NO. 37593-I-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNY McQUEEN, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 04-1-03729-0

Respondent's Brief

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A. ISSUES PERTAINING TO DEFENDANT'S ASSIGNMENT OF ERROR.

1. Whether Defendant is precluded from arguing "prosecutorial vindictiveness" on appeal where no objection was made at the trial level, and the claimed error is not manifest.

2. Whether, even if the claimed error may be raised for the first time on appeal, the State did not act vindictively when, at re-sentencing, it made the same sentencing recommendation as it had made at the first sentencing, and there was no change in the standard range.

B. STATEMENT OF THE CASE.

1. Procedure

On September 7, 2004, by Amended Information, the defendant was charged with one count of Robbery in the First Degree, two counts of Assault in the Second Degree, and one count of False or Misleading Statement to a Public Servant, violations of RCW 9A.56.190, 9A.56.200(1)(iii), 9A.36.021(1)(a), and 9A.76.175, respectively. CP 6-8. The victims of Count I, Robbery in the First Degree, were listed in the Amended Information as "Derek Simon and/or Christopher Voelker." *Id.* The victim of Count II, Assault in the Second Degree, was listed in the Amended Information as "Derek Simon." *Id.* The victim of Count III,

Assault in the Second Degree, was listed in the Amended Information as "Christopher Voelker." *Id.*

Additionally, the Amended Information included language alleging that the crimes were aggravated by an offender score in excess of 9 points, and by unscored misdemeanor history. *Id.* The purpose of such language was to put the defense on notice that the State was considering seeking an exceptional sentence upwards in the event of a conviction. RP 5, 11/12/04.

Upon the conclusion of a jury trial, the defendant was found guilty of all felony charges. CP 58, 59, and 62. At the time of the original sentencing, the Defendant was found to have an offender score of 14 points, based upon 10 points worth of prior criminal history and 4 points for the other current offenses. CP 153-163 (Judgment and Sentence 11/12/04). Both Robbery in the First Degree and Assault in the Second Degree are "violent" offenses, and each "violent" other current offense counts as 2 points towards the sentence of another "violent" current offense. RCW 9.94A.525(8).

Accordingly, the defendant's standard range for the most serious offense, Robbery in the First Degree, was 129-171 months. CP 153-163 (Judgment and Sentence, 11/12/04). Although statutory aggravating factors existed, the State felt that a standard range sentence was sufficient for the Defendant's conduct, and recommended a sentence at the high end of the range, 171 months. RP 5, 11/12/04. The State argued that the

defendant's excessive offender score, his unscored misdemeanor and gross misdemeanor history, committing the current offenses while on intensive drug-court supervision, accumulating his voluminous criminal record by the age of 21 or 22, and lying to the jury during the trial, all pointed towards a high-end sentence. RP 5-7, 11/12/04. The State did not argue the fact of multiple victims or multiple assaults, or nature of injuries. Such factors were inherent in the crimes for which Defendant was convicted.

Victim Christopher Voelker then took the opportunity to address the Court. RP 8-9, 11/12/04. During his statement, he told the Court about the effect the crimes had had on him, how they have made it difficult for him to carry out his responsibilities at work, and about how little regard Defendant had for human life. *Id.* In conclusion, he joined the State's request for the most that could be imposed under the standard range. *Id.*

The trial court, however, did not find Defendant's conduct as serious as the State or victim did, and imposed a sentence in the middle of the range, 150 months. RP 16, 11/12/04.

The Defendant appealed the convictions, arguing insufficient evidence of the Robbery in the First Degree and both Assaults in the Second Degree. CP 101-107. The convictions were affirmed on appeal. *Id.*

In a personal restraint petition, the Defendant asked that the Robbery conviction be set aside for insufficient evidence. CP 110-111. That request was denied. *Id.* Also in the personal restraint petition, Defendant asked that the Assault convictions be set aside not because of insufficient evidence, but rather because they involved the same force as that used to commit the Robbery. *Id.* The deputy prosecutor handling the personal restraint petition conceded error on that issue, based upon ***State v. Freeman***, 153 Wn.2d 765, 108 P.3d 753 (2005). *Id.* Accordingly, the matter was sent back to the trial court to vacate the two Assaults in the Second Degree convictions, and to re-sentence Defendant. *Id.*

At the re-sentencing, Defendant's offender score was 10 points. CP 164-175 (Judgment and Sentence, 3/14/08). As every offender score over 9 points carries the same standard range, Defendant's sentencing range was the same as it had been during the original sentencing. RCW 9.94A.510. As the Defendant still had the same standard range, still had an offender score in excess of 9 points, still had the same unscored misdemeanor history, still had committed the crime while on intensive drug court supervision, and still had committed the acts as testified to at trial, the State made the same recommendation as it had made at the first sentencing. RP 4-6, 3/14/08. The State reinforced that recommendation

with the existence of new reasons: multiple victims and gratuitous injuries. *Id.* Unlike at the first sentencing, those reasons were not inherent in the charges.

Again, the trial court imposed the same sentence imposed at the original sentencing, 150 months. CP 164-175 (Judgment and Sentence, 3/14/08). Defendant now appeals, arguing the State was acting vindictively when, at the re-sentencing, it requested a higher sentence than the Court ordered at the first sentencing.

2. Substantive Facts.[1]

On July 30, 2004, Defendant entered a Fred Meyer Store, and placed an order for food in the deli section. Upon receiving the food, he then exited the store without paying for it. No. 32592-6-II Ruling Affirming Judgment and Sentence, at 1-2. Store Security Officer Christopher Voelker followed Defendant out of the store, and fully identified himself as store security. *Id.* at 2. While still holding the stolen property, Defendant responded by turning to look at Voelker, and then hitting him on the left side of the head with a closed fist. *Id.*

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[1] As mentioned above, in a previous appeal on this case, the Court of Appeals took up the issue of sufficiency of the evidence for the two counts of Assault in the Second Degree. In holding that there was sufficient evidence to uphold those convictions, the Court of Appeals took the opportunity to set out the facts as presented herein.

While Defendant and Voelker struggled, Loss Prevention Specialist Derek Simon responded to assist Voelker. *Id.* As Simon approached Defendant and Voelker, Defendant struck Simon in the face with a closed fist, again, while still clutching the bag of stolen food. *Id.* All three then struggle for awhile, after which the defendant was ultimately controlled and placed in handcuffs. *Id.* at 3.
Once in custody, Defendant falsely identified himself as "Jacari C. Mickey." *Id.* In finding sufficient evidence of "temporary but substantial disfigurement" and "temporary but substantial loss or impairment of the function of any bodily part" for Assault in the Second Degree committed against Christopher Voelker, the Court of Appeals focused on the evidence that Defendant's punch to Voelker's head caused: a painful and visible, fist-sized lump that lasted for four to five days; lightheadedness and nausea into the following day; scrapes on his elbows; the need to take over-the-counter pain medication. *Id.* at 6.

In finding sufficient evidence of "temporary but substantial disfigurement" and "temporary but substantial loss or impairment of the function of any bodily part" for Assault in the Second Degree committed against Derek Simon, the Court of Appeals focused on the evidence that Defendant's punch to Simon's head caused: his eye to temporarily swell; his vision to become blurred; pain and bruising to last for a week; him to take over-the-counter pain medication for a couple of days; a cut under his eye; slight swelling of the bridge of his nose. *Id.* at 6-7.

C. ARGUMENT.

1. DEFENDANT IS PRECLUDED FROM ARGUING "PROSECUTORIAL VINDICTIVENESS" ON APPEAL WHERE NO OBJECTION WAS MADE AT THE TRIAL LEVEL, AND THE CLAIMED ERROR IS NOT MANIFEST.

The general rule is that a sentence within the standard-range cannot be appealed. RCW 9.94A.585(1). An exception to that rule exists, however, where the Defendant contests the court's procedure in imposing the standard-range. ***State v. Henderson***, 99 Wn. App. 369, 993 P.2d 928 (2000).

That said, failure to object at the trial level generally results in waiver of the issue on appeal. ***State v. Kirkman,*** 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception exists where "manifest error" affects a constitutional right. RAP 2.5(a)(3). That exception, however, is very narrow in scope, and is limited to error that is "...unmistakable, evident or indisputable. ***Kirkman***, 159 Wn.2d at 934 (quoting ***State v. Scott***, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)); ***State v. Lynn,*** 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Furthermore, error is "manifest" if either:

1) it results in actual prejudice to the defendant, or

2) defendant makes a "'plausible showing'" "'that the asserted error had practical and identifiable consequences...."

State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999) (quoting ***Lynn***, 67 Wn. App. at 345).

While due process is certainly a constitutional right, Defendant's claim of "prosecutorial vindictiveness" during the re-sentencing is neither unmistakable, evident nor indisputable. At that hearing, the State recommended the high end of the range, which was exactly what the State had recommended at the original sentencing. The Court of Appeals did not remand the case for imposition of a particular sentence, and, as the Defendant had been convicted at trial, the State was not bound by the terms of a guilty plea. When Defendant came back for re-sentencing after appeal, and faced with the same standard-range, the State did not seek a higher sentence, but rather made the same recommendation again. That cannot be said to be an unmistakable, evident or indisputable error.

If the Defendant had made the claim of vindictiveness at the time of the second sentencing, the State would have had the opportunity to articulate the non-vindictive reasons for recommending the same sentence.

Furthermore, just as the judge did at the original sentencing, the judge declined to impose the sentence requested by the State, again

ordering a sentence in the middle of the range. Defendant has failed to make a "'plausible showing'" that the claimed error had practical and identifiable consequences, and there was no actual prejudice to Defendant. The claimed error, therefore, was not manifest, and Defendant failed to properly preserve the issue at the trial level.

2. EVEN IF THE CLAIMED ERROR MAY BE RAISED FOR THE FIRST TIME ON APPEAL, THE STATE DID NOT ACT VINDICTIVELY WHEN, AT RE-SENTENCING, IT MADE THE SAME SENTENCING RECOMMENDATION AS IT HAD MADE AT THE FIRST SENTENCING, AND THERE WAS NO CHANGE IN THE STANDARD RANGE

Prosecutorial vindictiveness, violative of due process requirements, occurs when the State acts against a defendant for exercising his statutory or constitutional rights. ***State v. Korum***, 157 Wn.2d 614, 141 P.3d 12 (2006)(citing ***United States v. Meyer***, 258 U.S. App. D.C. 263, 810 F.2d 1242, 1245 (1987), and ***United States v. Goodwin***, 457 U.S. 368, 372-85, 102 S. Ct. 2485, 73 L.Ed.2d 74 (1982)). The prosecutor's conduct is only "vindictive" if it is "...designed to penalize a defendant for invoking legally protected rights." ***Korum,*** at 627 (citing ***Meyer***, at 1245).

A presumption of "vindictiveness" occurs where the totality of circumstances establish "...a realistic likelihood of vindictiveness." *Id.* The burden, however, is on the Defendant to prove such likelihood. *Id.* Once the Defendant has satisfied that burden, the State need only present "...objective evidence justifying the prosecutorial action..." to rebut the presumption. *Id.*

Defendant's curious argument accuses the State of being vindictive for recommending a higher sentence at the second sentencing than the Court ordered at the first sentencing. Appellant's Opening Brief, at 9. Defendant, however, provides no authority for the proposition that the State is somehow bound to the previous sentence. The State did not penalize the Defendant for exercising his rights. The State has always been consistent in its sentencing recommendations. The Defendant's appeal and personal restraint petition had no effect on his standard range. The factors upon which the State relied for its recommendation did not change from sentencing to sentencing. Accordingly, the State made the same sentencing recommendation at his second sentencing, after his appeal and person restraint petition, as the State had made prior to the defendant's exercise of those rights.

In ***State v. Amos***, 147 Wn. App. 217, 195 P.3d 564 (2008), the defendant pled guilty to, *inter alia*, Robbery in the First Degree and Assault in the Second Degree, and stipulated to an exceptional sentence of 120 months in prison. *Id.* at 224. He then filed a personal restraint petition, arguing successfully that there had been an error in the calculation of his standard-range. *Id.* At the re-sentencing, the judge imposed the same sentence, 120 months, that had been imposed at the first sentencing. *Id.* at 234. On appeal, the defendant argued that the judge acted vindictively in imposing that sentence, claiming that it was in retaliation for the successful personal restraint petition. *Id.* In rejecting the claim of vindictiveness, the Court of Appeals noted that the trial judge had imposed the same sentence at both sentencings, and therefore, the defense had failed to prove vindictive retaliation. *Id.*

Defendant cites to ***United States v. Goodwin***, 457 U.S. 368, 102 S. Ct. 2485, 73 L.Ed.2d 74 (1982) as support for the notion that punishment of a defendant for availing himself of his appellate rights is prohibited vindictiveness. Appellant's Opening Brief, at 6. That case, however, discusses the presumption of vindictiveness in the context of a judge imposing a **higher** sentence than previously imposed, "...a presumption that must be rebutted by 'objective information...justifying the increased sentence.'" ***Goodwin***, at 374 (emphasis added).

In the present case, just as the State was consistent in its sentencing recommendations, so too was the judge in imposing the sentences. No evidence exists from which any court can determine that the Defendant received harsher treatment for exercising his appellate rights.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that the defendant's conviction be affirmed.

DATED: February 26, 2009.

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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.

2-26-09 Theresa Kahn
Date Signature

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