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Washington State
Supreme Court

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff,

v.

TYLER DAVID ROBB,
Defendant.

MOTION FOR DISCRETIONARY REVIEW

RAP 13.4(c)

Tyler Robb,
Defendant

Stafford Creek Corr. Ctr.
191 Constantine Way
Aberdeen, WA 98520

TYLER DAVID ROBB, MOTION FOR DISCRETIONARY REVIEW

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ER 803

A. IDENTITY OF MOVING PARTY

Tyler David Robb, acting pro se, unschooled at law, and without assistance of counsel, requests this Court review the decisions of the Court of Appeals on his direct appeals. Leniency on partial citations is requested.

B. DECISIONS OF COURT OF APPEALS

In cause no. 47890-1-II (State v. Robb, 2017 Wash.App. LEXIS 5, hereinafter Decision 1), Division II of the Court of Appeals entered a decision on Robb's first direct appeal, and remanded to vacate count 2, a charge for child molestation in the second degree, keeping the charge of child rape in the second degree. The trial court thereafter vacated count 2.

Subsequently, in cause no. 51342-1-II (hereinafter Decision 2) Robb appealed the decision of the trial court, following the remand instructions, to not resentence him. On this second direct appeal, Robb argued that the trial court failed to recognize its authority to resentence him, and raised the argument of ineffective assistance of counsel for not insisting on resentencing consequent the remand. The Court of Appeals decided that the trial court had "correctly interpreted its decision." Decision 2, p. 4. They went on to say that "because our court's remand in-

structions did not authorize resentencing... counsel was not ineffective for failing to request it." Id.

Robb now requests this court review the Court of Appeals decisions on the issues presented in Part C, below.

C. ISSUES PRESENTED FOR REVIEW

1. Should the higher charge of child rape (count 1) be vacated for insufficiency of evidence because the only evidence was for the lower crime of child molestation (vacated on grounds of double jeopardy), and because the elements of the crime are not present?

And,

2. Was it error in the first direct appeal to qualify an allegation by the victim, made after having time to think about what she wanted to say and after becoming emotional, as an "excited utterance" under ER 803?

D. STATEMENT OF THE CASE

On August 5th, 2015, Tyler Robb was convicted of two charges; a more serious crime of child rape in the second degree, and a less serious crime of child molestation in the second degree. These convictions were based upon: 1) the statement of the alleged victim, DIA; and 2) a "Y-STR"

DNA sample. The otherwise hearsay statement of DIA was qualified under the excited utterance exception to ER 803 on the admissibility of hearsay. Decision 1, at ¶2(B).

Upon conviction, and with no prior criminal record, the trial court sentenced Robb to 90 months, which is in the middle of the lowest offender score range ("0") for a level XI-seriousness crime. See RCW 9.94A.510, Table 1.

E. ARGUMENT FOR REVIEW

E.1. Should the higher charge of child rape (count 1) be vacated for insufficiency of evidence because the only evidence was for the lower crime of child molestation (vacated on grounds of double jeopardy), and because the elements of the crime are not present?

The Court of Appeals vacated count 2, Robb's lesser charge of second degree child molestation—a level VII offense—under principals of double jeopardy.

The problem now becomes one of "proof beyond a reasonable doubt" that the remaining alleged crime was committed. In this unschooled question, it seems that in double jeopardy cases, it should be requisite with due process that the grosser crime be vacated under the rule of leniency. Supporting this notion is the fact that the State's use of DNA evidence was used to prove the lesser charge, now vacated, of child molestation. The elements of the crime of child rape under RCW 9A.44.076, to wit, of penetration or sexual intercourse, have not been shown.

DIA's statement is that Robb put his "hand" into her vaginal "area," which is quite a different thing from putting his hand or anything into her vagina per se. Nor was there any DNA evidence recovered from her "vaginal area."

The State attempted to show a nexus of corpus delecti to support DIA's statement by using DNA; a "Y-STR" sample using arguably insufficient data pairs (4 out of 17). Decision 1 at _. This sample was collected from a non-probative site—DIA's breast—not from her vagina in a way that would have met the elements for child rape defined under RCW 9A.44.076. This should prove that Robb is not guilty of the charge of child rape, or is, at the least, a far stretch from proving it "beyond a reasonable doubt" as required in a criminal prosecution.

Further, the DNA sample was arguably non-probative, yielding results which could have been from approximately 1 in 9 men in the United States' national DNA database. Decision 1 at _. Whether this DNA sample was from Robb, or from another man—perhaps a boyfriend, or a visitor—and whether it was deposited on DIA's breast by direct contact (i.e., someone touching her breast), or by contact with bedding, or transfer through the household laundry or something else, was not proven. Neither was it proved whether that DNA sample came from a man's fingers, or his

ankle, or dandruff, or some other source of exfoliated or desquamated cells. (The record does not mention semen being detected in the medical examination.) About all that was proven was that the DNA sample was from a man, and the expert witness testified that Robb (being male) was "not ruled out" as being the source of the DNA. Decision 1 at _. This is a very long way from conclusively proving that Robb was the source "beyond a reasonable doubt" as required for a criminal prosecution.

But a more salient point is that the collection site for the DNA was the girl's breast, which may have potentially been material to the charge of child molestation, as defined under RCW 9A.44.086, but not for child rape, as defined RCW 9A.44.076.

The question for the Court on this point is, quite obviously, whether Robb's "remaining count of rape [of a] child in the second degree" upon which "the sentence now rests" should be dismissed. See Decision 2 at 2 (citing VRP at 3).

E.2. Was it error in the first direct appeal to qualify an allegation by the victim, made after having time to think about what she wanted to say and after becoming emotional, as an "excited utterance" under ER 803?

In Robb's first direct appeal, the Court of Appeals decided that DIA's testimony was admissible under an exception to the hearsay rule as an "excited utterance."

Decision 1 at _. Robb simply asks this Court for review of the appellate court's decision for error, as it appears DIA's statement was made to her mom significantly after having time to think about things. DIA "eventually went downstairs" and "asked Robb for a bowl of cereal, trying to act as normal as possible..." Moreover, there was enough time elapsed that Robb had "finished getting ready for work." Id. at ¶7.

Despite notes in the record of DIA's later emotional state—which is not being contested—it appears that her hysteria when she called her mother was exhibited a considerable while after an additional time gap of possibly "30 minutes" or "an hour," the onset of which has not been established. Decision 1, at _. We might speculate that this additional span of time was after breakfast, and after Robb's having left for work, during which time DIA was apparently able to portray being "as normal as possible." This evidences an apparent coherent capacity to contemplate and reason, as well as the time needed to plan, and seems to fall outside precedent for the excited utterance exception. While not as long as the time gap in State v. Ramirez (46 Wn.App. 223, 730 P.2d 98 (1986)) where a delay of five hours between sexual contact and an 8-year old victim's declaration to her mother was considered beyond the scope of the excited utterance exception, DIA's similar

deliberation and acting "normal," though not as long, likewise seems to have demonstrated time to reflect, and should likewise disqualify DIA's statements without exception as hearsay, regardless her elevated emotional state. In Ramirez, the child's statements were given statutory admission because she was under the age of 10. According to the record, DIA, by contrast, was 13. (Because of the unschooled, pro se nature of this motion, Robb is unable to cite the statute referenced in Ramirez, other than it falling under ER 803.)

F. CONCLUSIONS

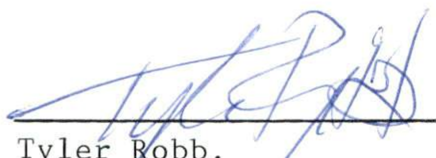
Based on the foregoing, Tyler Robb requests that this Court:

1) Grant review based upon the grounds indicated in Part E; and

2) Mandate Robb's case for dismissal with prejudice in the interests of justice, in that no elements of the crime were proven beyond a reasonable doubt.

Timely submitted under GR 3.1, December 9, 2019.

Respectfully Submitted,



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Filed
Washington State
Court of Appeals
Division Two

September 4, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TYLER DAVID ROBB, Appellant.	No. 51342-1-II UNPUBLISHED OPINION

GLASGOW — In a prior appeal, we affirmed Tyler David Robb's second degree child rape conviction, but we vacated his second degree child molestation conviction based on double jeopardy. On remand, the trial court vacated the second degree child molestation conviction but did not resentence Robb. Robb now appeals his sentence following remand, arguing that the trial court failed to recognize its authority to resentence him on his remaining second degree child rape count. Robb also argues that he was provided ineffective assistance of counsel at the resentencing hearing because his attorney failed to request a lower sentence on remand. We affirm.

FACTS

A jury found Robb guilty of second degree child rape and second degree child molestation based on a single incident involving his 13 year old stepdaughter. At sentencing, the trial court determined that both counts encompassed the same criminal conduct and counted as one crime for purposes of calculating Robb's offender score. The trial court calculated Robb's offender score as 0 and sentenced him to 90 months of total confinement.

Robb appealed, and we held that his convictions for both child rape and child molestation violated double jeopardy. We also held that the trial court erred in imposing two sentencing conditions that were not crime related.

We affirmed Robb's second degree child rape conviction and ordered "remand for the trial court to vacate Robb's conviction for second degree child molestation and to strike the sentencing conditions regarding controlled substances and sexually explicit material." Clerk's Papers (CP) at 30. We also issued a mandate "for further proceedings in accordance with the attached true copy of the opinion." CP at 1.

On remand, the State presented an order amending Robb's felony judgment and sentence to reflect this court's decision. The State argued to the trial court that "the remaining count of rape [of a] child in the second degree is the one on which the sentence now rests, but it doesn't change anything else about the terms or length of the sentence." Verbatim Report of Proceedings (VRP) at 3.

In response, Robb's counsel stated: "I believe the order is consistent with the court of appeals decision." VRP at 3. Counsel also informed the trial court that Robb wanted to be resentenced, but "I don't think I have the authority to request that." VRP at 4. The trial court ruled that it had "nothing to do at this point," and that the remaining count of second degree child rape was the conviction on which the sentence rested. *See* VRP at 3-4.

The trial court entered an order vacating Robb's second degree child molestation conviction and striking the two sentencing conditions related to controlled substances and sexually explicit material. Robb appeals.

ANALYSIS

Robb argues that the trial court abused its discretion on remand because it failed to recognize its discretion to resentence him on his remaining second degree child rape count. We disagree.

A trial court abuses its discretion if it categorically refuses to exercise its discretion or fails to recognize its discretion. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017), *amended on recons.*, 2019 WL 1968363 (June 4, 2019); *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A trial court's discretion to resentence on remand is constrained by the scope of our court's mandate. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). When our opinion orders remand for resentencing, the resentencing court has broad discretion to resentence the defendant on all remaining counts. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). However, the resentencing court does not retain the same discretion when our court remands to the trial court with direction that leaves no room for exercise of independent

judgment. *State v. Schwab*, 134 Wn. App. 635, 645, 141 P.3d 658 (2006), *aff'd*, 163 Wn.2d 664, 185 P.3d 1151 (2008).

Here, our opinion specifically and narrowly instructed the trial court on remand to "vacate Robb's conviction for second degree child molestation and to strike the sentencing conditions regarding controlled substances and sexually explicit material." CP at 30. This language does not suggest that the trial court had broad discretion to conduct an entirely new sentencing hearing on Robb's remaining count. And nothing in our opinion suggests that our court intended to grant the trial court such authority on remand.

Robb relies on *Kilgore* to argue that even absent an explicit remand for resentencing, remand can be considered "open-ended" enough to allow the trial court discretion to resentence. Br. of Appellant at 4-5; *Kilgore*, 167 Wn.2d 28. But *Kilgore* is distinguishable. In *Kilgore*, the remand was "for further proceedings" without limitation because in that case, the defendant could have been retried on two counts. *Id.* at 34. In this case, we remanded only to "vacate Robb's conviction" on one count and "to strike [certain] sentencing conditions." CP at 4. When our court remands for resentencing, it says so explicitly. *See, e.g.*, *Toney*, 149 Wn. App. at 792.

Accordingly, the trial court correctly interpreted its authority under our mandate and its ruling was not an abuse of discretion.

Robb also argues that his counsel was ineffective for failing to argue for a lower sentence following remand. But because our court's remand instructions did not authorize resentencing,

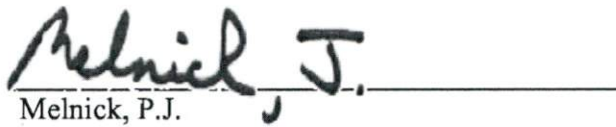
Robb's counsel was not ineffective for failing to request it.

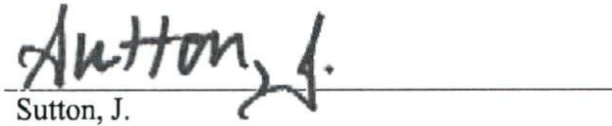
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:


Melnick, P.J.


Sutton, J.

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