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COURT OF APPEALS
DIVISION II

NO. 35331-8-II

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ST. J. ...

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB MELVIN KORUM,

Appellant.

ON APPEAL FROM THE PIERCE COUNTY SUPERIOR COURT

RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS

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STATUTES

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I. COUNTERSTATEMENT OF THE ISSUE

1. Whether the defendant's merger argument is properly before this court when the issue could have been, but was not, raised in his first appeal and the defendant did not raise the issue in a timely manner at his resentencing?

2. Whether the robbery and assault convictions merge for purposes of sentencing?

II. FACTS RELEVANT TO THIS RESPONSE

During the summer months of 1997, Jacob Korum, along with three of his childhood friends and one recent acquaintance, planned and executed a series of home invasion robberies. 1RP 795-803, 806.¹ Korum was eventually charged with numerous counts of first degree robbery or attempted first degree robbery and numerous counts of second degree assault or attempted second degree assault arising out of these incidents. CP 69-85. The victims of some of the assault counts were also identified as the victims of the robbery counts. Id.

All of the charges were tried to a jury in March of 2001. The robbery "to convict" jury instruction provided as follows:

To convict the defendant of the crime of Robbery in the First Degree as charged in Count VI (6), each of the following elements of the crime must be proved beyond a reasonable doubt, that:

(1) on or about the 30th day of August, 1997, the defendant and/or an accomplice unlawfully took personal property, not belonging to the defendant, from the person or

¹The transcripts from Korum's first appeal have been included in the record of this appeal by order of Commissioner Schmidt. The transcripts from State v. Korum, COA No. 27482-5-II, are cited as "1RP". The transcripts from the post-appeal resentencing hearing is cited as "2RP".

in the presence of Judy Beaty;

(2) the defendant and/or an accomplice intended to commit theft of the property;

(3) the taking was against the person's will by the defendant's and/or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of another;

(4) the force or fear was used by the defendant and/or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking;

(5) in the commission of these acts or in immediate flight therefrom, the defendant and/or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and

(6) the acts 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.

Jury Instruction 23, CP 110 (see also Jury Instructions 33, 37, 44, 46, and 49). The jury convicted Korum of each of the robberies. CP 160-203, 205-221.

Korum filed a timely notice of appeal from the judgment and sentence that was originally imposed. While Korum raised numerous issues in this appeal, a claim that the robbery and assault convictions merged was not asserted.

On March 15, 2004, this Court issued an opinion (1) dismissing all of the kidnapping charges on the ground that the restraint was incidental to the robberies, (2) dismissing all of the charges that were added after Korum rescinded the plea agreement, and (3) directing the trial court on remand to

determine whether any of the original 16 counts should also be dismissed pursuant to CrR 8.3(b) "in order to provide a deterrent to prosecutorial vindictiveness". State v. Korum, 120 Wn. App. 686, 86 P.3d 166, 182 (2004), rev'd in part, 157 Wn.2d 614, 141 P.3d 13 (2006).

On August 17, 2006, the Washington Supreme Court declined to review the Court of Appeals' ruling with respect to the kidnap charges,² but did affirm the remaining 20 convictions. State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006). The Court then remanded the matter to the trial court for "resentencing consistent with this opinion." Id., at 653.

A resentencing hearing was held on September 8, 2006. Korum did not mention the case of State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), until his reply brief. CP 329, at page 2. Orally, Korum indicated to the court that:

MS. GRIFFITH: I think I can clarify that. I'm not raising an issue that the counts should be merged in this case. I just cited that as authority that things are going opposite – in the opposite direction of what the State is asking. I'm not asking that you consider the assaults to run concurrently with the robbery, so there's no real Freeman issue. Is that clear?

THE COURT: Well, I think you might have just misstated. I think you are asking that the counts run concurrent. You're not asking that they be merged.

MS. GRIFFITH: Right. The Freeman case holds that assaults and robberies can merge, and we're not asking you to do that.

2RP 6-7.

Korum filed a timely notice of appeal. CP 360. Korum, dissatisfied with the briefing filed by his counsel, asserts for the first time on appeal that

²The Washington Supreme Court did, however, reaffirm its earlier rejection of the kidnap merger doctrine that was the basis for this Court's vacation of the kidnapping convictions in State v. Louis, 155 Wn.2d 563, 571, 120 P.3d 936 (2005) (kidnapping, even when incidental to the robbery, does not merge with robbery).

his assault convictions should merge with his kidnapping convictions pursuant to State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).

III. ARGUMENT

A. KORUM'S MERGER ARGUMENT IS NOT PROPERLY BEFORE THE COURT

Korum has submitted a statement of additional grounds ("SAG"). His SAG is subject to the same standards of review and court rules as a brief prepared by an attorney. State v. Smith, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985) (a pro se litigant is required to comply with court rules to the same degree that an attorney must comply with the rules); State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995) (the right to self-representation is not a license to a pro se defendant not to comply with the rules of procedural and substantive law).

In his SAG, Korum raises a single issue. He claims that his second degree assault convictions merge into his robbery convictions requiring the dismissal of the merged charges. Korum, however, is procedurally barred from raising this claim on three separate grounds.

First, Korum is barred from raising his merger argument under the law of the case doctrine. This doctrine prohibits consideration of a question that might have been determined in a prior appeal if it had been presented. See, e.g., State v. Worl, 129 Wn.2d 416, 425-26, 918 P.2d 416 (1996); State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993). Korum could have, but did not, raise his assault/robbery merger issue in his first appeal. He may not, therefore, assert it at this time.

Second, Korum did not raise his assault/robbery merger issue until his reply sentencing memorandum. This improper action precludes consideration

of the issue. See, e.g., Cowiche Canyon Conservancy v. Bosley, 118 Wash. 2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”); State v. Manthie, 39 Wn. App. 815, 826 n. 1, 696 P.2d 33, review denied, 103 Wn.2d 1042 (1985) (it is improper to raise issues, even of constitutional magnitude, for the first time by reply brief, as there is no opportunity for an opposing party to respond).

Third, Korum specifically withdrew the issue from the trial court’s consideration. A withdrawn motion may not be renewed on appeal. See, e.g., State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983); State v. Gregory, 80 Wn. App. 516, 518 n. 2, 910 P.2d 505, review denied, 129 Wn.2d 1009 (1996).

B. FREEMAN ONLY APPLIES WHEN THE JURY IS INSTRUCTED IN THE “INFLECTS BODILY INJURY” ALTERNATIVE MEANS OF COMMITTING FIRST DEGREE ROBBERY

Korum’s jury was instructed to convict him of robbery in the first degree solely upon the alternatives found in RCW 9A.56.200(1)(a)(i) and (ii). This fact precludes the relief he is seeking.

The question in Freeman was “whether and, if so, when, the legislature intended to punish separately both a robbery elevated to first degree by an assault, and the assault itself.” Freeman, 153 Wn.2d at 771. This question arose because the defendants in Freeman had been charged with robbery under RCW 9A.56.200(1)(a)(iii) – the “inflicts bodily injury prong”. See 153 Wn.2d at 769. In addition, the sole assault victim was also the victim of the charged robbery.

Here, Korum was charged with robbery under the “armed with a deadly weapon” and the “displays what appears to be a firearm or other deadly weapon” prongs. See RCW 9A.56.200(1)(a)(i) and (ii). The robbery “to convict” instructions, consistent with the charging document, did not require the jury to find that Korum or one of his accomplices inflicted bodily injury during the robbery. In other words, Korum’s robbery was not elevated to first degree by an assault. Thus, he is properly punished for both the assault and the robbery. See State v. Esparza, 135 Wn. App. 54, 65-66, 143 P.3d 612 (2006); State v. Cole, 117 Wn. App. 870, 73 P.3d 411 (2003), review denied, 151 Wn.2d 1005 (2004).

IV. CONCLUSION

The sentence imposed upon Korum post-appeal was reasonable and lawful. The sentence should be affirmed.

DATED this 26th day of March, 2007.

Respectfully submitted,



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STATE OF WASHINGTON

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DEPT. OF

PROOF OF SERVICE

I, Amber Castillo, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 26th day of March, 2007, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 26th day of March, 2007, at Olympia, Washington.


Amber Castillo