The possibility of multiple "possessions" of the same firearm finds support in *State v. Kenyon*, 150 Wn. App. 826, 208 P.3d 1291 (2009), in which Division Two of this court considered the character of the crime of unlawful possession of a firearm in a different context: a defendant's argument that a second prosecution for his unlawful possession of a firearm in 2004 should have been dismissed under CrR 4.3.1 because it was "related" within the meaning of the rule to an earlier prosecution for possessing the same firearm in 2005.

In *Kenyon*, the material facts were summarized in findings by the trial court that were treated as verities on appeal:

> "In this particular case, although the same firearm, identified by its serial number, was possessed on one occasion and allegedly possessed in this case on another occasion, those two time periods are eight months apart. They have intervening time where Mr. Kenyon was incarcerated both in jail and in prison. Certainly this could not be said to be a single criminal incident or episode.
>
> "The allegation is that Mr. Kenyon possessed this firearm, divested himself of it by throwing it out the window, and then at a later time regained it and possessed it again. The Court finds that this is not a situation where the facts amount to a related offense, because it is not a single criminal incident or episode."

150 Wn. App. at 833.

Division Two concluded that the trial court erred in failing to dismiss the second prosecution and in the process made two observations that are relevant to the issue presented here, and with which we agree. First, it stated that "[t]he act upon which these two charges rest—ownership, possession, or control of a single firearm—is a "'course of

conduct'" rather than a discrete act because that behavior takes place over a period of time rather than at one distinct moment." *Id.* at 834. At the same time, it regarded the two instances of possession as different offenses when it stated that they "were related and, as such, *should have been charged at the same time*." *Id.* (emphasis added). Implicitly, the court accepted the trial court's reasoning that the defendant's act of throwing the firearm out the window and regaining possession of it many months later, following a period of incarceration, resulted in a distinct, separately chargeable course of conduct.

Other Washington decisions support the concept that a crime that is defined as a course of conduct can, depending on the facts, be interrupted and committed anew. In *Hall*, the Supreme Court found that a criminal defendant's hundreds of calls to a witness in an effort to dissuade her from testifying constituted a single witness tampering offense, concluding that the witness tampering statute criminalizes the "ongoing" attempt to persuade a witness not to testify. 168 Wn.2d at 733. It stated in dicta that "[o]ur determination might be different if Hall had changed his strategy . . . or if he had been stopped by the State briefly and found a way to resume his witness tampering campaign." *Id.* at 737.

In *State v. Chouap*, 170 Wn. App. 114, 125, 285 P.3d 138 (2012), Division Two, citing this dicta in *Hall*, found the crime of attempting to elude a pursuing police vehicle to be one that a defendant could "commit . . . anew with each pursuit." In *Chouap*, the

defendant had attempted to elude law enforcement in two high speed chases: one in Tacoma, involving Tacoma police, and another in Lakewood, involving Lakewood police. The court found two pursuits and two offenses where "the first pursuit ended when the Tacoma police officers stopped pursuing Chouap because of his dangerous driving," and he had thereby "successfully eluded the pursuing police vehicle." *Id.*

We conclude, as did Division Two in *Kenyon*, that the crime of unlawful possession of a firearm is a "course of conduct" rather than a discrete act. We agree that an interruption in possession of a particular firearm may result in different "possessions" just as the interruption of the defendant's effort to elude in *Chouap* resulted in different "pursuits." We need not decide in this case what the duration or character of the interruption would have to be in order to give rise to distinct, separately chargeable unlawful "possessions" of a firearm, however, because the State offered no evidence that Mr. Mata's possession of the .45 caliber handgun on July 28 (at times actual; at others, constructive) was ever interrupted.

"[W]hen a statute defines a crime as a course of conduct over a period of time, 'then it is a continuous offense and any conviction or acquittal based on a portion of that course of action will bar prosecution on the remainder.'" *State v. McReynolds*, 117 Wn. App. 309, 339, 71 P.3d 663 (2003) (quoting *Harrell v. Israel*, 478 F. Supp. 752, 754-55 (E.D. Wis. 1979)). Mr. Mata's acquittal of unlawful possession of the .45 caliber

handgun based on a portion of his possession of the firearm on July 28 barred prosecution of the remainder. The unlawful possession conviction must be reversed.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with RCW 2.06.040, the rules governing unpublished opinions.

I

Mr. Mata next argues that allowing the State to amend the information for the third time after the State rested violated his rights under the Sixth Amendment to the United States Constitution, article I, section 22 of the Washington State Constitution, and CrR 2.1(d).

CrR 2.1(d) allows the trial court to permit the State to amend an information "at any time before verdict or finding if substantial rights of the defendant are not prejudiced." We review a trial court's decision to allow amendment under the rule for abuse of discretion. *State v. Guttierrez*, 92 Wn. App. 343, 346, 961 P.2d 974 (1998).

If the criminal rule were our only concern, we would find no prejudice to Mr. Mata's substantial rights and no abuse of discretion. All of the evidence presented at trial was that Mr. Mata was armed with a handgun—and what is important here, that he displayed that handgun during the course of both robberies. In *In re Personal Restraint of Brockie*, 178 Wn.2d 532, 309 P.3d 498 (2013) our Supreme Court (although addressing a different issue) recognized that where a defendant is charged with first

degree robbery based on the means of "display[ing] what appears to be a firearm or other deadly weapon,"[3] then evidence that he was armed with and displayed his weapon does not present a risk that the jury will convict on the basis of an uncharged alternative means of being "armed with a deadly weapon."[4] As explained in *Brockie*:

> Throughout the trial, the evidence consistently showed that the robber displayed what appeared to be a gun throughout the robberies. There is no indication that the trial included any discussion or claim that the robber was armed with a deadly weapon but did not display it. Thus, based on the facts in this particular case, any juror that found the robber was armed with a deadly weapon necessarily would have found that the robber displayed the weapon—the alternative means that was properly described in the charging information.

178 Wn.2d at 540. There was even less possibility of prejudice here, where Mr. Mata had been charged since the second amendment of the information with firearm enhancements on the robbery and attempted robbery counts. He was thereby on notice (if not through the means charged in counts 1 and 2) that the State intended to offer proof that he was armed.

Mr. Mata points out, however, that the "essential elements" rule applies in addition to CrR 2.1(d). In *State v. Pelkey*, 109 Wn.2d 484, 487-88, 745 P.2d 854 (1987), our Supreme Court, having considered the requirement of article I, section 22 of the Washington Constitution that the accused be adequately informed of the State's charges,

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[3] The means provided by RCW 9A.56.200(1)(a)(ii).

[4] The means provided by RCW 9A.56.200(1)(a)(i).

held that the State may not amend a charge after resting its case-in-chief. It found the requirement of notice to be subject to only two narrow exceptions. "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. Anything else is a violation of the defendant's article 1, section 22 right." *Id.* at 491. Later cases have characterized *Pelkey* as announcing a "bright line" rule and held that where an amendment by the State after resting does not meet one of its exceptions, the defendant is not required to show prejudice. *State v. Vangerpen*, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995); *State v. Markle*, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992).

Here, the State's third amendment added an alternative means of committing the robberies charged in counts 1 and 2: being "armed with a firearm" in the commission of or immediate flight therefrom. Contrary to the State's contention on appeal, Mr. Mata objected to the State's request for the third amendment.[5] The State also argues that "nothing 'new'" was added to the third amended information, Br. of Resp't at 11-12, but in *Brockie*, the Supreme Court pointed out that a person may be armed with but not display a weapon, and "[t]he legislature clearly intended to treat the two alternative means of committing robbery in the first degree as distinct." 178 Wn.2d at 538.

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[5] Mr. Mata's lawyer stated, "Your honor, the state has rested. We went to trial on these charges. I don't think that the amendment should be permitted." RP (Oct. 20, 2011) at 814. Although there was confusion about what was being added by the third amendment, the objection was sufficient.

Nonetheless, in an uncharged alternative means case such as this one, involving a charging document that is sufficient but an amendment that should not have been permitted, the State may show harmlessness. *Id.* at 539 n.2 (citing *State v. Bray*, 52 Wn. App. 30, 34-36, 756 P.2d 1332 (1988)); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless). We find a constitutional error harmless only if convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. *Guloy*, 104 Wn.2d at 425.

In cases where a jury is instructed on an uncharged offense, harmlessness is most commonly shown by other instructions that define the crime in a manner that leaves only the charged alternative before the jury. *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942). In this case, harmlessness is shown by the fact that all of the evidence and argument was that Mr. Mata displayed a firearm when he robbed Mr. Sisneros and Mr. Kroeger. The possibility of an undisplayed firearm was never suggested. And Mr. Mata's defense was to deny any involvement in the robberies; he did not challenge the testimony of the robbery victims and other witnesses that a handgun was displayed in both robberies. *Cf. Brockie*, 178 Wn.2d at 540. Given that the only evidence offered or argued by the State was evidence of a displayed, not a concealed, firearm, the error in permitting the late amendment was harmless.

II

Mr. Mata next argues that the trial court erroneously relied on RCW 9.94A.589(3) to "[impose] a consecutive sentence on Mr. Mata's Yakima County convictions with the Pierce County convictions." Br. of Appellant at 21. We conclude that the statute did not apply but that the result was still the consecutive sentencing ordered by the court.

During the sentencing hearing, the lawyers argued about the State's proposed language in section IV.A of the judgment and sentence, dealing with confinement, which reads in part as follows:

> 4.A.2 Concurrent or Consecutive:
> ☒ Consecutive With Other Sentences: Unless otherwise specified here, this sentence shall be consecutive with prior sentences.

CP at 756 (bold face omitted). Mr. Mata's lawyer argued that the court should exercise its discretion by allowing its sentence to run concurrently with the Pierce County sentences, contending that the Pierce County crimes "were part of the same crime spree," that Mr. Mata had "been in custody on this case and the other case during that time," and that the Pierce County "sentence was prior because they ended up with his body first." RP (Dec. 5, 2011) at 91, 92. The State argued that the trial court should exercise its discretion to have the sentences run consecutively, pointing out that "in a case where the court's imposing an exceptional sentence I can't imagine why you—the court would then run concurrent a separate case." *Id.* at 93.

We are puzzled by the positions taken by the parties on the application of RCW 9.94A.589(3) in light of the State's argument in the trial court, which is now Mr. Mata's argument on appeal, that Mr. Mata was serving community custody at the time he committed the Yakima County crimes in which case the statute does not apply.[6]

RCW 9.94A.589(3) provides:

> 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 added.)

On appeal, Mr. Mata argues that because he was subject to community custody at the time he committed the Yakima crimes, he was "'[subject to] sentence for conviction of a felony'" within the meaning of Washington statutes dealing with sentencing and confinement, as decided in *State v. Roberts*, 76 Wn. App. 290, 292-93, 884 P.2d 628 (1994). Appellant's Br. at 23. On that basis, he argues, RCW 9.94A.589(3) did not apply. From this, he argues that any consecutive sentence imposed would have to be imposed as an exceptional sentence. But since the State did not ask for, nor did the court

[6] This is confirmed by his judgment and sentence, which found commission of a current offense while on community placement, community custody, or community supervision, which added one point to his offender score. *See* CP at 764.

order, exceptional consecutive sentencing, he argues that his Yakima County sentence must run concurrent to his Pierce County sentence.

The State responds with settled law that where RCW 9.94A.589(3) applies, the sentencing judge enjoys "discretion to impose either a concurrent or consecutive sentence for a crime that the defendant committed before he started to serve a felony sentence for a different crime," without finding aggravating factors that would support an exceptional sentence. *State v. King*, 149 Wn. App. 96, 101, 202 P.3d 351 (2009). It does not address *Roberts* and is now silent on whether Mr. Mata was subject to community custody at the time he committed the Yakima crimes, thereby taking him outside the operation of RCW 9.94A.589(3).

Where RCW 9.94A.589(3) does not apply, the default provision applicable to defendants in Mr. Mata's situation is RCW 9.94A.589(2)(a). It provides in relevant part that "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." The result is consecutive sentencing. *See State v. Mahone*, 164 Wn. App. 146, 152, 262 P.3d 165 (2011). While the trial court might have lacked the discretion provided by RCW 9.94A.589(3) that was urged by the State, the default result is the consecutive sentencing reflected in the judgment and sentence. Any mistaken reasoning was harmless.

III

Mr. Mata next raises a conditional challenge to the the trial court's application of the free crimes doctrine as a basis for his exceptional sentence "depending upon the decision made by the appellate court on the argument contained in his brief." Br. of Appellant at 24. He does not argue that the trial court lacked a sufficient basis for applying the doctrine given the convictions and the offender score on which it based its sentencing decision but only argues that decisions on appeal might change the calculus.

A defendant's standard range sentence reaches its maximum at an offender score of "9 or more." RCW 9.94A.510. The result for a defendant being sentenced for multiple current offenses that result in an offender score greater than nine is that further increases in the offender score do not increase the standard sentence range. *State v. France*, 176 Wn. App. 463, 470, 308 P.3d 812 (2013), *review denied*, 318 P.3d 280 (2014). However, a trial court may impose an exceptional sentence if "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). The shorthand term "free crimes" is commonly used for the "current offenses going unpunished" that might justify an exceptional sentence.

Mr. Mata had an offender score of 14 prior to committing the crimes prosecuted here. In support of the exceptional sentence imposed by the court, it identified the free crimes aggravator as one reason. Correcting Mr. Mata's offender score for our reversal

of the unlawful possession of a firearm conviction will reduce his offender score but it will still be high and well within "free crimes" aggravator territory. Reading the trial court's findings in support of its exceptional sentence as a whole, we question whether its position on an exceptional sentence will change, but that is a decision for the trial court to make in resentencing Mr. Mata.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Mata states seven.[7]

Whether Mr. Mata's Sixth Amendment right to confront witnesses against him was violated when the recording of his police phone call was not properly authenticated. Mr. Mata's first ground is that the audiotape of his June 15 call from jail to Ms. Barrientes was not properly authenticated. He cites the seven-part test for authentication provided by Washington case law.[8]

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[7] On the last page of Mr. Mata's SAG, he complains of an inadequate record on appeal, mentioning "many motions" that he filed before pretrial and trial proceedings. We note that Mr. Mata appealed only the jury verdict, judgment, and sentence and has therefore brought up for appeal only those matters and any orders or rulings prejudicially affecting them. RAP 2.4(b)(1).

[8] A proper foundation requires:
"(1) It must be shown that the mechanical transcription device was capable of taking testimony. (2) It must be shown that the operator of the device was competent to operate it. (3) The authenticity and correctness of the recording must be established. (4) It must be shown that changes, additions, or deletions have not been made. (5) The manner of preservation of the record must be shown. (6) Speakers must be identified. (7) It must

The State called Lieutenant Gordon Costello to authenticate the recording of Mr. Mata's call. The lieutenant testified as to the nature of the jailhouse recording system, its methods of storage, the process for identifying the inmate-caller through a pin number, the methods of recording, whether changes or deletions may be shown, and he identified Mr. Mata as one of the speakers on the call. The trial court found sufficient circumstantial evidence identifying Christina Barrientes as the woman speaking during the call in the form of her partial identification of herself, her phone number, address, voice identification, and the fact that she picked up a handgun on June 16 consistent with the substance of the call.

Mr. Mata cannot raise objections to the evidence that were not raised in the trial court. RAP 2.5(a). The trial court considered his objections to recordings of several calls offered by the State and admitted only the recording of the June 15 call. We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). The court did not abuse its discretion in finding that the State had laid a sufficient foundation for admitting the recording.

Whether substantial evidence supports the rapid recidivism exceptional sentence and whether the jury was provided proper guidance for its instruction. Mr. Mata's

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> be shown that the testimony was freely and voluntarily made, without any kind of duress."

State v. Robinson, 38 Wn. App. 871, 885, 691 P.2d 213 (1984) (quoting *State v. Williams*, 49 Wn.2d 354, 360, 301 P.2d 769 (1956)).

second ground challenges the instruction and evidence on the rapid recidivism aggravator. The jury was instructed that if it found Mr. Mata guilty of any of the charged crimes it must determine "whether the defendant committed the crime shortly after being released from incarceration." CP at 518. It answered "yes." CP at 525. Mr. Mata argues that the approximately six weeks at issue here was not "rapid," the jury was not properly guided on what constitutes a "rapid" time frame, and there was no evidence on which the jury could find that the dates on which he was released from custody and then reoffended.

Because the aggravating factor codified in RCW 9.94A.535(3)(t) is that "[t]he defendant committed the current offense shortly after being released from incarceration," "[t]his is the only fact that must be found by the jury." *State v. Williams*, 159 Wn. App. 298, 312-13, 244 P.3d 1018 (2011). The "technical term rule" requires courts to define technical words and expressions but not words and expressions that are of ordinary understanding and self-explanatory. *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). The language used in the court's instruction or special verdict form on the rapid recidivism aggravator is language of ordinary understanding and self-explanatory. We also note that "[a] trial court is not required to impose an exceptional sentence merely because a jury finds an aggravating circumstance proved. Rather, in such a circumstance, the trial court may sentence the defendant to an exceptional sentence if it determines 'that

the facts found are substantial and compelling reasons justifying an exceptional sentence.'" *Williams*, 159 Wn. App. at 314 (quoting RCW 9.94A.537(6)).

Mr. Mata also makes a constitutional vagueness challenge to the instruction and verdict form. Where a statute does not impinge on First Amendment rights, we evaluate a vagueness challenge "by examining the statute as applied under the particular facts of the case." *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). Statutes are presumed to be constitutional. *City of Spokane v. Vaux*, 83 Wn.2d 126, 129, 516 P.2d 209 (1973). "When a statute does not define terms alleged to be unconstitutionally vague, we 'may look to existing law, ordinary usage, and the general purpose of the statute to determine whether the statute meets constitutional requirements of clarity.'" *Williams*, 159 Wn. App. at 319 (internal quotation marks omitted) (quoting *State v. Hunt*, 75 Wn. App. 795, 801, 880 P.2d 96 (1994)).

As applied to Mr. Mata, RCW 9.94A.535(3)(t) is not vague. The evidence presented to the jury was that Mr. Mata was making arrangements to acquire the handgun used to commit the robberies while in jail. Committing a crime within six weeks of release fits well within any common understanding of "shortly after."

Finally, the State presented evidence on the time frame involved in a bifurcated proceeding on the rapid recidivism issue, conducted after the jury had returned its verdicts of guilty. Lieutenant Costello testified that Mr. Mata had been incarcerated in June 2009 for "a guilty finding on a charge of offender accountability," that "[h]e was

released on 6-20-2009 at 1939 [hours]," and that the number of days between his June 20 release and July 28 was "38 days." RP (Oct. 24, 2011) at 1066-68. The jury had been presented with substantial evidence during the trial that the date of the crimes charged was July 28.

Whether Mr. Mata had adequate notice of the prohibition against firearm possession. Mr. Mata's third ground relates to the unlawful possession conviction that we reverse. It is moot.

The court erred in using a single definition of "firearm" for each charge; it ignored the fact that the alleged weapon had never been tested or shown to be able to fire a projectile; defense counsel was ineffective for not hiring experts on the issue of identification and made mistakes during pretrial motions; and the prosecutor committed misconduct in opening statements and during trial by violating the court's pretrial order about "crime spree" evidence. Mr. Mata's fourth, fifth, sixth, and seventh grounds are all insufficiently supported under RAP 10.3(a)(6). They lack citation to relevant portions of the record, identification of the claimed error, supporting legal authority, and reasoned argument. We refuse to consider them.

We reverse Mr. Mata's conviction of first degree unlawful possession of a firearm

and remand to the sentencing court for a recalculation of the offender score and resentencing.

Siddoway, A.C.J.

WE CONCUR:

Brown, J.

Kulik, J.P.T.

APPENDIX "B"

2011 OCT 21 AM 10: 14

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOE ANTHONY MATA DOB: 11/11/1981 Defendant.	NO. 09-1-01475-8 THIRD AMENDED INFORMATION

TO: JOE ANTHONY MATA
ADDRESS: 403 KENWARD WAY, YAKIMA, WA 98901

By this Information, the Prosecuting Attorney accuses you of committing the following crime(s):

Count 1 - FIRST DEGREE ROBBERY – RCW 9A.56.190, 9A.56.200(1)(a)(i) and/or (ii), 9.94A. 533(3), 9.94A.825, 9.94A.570, 9.94A.030, 9.94A.535(3)(t) and 9.94A.535(2)(c)

CLASS A FELONY – The maximum penalty is Life imprisonment and/or a $50,000.00 fine.

On or about July 28, 2009, in the State of Washington, with intent to commit theft, you unlawfully took, from the person or in the presence of Zack A. Sisneros, the property of another, against that person's will, by use or threatened use of immediate force, violence, or fear of injury to that person or his/her property or the person or property of anyone in order to obtain or retain the property taken, and in the commission of or immediate flight therefrom, you were armed with a firearm and/or you displayed what appeared to be a firearm.

ORIGINAL

JAMES P. HAGARTY
WSBA #30466 3-000000093
Yakima, Washington 98901
(509) 574-1210 Fax (509) 574-1211

Count 2 - FIRST DEGREE ROBBERY – RCW 9A.56.190, 9A.56.200(1)(a)(i) and/or (ii), 9.94A. 533(3), 9.94A.825, 9.94A.570, 9.94A.030, 9.94A.535(3)(t) and 9.94A.535(2)(c)

CLASS A FELONY – The maximum penalty is Life imprisonment and/or a $50,000.00 fine.

On or about July 28, 2009, in the State of Washington, with intent to commit theft, you unlawfully took, from the person or in the presence of Shaun Kroeger, the property of another, against that person's will, by use or threatened use of immediate force, violence, or fear of injury to that person or his/her property or the person or property of anyone in order to obtain or retain the property taken, and in the commission of or immediate flight therefrom, you were armed with a firearm and/or you displayed what appeared to be a firearm.

Count 3 - ATTEMPTED FIRST DEGREE ROBBERY – RCW 9A.56.190, 9A.56.200(1)(a)(i) and/or (ii), 9A.28.020, 9.94A. 533(3), 9.94A.825, 9.94A.570, 9.94A.030, 9.94A.535(3)(t) and 9.94A.535(2)(c)

CLASS B FELONY – The maximum penalty is 10 years imprisonment and/or a $20,000.00 fine.

On or about July 28, 2009, in the State of Washington, with intent to commit the crime of First Degree Robbery, and with intent to commit theft, you unlawfully took a substantial step toward taking, from the person or in the presence of Jake McDonald, the property of another against that person's will, by use or threatened use of immediate force, violence, or fear of injury to that person or his/her property or the person or property of anyone in order to obtain or retain the property taken, and in the commission of or immediate flight therefrom, you were armed with a firearm and/or you displayed what appeared to be a firearm.

Furthermore, **when you committed any of the above listed crimes,** you (or an accomplice) were armed with a firearm, and your penalty will be increased. An additional 5 years shall be added to the standard sentence range for a first offense and an additional 10 years shall be added to the standard sentence range if you have previously been sentenced for any deadly weapon enhancements after July 23, 1995. (RCW 9.94A. 533(3) and 9.94A.825.)

Furthermore, if you are found to be a "persistent offender" by having been previously convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030, the mandatory penalty **for any of the above listed offenses** is life imprisonment without the possibility of release. (RCW 9.94A.570 and RCW 9.94A.030.)

JAMES P. HAGARTY
Yakima, Washington 98901
(509) 574-1210 Fax (509) 574-1211

Count 4 - FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM
RCW 9.41.040(1)(a), 9.94A.535(3)(t) and 9.94A535(2)(c)

CLASS B FELONY – The maximum penalty is 10 years imprisonment and/or a $20,000.00 fine.

On or about July 28, 2009, in the State of Washington, you knowingly owned or had in your possession or control a firearm, after having previously been convicted in the State of Washington of Second Degree Assault, Yakima County Superior Court Cause No. 99-8-00857-1, a serious offense.

Furthermore, you committed any of the above listed offenses shortly after being released from incarceration, and the court may impose an exceptional sentence above the standard sentence range for this crime. (RCW 9.94A.535(3)(t).)

Furthermore, you have committed multiple current offenses and your high offender score results in some of the current offenses going unpunished, and the court may impose an exceptional sentence above the standard sentence range for this crime. (RCW 9.94A.535(2)(c).)

DATED: October 20, 2011

JAMES P. HAGARTY
Prosecuting Attorney

By: _____
TROY J. CLEMENTS
Deputy Prosecuting Attorney
Washington State Bar Number 34399

Sex: Male; Race: Hispanic; Ht: 5'9"; Wt: 165; Eyes: Brown; Hair: Black; SID: WA17939672; DOL: MATA*JA190QJ; DOC: 845894; Our File No.: 98084/dcd; Agency No.: Yakima SO #09-13224

JAMES P. HAGARTY
Ya 12 30466 3-000000095
Yakima, Washington 98901
(509) 574-1210 Fax (509) 574-1211

APPENDIX "C"

ORIGINAL

INSTRUCTION NO. 5

A person commits the crime of First Degree Robbery when in the commission of a robbery he is armed with a firearm, or displays what appears to be a firearm.

APPENDIX "D"

ORIGINAL

INSTRUCTION NO. 9

To convict the defendant of the crime of First Degree Robbery in Count 1, 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 unlawfully took personal property of another from the person of Zack Sisneros;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts the defendant:

(a) was armed with a firearm; or

(b) displayed what appeared to be a firearm; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that element (1), (2), (3), (4), (6) and either of the alternative elements (5)(a) or (5)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a) or (5)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6) then it will be your duty to return a verdict of not guilty.

ORIGINAL

INSTRUCTION NO. 10

To convict the defendant of the crime of First Degree Robbery in Count 2, 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 unlawfully took personal property of another from the person of Shaun Kroeger;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts the defendant:

(a) was armed with a firearm; or

(b) displayed what appeared to be a firearm; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that element (1), (2), (3), (4), (6) and either of the alternative elements (5)(a) or (5)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a) or (5)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6) then it will be your duty to return a verdict of not guilty.

NO. 30466-3-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

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

I certify under penalty of perjury under the laws of the State of Washington that on this 14th day of April, 2014, I caused a true and correct copy of the *RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW* to be served on:

RENEE S. TOWNSLEY, CLERK — U.S. MAIL
Court of Appeals Division III
500 North Cedar Street
Spokane, Washington 99201

YAKIMA COUNTY PROSECUTOR'S OFFICE — U.S. MAIL
Attn: David B. Trefry
128 N 2nd St, Rm 211
Yakima, Washington 98901

JOE ANTHONY MATA #845894
Washington State Penitentiary
1313 N. 13th Ave, Golf West #C119
Walla Walla, Washington 99362

U.S. MAIL

Dennis W. Morgan, Attorney at Law
DENNIS W. MORGAN LAW OFFICE
P.O. Box 1019
Republic, Washington 99166
Telephone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com