

NO. 36032-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LIONEL DIMITI GEORGE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 06-1-01393-1

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY _____
DEPUTY

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it decided to not order a second competency evaluation for defendant when the trial court had previously found defendant competent and observed nothing to indicate that the *status quo ante* had been altered?
2. Was a scrivener's error made in the judgment and sentence, and can it be corrected without the trial court holding a resentencing hearing?

B. STATEMENT OF THE CASE.

1. Procedure

On March 9, 2006, the Pierce County Prosecutor's Office filed an information in Cause No. 06-1-01391-1, charging LIONEL DIMITI GEORGE, hereinafter "defendant," with one count of first degree robbery with a firearm sentencing enhancement. CP 1-3.

On May 2, 2006, upon his own motion, defendant was ordered by the Honorable Lisa Worswick to be committed to Western State Hospital for evaluation, under three cause numbers, including 06-1-01393-1. CP 4-7. Judge Worswick ordered, in part, that the evaluation diagnose defendant and render "an opinion as to the defendant's capacity to understand the proceedings and to assist in his own defense." CP 4-7. On

June 14, 2006, Judge Worswick also ordered that Dr. Rich Kolbell examine defendant and perform an independent expert professional analysis of defendant's competence to stand trial pursuant to the provisions of RCW 10.77. CP 8-9. Dr. Kolbell's report and analysis, as well as the verbatim report of proceedings in which his report and its conclusions were discussed, have not been made part of the record on review in this appeal.

Defendant was admitted to Western State for a 15-day evaluation by the sanity commission on June 29, 2006, and the sanity commission submitted its report on July 14, 2006, signed by Dr. Ray Hendrickson. CP 10-12. According to the report, the evaluation included a "multidisciplinary intake assessment" of defendant, Dr. Hendrickson's forensic evaluations of defendant, the Washington Access to Criminal History (WATCH) Report from the Washington State Patrol, defendant's criminal history received in discovery materials, other discovery materials, and a review of the Mental Health Division's Intranet Database. *Id.* The commission determined that defendant suffered from schizo-affective disorder, bipolar disorder, and other unidentified diagnoses. *Id.* The commission also determined defendant was "a high risk for future serious dangerous behavior and a high risk for other forms of dangerous behavior." *Id.* However, the commission determined that defendant was not "an imminent risk of danger to self or others," and therefore determined that an evaluation by a Designated Mental Health Professional

was unnecessary. *Id.* Based on its evaluation, the commission concluded defendant “ha[s] the capacity to understand the proceedings he faces... a present rational as well as factual understanding of those proceedings, and... the understanding, and capacity to assist in his own defense.” *Id.*

During the evaluation, defendant was able to describe the role of his attorney, the prosecutor, the judge, the jury, and his options as a defendant. *Id.* Defendant understood the meaning of confidentiality and privilege, diminished capacity, different types of pleas and plea bargaining, and the appellate process. *Id.* Western State mental health professionals presented defendant with three hypothetical cases; defendant was able to identify the defenses in the two appropriate cases, and said that the hypothetical defendant who had no defense should try to plea bargain. *Id.* The commission concluded that “... [defendant] presents an understanding of the legal system beyond that presented by most people who have no history of mental illness.” *Id.* Also during the evaluation, defendant stated that he heard voices, some common, some from either Jesus or God. *Id.* The commission concluded that these voices, while auditory hallucinations, were attributable in part to his Native American beliefs. *Id.* Defendant also stated that he suffered from bipolar disorder and had what the commission described as “paranoid thoughts.” *Id.*

The Honorable Beverly Grant held a competency hearing on July 14, 2006. CP 13-14. The trial court considered the evaluation from Western State, the records and files in this matter, the Forensic Mental

Health Report, and statements from the prosecutor and defense counsel in coming to its determination of defendant's competency. *Id.* The trial court ruled that defendant was competent to stand trial. *Id.* The verbatim report of proceedings from this hearing have not been provided for the record on review.

Defendant went to trial before the Honorable Frank Cuthbertson on two additional cause numbers, 06-1-01123-8 and 06-1-01534-9, after the competency hearing and before defendant went to trial in the present case. RP 11; CP 10-12, 13-14. The present matter proceeded to trial before Judge Cuthbertson on November 27, 2006. RP¹ 2. The State filed an amended information on December 6, 2006, amending the first degree robbery charge by removing the language pertaining to a firearm enhancement and adding accomplice language to the robbery charge. CP 38-39, RP 65-66.

Prior to the CrR 3.5 hearing regarding the admissibility of a statement defendant made to police, defense counsel asked the court to send defendant back to Western State for another competency hearing. RP 7-9; CP 60-63, 72-75. Defense counsel stated that defendant was "continuing to hear voices," including that both defense counsels and the prosecutor "may have hidden agendas," and "the voices are affecting his

¹ There are two volumes of Verbatim Reports of Proceedings: RP, 12/5/06-3/2/07; 2RP, 3/6/07.

ability to deal with us.” RP 7-8. Defense counsel said that defendant wished to have another competency hearing, which contrasted with defendant’s hostility to his previous competency hearing. RP 8. The trial court responded that it had reviewed the evaluation provided by Western State and the record of the competency hearing, and that it believed defendant was competent to stand trial and it would not order another competency hearing. RP 10-11. The trial court said it understood that Western State had found defendant suffered from mental illness, including schizo-affective disorder and bipolar disorder. RP 10. The trial court then laid out the factors that contributed to its determination that defendant was competent and a second competency hearing was not warranted:

COURT: ... The panel found that not only was Mr. George rational and coherent, he was able to assist at trial, and in fact, enjoyed a greater understanding of legal concepts and legal processes than most lay people, at least that was the finding of the evaluators at that time. Mr. George does not appear to have decompensated significantly or at all since the evaluation back in July, and I have – I’m going to take judicial notice that Mr. George for purposes of this record has been in this courtroom, in this court on two previous matters over the past two weeks, so I’ve had an opportunity to observe his behavior, and again, I haven’t seen any decompensation and I understand and Mr. George has made a record previously that he is being treated in the jail with – I assume it’s antipsychotic or psychotropic medication of some sort. He didn’t know what they were, and so I believe it would be appropriate to go

forward at this time without another competency evaluation.

RP 10-11.

Following the CrR 3.5 hearing, defense counsel proceeded to make multiple motions in limine, several of which were granted. RP 45-61, 261-64; CP 18-33. Defense counsel successfully moved to have defendant's previous convictions excluded except for impeachment purposes if defendant took the stand, including a robbery in Fife that, along with the crime in the present case, had been part of a crime spree. RP 45-46, CP 18-33. Defense counsel also successfully moved to have police testimony regarding whether the gun used in defendant's trial on the Fife robbery matched the gun that was used in the present case. RP 52-53, CP 18-33. Defense counsel later successfully moved to have police testimony excluded regarding whether defendant stole sunglasses from the store. RP 261-64.

Defense counsel raised the issue of defendant's competency again after the State rested its case. RP 277. Defense counsel stated that she still had serious concerns about defendant's competency, and that she had doubts about his ability to "understand the nature of the proceedings and to assist counsel." *Id.* Defense counsel indicated that defendant was opting to testify in his own defense after she had discussed his constitutional right to do so at length with him, and that defendant's

decision to testify was against the advice of counsel. RP 277-78. The trial court responded that the evaluation from Western State indicated that defendant was competent to stand trial, that he understood the charges against him, the role of the judge, jury, and attorneys, and his rights as a defendant. RP 278-79. The trial court also stated that it had observed defendant during the trial, and defendant had behaved appropriately during the proceedings. RP 279. The trial court then ruled that defendant was competent to testify against the advice of defense counsel. *Id.*

Following defendant's testimony, defense counsel again raised the issue of his competency. RP 319-20. Defense counsel repeated her concerns that defendant did not understand the nature of the proceedings and was unable to assist in his own defense. RP 320. Defense counsel argued that defendant's testimony indicated that he was incompetent to stand trial. *Id.* The trial court responded that, from its perspective, defendant was choosing to be nonresponsive in his answers and that it believed defendant understood the questions. *Id.*

After hearing the evidence, the jury found defendant guilty of first degree robbery. RP 365-67; CP 95. The court proceeded to sentence defendant to 171 months in the Department of Corrections, and 18 to 36 months of community custody upon release, to run concurrently with sentences under a different cause number. 2RP 12-13, CP 110-21. The

court also ordered defendant to pay monetary penalties. 2RP 13, CP 110-21. From entry of this judgment, defendant filed a timely notice of appeal. CP 125-37.

2. Facts

On March 6, 2006, Joshua Moore, a security guard at Kmart in Puyallup, noticed that a man, a woman, and a young man were acting suspiciously inside the store. RP 139-140. The loss prevention manager, Thomas Heffner, was operating the video surveillance in the store and also observed the woman's strange behavior. RP 202. The woman, later identified as Gabrielle Saluskin², was pulling several pieces of girl's cosmetics off the shelf in a manner that indicated she was not paying particular attention to which items she was selecting or the prices of the items, as well as peeling the electronic article surveillance tags off of some of the items. RP 140-42, 144-45, 202. Saluskin then put the cosmetics in her jacket to conceal them. RP 145. Heffner observed Saluskin move to the jewelry spinners and grab some items from them. RP 203. Saluskin then met up with defendant and her son, Rusty Saluskin, in the electronics department and had a conversation with them. RP 145-46, 205. Gabrielle Saluskin then went over by the bathrooms, came back out, and made her

² Gabrielle Saluskin is also referred to as Shawntay Saluskin, and Rusty Saluskin is also referred to as Rudolph Saluskin, in the clerk's papers and the verbatim report of proceedings.

way past the registers, through the front door, and out of the store, making no attempt to pay for the merchandise. RP 146-50. Moore identified himself to Saluskin and asked her to come back into the store, and Saluskin said she would. RP 152-53, 206. Heffner came out of the store to meet Moore, and the two began to escort Saluskin back into the Kmart. RP 153, 206-07.

Defendant emerged from the Kmart and started cussing. *Id.* Defendant then reached into his jacket and pulled out a semiautomatic pistol from his right pocket, cocked it, and pointed in at Moore. RP 154, 156, 207-08, 217. Moore ran away, across the parking lot, while Heffner ran back into the Kmart. RP 154-55, 209-10. As Moore ran, he could see defendant get into a full-size van with stripes along the side and a ladder on the back. RP 118, 156, 160, 210. Moore heard the squealing of tires and saw defendant and Gabrielle Saluskin in the van as the van exited the parking lot. RP 155, 159. Heffner watched as the van took a right onto River Road and headed towards I-5. RP 216-18. At trial, Moore and Heffner identified defendant as being the man who pulled a gun on them and the driver of the van. RP 153, 157, 195, 219.

At trial, defendant testified in his own defense. RP 304-18. During direct examination, the prosecutor objected twice that defendant's answers were nonresponsive. RP 306, 307. At the conclusion of direct, defendant asked the trial court if he was "going to get to say what I want

to say” regarding the case. RP 307. The trial court responded that it assumed he had. *Id.* On cross-examination, defendant denied stealing anything and denied taking any merchandise out of the Kmart. RP 310-312, 315. Defendant denied pulling a gun on the security guards, or that there was a struggle between the security guards and Gabrielle Saluskin. RP 314-16. In his denial of pulling a gun on the security guards, defendant mentioned details of a robbery in Fife, saying that he had no knowledge of the gun until that robbery. RP 45-46, 313-14, 316. Defendant denied stealing sunglasses, saying, “... I didn’t steal nothing. I had money,” even though the prosecutor had not accused him of stealing the sunglasses or produced a witness who said defendant had stolen sunglasses. RP 65, 262-63, 310. Defendant also gave a number of nonresponsive answers, including asking why the prosecutor had not shown at trial the gun that had been pulled on the security guards. RP 308-18. Defendant never admitted to using the gun, nor did he say that the State had a gun that he had used. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION WHEN IT DECIDED TO NOT ORDER A SECOND COMPETENCY EVALUATION WHEN IT HAD PREVIOUSLY FOUND DEFENDANT COMPETENT AND OBSERVED NOTHING TO INDICATE THAT THE *STATUS QUO ANTE* HAD BEEN ALTERED.

Due process prohibits subjecting an incompetent defendant to criminal proceedings. *Pate v. Robinson*, 383 U.S. 375, 386, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). This constitutional protection is reflected in RCW 10.77.050, which provides, “No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050.

“The determination of whether a competency examination should be ordered rests generally within the discretion of the trial court.” *State v. Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001) (citing *State v. Thomas*, 75 Wn.2d 516, 518, 452 P.2d 256 (1969)). If there is a question of a defendant’s competency, RCW 10.77.060 mandates that “the trial court *must* appoint experts and order a formal competency hearing.” *State v. Marshall*, 144 Wn.2d 266, 278, 27 P.3d 192 (2001) [emphasis in

original] (citing RCW 10.77.060(1)(a)).³ The procedures under RCW 10.77.060 are mandatory, and the court must follow the statute in order to determine a defendant's competency to stand trial. *Fleming*, 142 Wn.2d at 863 (citing *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241

³ The procedures the trial court must follow under RCW 10.77.060(1) are, in relevant part:

(a) Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant. The signed order of the court shall serve as authority for the experts to be given access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant. At least one of the experts or professional persons appointed shall be a developmental disabilities professional if the court is advised by any party that the defendant may be developmentally disabled... For purposes of the examination, the court may order the defendant committed to a hospital or other suitably secure public or private mental health facility for a period of time necessary to complete the examination, but not to exceed fifteen days from the time of admission to the facility.

The experts' reports, pursuant to RCW 10.77.060(3), are to include:

- (a) A description of the nature of the examination;
- (b) A diagnosis of the mental condition of the defendant;
- (c) If the defendant suffers from a mental disease or defect, or is developmentally disabled, an opinion as to competency;
- (d) If the defendant has indicated his or her intention to rely on the defense of insanity pursuant to RCW 10.77.030, an opinion as to the defendant's sanity at the time of the act;
- (e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged;
- (f) An opinion as to whether the defendant should be evaluated by a county designated mental health professional under chapter 71.05 RCW, and an opinion as to whether the defendant is a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions.

(1982); *City of Seattle v. Gordon*, 39 Wn. App. 437, 441, 693 P.2d 741 (1985)).

A defendant is competent to stand trial when he is able to understand the charges against him and capable of assisting in his own defense. *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986). The trial court's determination of a defendant's competence to stand trial shall not be reversed absent a manifest abuse of discretion. *State v. Hicks*, 41 Wn. App. 303, 306, 704 P.2d 1206 (1985) (citing *State v. Crenshaw*, 27 Wn. App. 326, 330, 617 P.2d 1041 (1980), *aff'd*, 98 Wn.2d 789, 659 P.2d 488 (1983)).

Once a competency determination is made, the court is not required to revisit competency unless "new information presented has altered the *status quo ante*." *State v. Ortiz*, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992) [emphasis in original]. Relevant factors in determining whether further inquiry into a defendant's competence is required include irrational behavior, a defendant's demeanor at trial, and any prior medical opinion on competence to stand trial. *Drope v. Missouri*, 420 U.S. 162, 180, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

The trial court properly relied on the documentation provided to it and its own observations of defendant in reaching its determination that a second competency hearing was not warranted. RP 10-11, 278-79, 320; CP 10-12, 13-14. The trial court's reliance on the provided documentation was proper in part because the previous judges who presided over this

matter, as well as the appointed experts, had followed the procedures mandated by RCW 10.77.060. RP 10-11, 278-79; CP 4-7, 8-9, 10-12, 13-14. Once defendant made a motion questioning his competency, Judge Worswick appointed two experts charged with rendering an opinion as to defendant's mental condition, granted the experts access to defendant's medical records, and ordered defendant be committed to Western State for 15 days for his examination. CP 4-7, 8-9. While there is no documentation in the record from Dr. Kolbell's examination, the examination from Dr. Ray Hendrickson at Western State fully complies with RCW 10.77.060(3). CP 10-12. Dr. Hendrickson described the nature of his examination of defendant, diagnosed defendant's mental condition, and rendered opinions regarding defendant's competency, whether defendant should be evaluated by a designated county mental health professional, and whether he was a substantial danger to other persons. CP 10-12; RCW 10.77.060(3)(a), (b), (c), and (f).

Judge Grant properly weighed the evidence before her, including the evaluation from Western State, the comments from the prosecutor and defense counsels, and other "records and files in this matter," in ruling that defendant was competent to stand trial. CP 13-14, RCW 10.77.060. Defendant does not challenge this initial finding of his competency or the underlying findings of fact regarding defendant's competence. Therefore, the initial finding of defendant's competence to stand trial and the underlying facts the trial court cited in determining defendant's

competency are treated as verities on appeal. CP 10-12, 13-14; *State v. Lewis*, 141 Wn. App. 367, 384, 166 P.3d 786 (2007) (citing *State v. Wilson*, 136 Wn. App. 596, 605, 150 P.3d 144 (2007)).

The present case is similar to *Ortiz*. *Ortiz*, 119 Wn.2d at 294. Ortiz was convicted of aggravated first degree murder, but his conviction was reversed because improper rebuttal evidence was admitted. *Id.* at 299. Before his second trial, Ortiz received a competency hearing and he was found competent to stand trial, a decision which was later upheld by the State Supreme Court. *Id.* (citing *State v. Ortiz*, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985), *cert. denied*, 476 U.S. 1144 (1986)). The second trial ended, however, after the trial court declared a mistrial because of juror misconduct. *Id.* Before Ortiz's third trial, the trial court held another competency hearing. *Id.* The trial court ruled that it was unable to depart from its previous competency ruling because the Supreme Court has sustained the previous trial court's ruling that Ortiz was competent, and it was not faced with any new information. *Id.* at 299-301. The trial court held, "This Court cannot... take a different stance unless it can be said that new information presented has altered the *status quo ante*." *Id.* at 300-01. The State Supreme Court upheld the trial court's ruling, holding that Ortiz "did not produce any evidence that his condition had changed since his previous competency hearings," and therefore the trial court properly denied his motion for another competency hearing. *Id.* at 301.

In the present case, the trial court similarly neither observed, nor was faced with, new information that departed significantly from the information presented during the unchallenged competency hearing. In his evaluation, defendant was able to describe the function of his attorney, which was to “defend my rights and to file motions, to eliminate material that shouldn’t be there, to help me.” CP 10-12. Defendant also was able to describe his options when it came to testifying, including, “Plead the 5th Amendment, say nothing, let other witnesses speak on my behalf, or I could chose [sic] to tell what happened.” *Id.* Nothing in the record indicates that defendant was no longer aware of the roles he and his attorney played in a trial when he made the decision to testify on his own behalf.

Defendant, however, argues that his answers to the prosecutor’s questions, in which he gave narrative answers and discussed evidence that had previously been excluded, indicate that he may have been incompetent. Br. of Appellant at 17-20. Defense counsel made the same argument at trial; the trial court, who was able to observe defendant’s demeanor, stated, “He knows how to respond to [the questions]. Whether he chooses to or not or whether he chooses to attempt to give a soliloquy about what he wants to talk about in general is a conscious decision and knowing decision on his part.” RP 320. Defendant’s decision to give more narrative answers and to “tell what happened” may have been poor

trial strategy, but it did not alter the *status quo ante* and therefore require the trial court to hold a second competency hearing.

Defendant also does not argue that defense counsel presented new evidence to the trial court regarding his competency. Instead, defendant cites three incidents that he argues should have required the trial court to conduct another competency hearing: defendant's testimony, his diagnosis, and his hearing voices. Br. of Appellant at 20. The trial court considered the latter two during defendant's competency hearing in part by reviewing the commission's report, which discussed both issues. CP 10-12, 13-14; RP 10-11. Defendant concedes that his hearing voices was information that had already been presented to the trial court when it made its initial determination of his competency. Br. of Appellant at 3; CP 10-21, 13-14; RP 10-11. Similarly, defendant's diagnosis of schizo-affective disorder and that he had "paranoid thoughts" was also in defendant's evaluation, and had been considered by the trial court. CP 10-12, 13-14; RP 10-11. The trial court also observed defendant through two other trials in the previous two weeks, along with the prosecutor and defense counsel, and defendant had not decompensated during that time. RP 10-11.

Defendant argues that the Supreme Court's decision in *Fleming* should control in his case. *Fleming*, however, is distinguishable from the present case. Fleming pled guilty to two counts of first degree burglary and one count of first degree unlawful possession of a firearm. *Fleming*, 142 Wn.2d at 857. Prior to his guilty plea, two doctors performed separate

psychological/mental health evaluations on Fleming. *Id.* at 858-59. The first evaluation concluded that, while Fleming was “psychotic at the time” he committed the crimes, he was “marginally competent to stand trial.” *Id.* at 858. The second evaluation, however, concluded that Fleming was “presently incompetent to stand trial.” *Id.* at 858-59. Fleming’s attorney did not raise the issue of incompetence at any point during the proceedings, and there was nothing in the record to suggest that either mental health evaluation was given to anyone other than Fleming’s attorney. *Id.* at 860. The Supreme Court held that failure to raise the issue of competency when there was an expert opinion that Fleming was incompetent to stand trial constituted ineffective assistance of counsel, and therefore Fleming’s guilty plea was not knowingly, voluntarily, and intelligently given. *Id.* at 866-67.

In the present case, the trial court was able to review the mental health examination and fully consider it before rendering a decision on defendant’s competence to stand trial. There is nothing in the record to suggest a conflict between the mental health evaluations before the trial court. The court in *Fleming*, however, did not rule that Fleming was incompetent to stand trial, only that he had received ineffective assistance of counsel because his trial attorney had failed to raise the issue or distribute the mental health evaluations to the State and the trial court. The trial court never got the opportunity to exercise its discretion regarding Fleming’s competence to stand trial, so the Supreme Court was

not faced with the issue of whether or not the trial court manifestly abused its discretion. Here, defendant's trial counsel brought up the issue of his competence numerous times throughout the third trial, even after the trial court had already ruled on the matter.

The trial court properly exercised its discretion in not ordering a second competency evaluation for defendant. Defendant had not provided the trial court with new information that had altered the *status quo ante*, and the trial court fully considered the defendant's prior evaluation and his demeanor in the courtroom before ruling. Therefore, defendant's conviction and sentence should be affirmed.

2. A SCRIVENER'S ERROR WAS MADE IN THE JUDGMENT AND SENTENCE, AND CAN BE CORRECTED WITHOUT HOLDING A RESENTENCING HEARING.

The proper remedy for correction of scrivener's error is remand to the trial court. *In re PRP of Mayer*, 128 Wn. App. 694, 702, 117 P.3d 353 (2005). In *Mayer*, the defendant claimed his plea to second degree murder was involuntary because a scrivener's error in the plea documents and judgment and sentence listed the crime as first degree murder, thus making the documents facially invalid. *Mayer*, 128 Wn. App. at 700. The court held that the error did not render the plea invalid:

[Petitioner's] claim that the citation error made his plea involuntary amounts to a conclusory allegation of prejudice insufficient to warrant relief in a personal restraint petition.

Mayer, 128 Wn. App. at 701 (citing *In re PRP of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990)). The court held that the proper remedy was remand for correction of the scrivener's error. *Mayer*, 128 Wn. App. at 702.

In the present case, the judgment and sentence form has recorded that the defendant was convicted of first degree robbery with a "firearm enhancement." CP 110-21. This is a scrivener's error. Defendant was sentenced with a firearm enhancement, but that was under Cause No. 06-1-01123-8, not Cause No. 06-1-01393-1. 2RP 11-13, CP 110-21. The sentence imposed on defendant does not reflect a firearm enhancement; the only instance of the error is in paragraph 2.1 of the judgment and sentence. CP 110-21. Paragraphs 2.3 and 4.12 state that there was no sentencing enhancement. *Id.* The trial court has the authority to correct this error at any time, and the judgment and sentence should be corrected on remand to reflect these findings. *Mayer*, 128 Wn. App. at 701-02.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence, and remand the judgment and sentence to the trial court for entry of an order correcting of the scrivener's error.

DATED: APRIL 15, 2008

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Pierce County
Prosecuting Attorney

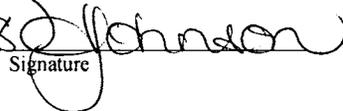


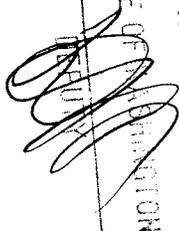
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Steven P. Johnson, Jr.
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and ~~appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/15/08 
Date Signature

STATE OF WASHINGTON
BY 
08 APR 16 PM 1:42
COURT OF APPEALS
DIVISION II