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Division II  
State of Washington

NO. 49742-5-II

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

STATE OF WASHINGTON, RESPONDENT

v.

OMAHA TUFONO, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Katherine M. Stolz

No. 16-1-01418-8

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**Brief of Respondent**

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## Table of Contents

A.	ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....	1
1.	DID THE TRIAL COURT ERRONEOUSLY SCORE APPELLANT'S THREE CALIFORNIA ROBBERY IN THE SECOND DEGREE CONVICTIONS AS ONE POINT EACH?.....	1
2.	DOES THAT ERROR REQUIRE RESENTENCING?.....	1
3.	DID THE TRIAL COURT ERRONEOUSLY INCLUDE APPELLANT'S CALIFORNIA VEHICULAR MANSLAUGHTER CONVICTION IN HIS OFFENDER SCORE?.....	1
4.	DOES THAT ERROR REQUIRE RESENTENCING?.....	1
5.	DID THE TRIAL COURT CONDUCT AN INDIVIDUALIZED INQUIRY INTO APPELLANT'S ABILITY TO PAY AT SENTENCING?.....	1
6.	DOES THAT ERROR REQUIRE RESENTENCING?.....	1
7.	SHOULD THIS MATTER BE REMANDED FOR FULL RESENTENCING OR REMANDED FOR MERELY MINISTERIAL RESENTENCING?.....	1
B.	STATEMENT OF THE CASE.....	1
C.	ARGUMENT.....	2
1.	THE STATE CONCEDES THAT THE TRIAL COURT ERRONEOUSLY SCORED APPELLANT'S THREE ROBBERY CONVICTIONS AS ONE POINT EACH.....	2
2.	THE STATE CONCEDES THAT THE TRIAL COURT SHOULD NOT HAVE INCLUDED DEFENDANT'S 1985 VEHICULAR MANSLAUGHTER CONVICTION IN ITS OFFENDER SCORE CALCULATION. ....	2

3.	THE STATE CONCEDES THAT THIS MATTER SHOULD BE REMANDED FOR CONSIDERATION OF APPELLANT'S ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.....	4
4.	THE TRIAL COURT'S COMPARABILITY DETERMINATION SHOULD NOT BE ACCORDED PRECLUSIVE EFFECT.....	4
5.	A FULL RESENTENCING HEARING IS NECESSARY IN THIS CASE. ....	8
D.	CONCLUSION.....	9

## Table of Authorities

### State Cases

<i>In re Cadwallader</i> , 155 Wn.2d 867, 876, 123 P.3d 456 (2005), <i>superseded on other grounds by State v. Jones</i> , 182 Wn.2d 1, 338 P.3d 278 (2014).....	4, 7
<i>In re Canha</i> , ___ Wn.2d ___, 402 P.3d 266, 271 (2017).....	5
<i>McNutt v. Delmore</i> , 47 Wn.2d 563, 565, 288 P.2d 848 (1955) .....	8
<i>State v. Blazina</i> , 182 Wn.2d 827, 839, 344 P.3d 680 (2015) .....	4
<i>State v. Bowman</i> , 57 Wn.2d 266, 270-71, 356 P.2d 999 (1960).....	3
<i>State v. Broadway</i> , 133 Wn.2d 118, 136, 942 P.2d 363 (1997) .....	8
<i>State v. Cobos</i> , 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014) .....	7
<i>State v. Eike</i> , 72 Wn.2d 760, 765-66, 435 P.2d 680 (1967) .....	4
<i>State v. Harrison</i> , 148 Wn.2d 550, 561, 61 P.3d 1104, 1109 (2003).....	7
<i>State v. Jones</i> , 182 Wn.2d 1, 8, 338 P.3d 278, 281 (2014) .....	7
<i>State v. Morley</i> , 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998).....	5
<i>State v. Ramos</i> , 171 Wn.2d 46, 48, 246 P.3d 811 (2011).....	8
<i>State v. Rowland</i> , 160 Wn.App. 316, 331, 249 P.3d 635 (2011), <i>aff'd</i> , 174 Wn.2d 150 (2012) .....	7
<i>State v. Sublett</i> , 176 Wn.2d 58, 86-89, 292 P.3d 715, 729 (2012).....	5
<i>State v. Toney</i> , 149 Wn.App. 787, 792, 205 P.3d 944 (2009).....	7, 8

Federal and Other Jurisdictions

Cal Penal Code § 212.5(c) ..... 5

Cal. Penal Code § 192(c)(2)..... 3

Cal. Penal Code § 211..... 5

*In re Dennis B.*, 18 Cal. 3d 687, 696, 557 P.3d 514,  
135 Cal. Rptr. 82 (1976) ..... 3, 4

*People v. Mai*, 22 Cal App. 4th 117, 27 Cal. Rptr. 2d 141 (1994) ..... 5, 6

*People v. Nguyen*, 24 Cal. 4th 756, 761, 14 P.3d 221, 224, 102 Cal. Rptr.  
2d 548, 551–52 (2000), as amended (Jan. 17, 2001) ..... 6

*People v. Ramos* (1982) 30 Cal.3d 553, 589, 180 Cal.Rptr. 266,  
639 P.2d 908, *revd. on other grounds sub nom.*  
*California v. Ramos* (1983) 463 U.S. 992, 103 S.Ct. 3446,  
77 L.Ed.2d 1171.) ..... 6

Statutes

Laws of 1983, ch. 164 § 1 ..... 3

RCW 9.94A.530(2)..... 7

RCW 9.94A.570..... 4

RCW 9A.56.190..... 5

Other Authorities

Persistent Offender Accountability Act..... 2

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

1. Did the trial court erroneously score appellant's three California robbery in the second degree convictions as one point each?
2. Does that error require resentencing?
3. Did the trial court erroneously include appellant's California vehicular manslaughter conviction in his offender score?
4. Does that error require resentencing?
5. Did the trial court conduct an individualized inquiry into appellant's ability to pay, at sentencing?
6. Does that error require resentencing?
7. Should this matter be remanded for full resentencing or remanded for merely ministerial resentencing?

B. STATEMENT OF THE CASE.

Appellant's opening brief adequately presents the basic facts.

Appellant timely appeals.

C. ARGUMENT.

1. THE STATE CONCEDES THAT THE TRIAL COURT ERRONEOUSLY SCORED APPELLANT'S THREE ROBBERY CONVICTIONS AS ONE POINT EACH.

Respondent agrees with appellant that the trial court erroneously scored appellant's three California robbery in the second degree prior convictions as one point each.<sup>1</sup> The procedure the trial court used was undoubtedly flawed.<sup>2</sup> Accordingly, this matter should be remanded back to the trial court for resentencing.

2. THE STATE CONCEDES THAT THE TRIAL COURT SHOULD NOT HAVE INCLUDED DEFENDANT'S 1985 VEHICULAR MANSLAUGHTER CONVICTION IN ITS OFFENDER SCORE CALCULATION.

Respondent agrees with appellant that appellant's 1985 California Vehicular manslaughter conviction should not have been included in the calculation of his offender score and that this case should be remanded for resentencing.

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<sup>1</sup> The State concedes no more than that because the State intends to argue on remand following appeal that appellant's California robbery in the second degree convictions are comparable to Washington robbery in the second degree convictions and are strikes for purposes of the Persistent Offender Accountability Act.

<sup>2</sup> As argued below, respondent maintains that the sentencing flaw stemmed from the sentencing court's failure to find appellant's California robbery convictions comparable to Washington robbery convictions. On the other hand, appellant maintains that the trial court had no basis for according one point for each of appellant's California robbery convictions after it found that the California robbery convictions were not comparable. Appellant's Brief at 8-9. Either way, the trial court's process was faulty.

- a. California's vehicular manslaughter statute's mental state is ordinary negligence.  
Washington's vehicular homicide mental state is appreciably more than that.

In 1985, Washington's vehicular homicide statute required either (a) being under the influence; (b) operation . . . in a reckless manner; or (c) operation . . . with disregard for the safety of others. Laws of 1983, ch. 164 § 1. Comparability obviously cannot be founded upon the "under the influence" prong because appellant's charged California offense did not involve intoxication.

Comparability cannot be founded upon the Washington's vehicular homicide "reckless" prong because appellant was convicted of California vehicular manslaughter (Cal. Penal Code § 192(c)(2)) which has an "ordinary negligence" mental state. Exhibit 3. Washington's vehicular homicide "reckless" standard is substantially narrower than California's "ordinary negligence" standard. Compare *State v. Bowman*, 57 Wn.2d 266, 270-71, 356 P.2d 999 (1960) with *In re Dennis B.*, 18 Cal. 3d 687, 696, 557 P.3d 514, 135 Cal. Rptr. 82 (1976).

Comparability cannot be founded on "operation . . . in disregard for the safety of others" because that mental state requires "something more than ordinary negligence" while California's vehicular manslaughter is founded on ordinary negligence. Compare *State v. Eike*, 72 Wn.2d 760,

765-66, 435 P.2d 680 (1967), with *In re Dennis B.*, 18 Cal. 3d 687, 696, 557 P.3d 514, 135 Cal. Rptr. 82 (1976).

- b. The record below fails to demonstrate that appellant's 1985 California vehicular manslaughter conviction did not wash out.

The State concedes that it did not meet its burden of establishing that appellant's California vehicular manslaughter conviction did not wash out. *In re Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005), *superseded on other grounds by State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

3. THE STATE CONCEDES THAT THIS MATTER SHOULD BE REMANDED FOR CONSIDERATION OF APPELLANT'S ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

The trial court in this case conducted no individualized inquiry into appellant's ability to pay discretionary legal financial obligations as required by *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). 12-13-16 RP. Since this case should be remanded back for full resentencing for the reasons stated above, the ability to pay inquiry can be conducted on remand.

4. THE TRIAL COURT'S COMPARABILITY DETERMINATION SHOULD NOT BE ACCORDED PRECLUSIVE EFFECT.

California robbery in the second degree is legally comparable to Washington second degree robbery for 9.94A.570 Persistent Offender

Accountability Act purposes. *State v. Sublett*, 176 Wn.2d 58, 86-89, 292 P.3d 715, 729 (2012). The comparability test used for POAA purposes is the same comparability test used to determine criminal history for offender score purposes. See *In re Canha*, \_\_\_ Wn.2d \_\_\_, 402 P.3d 266, 271 (2017) (citing *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998)).<sup>3</sup> The elements of California robbery in the second degree in 1989, at issue in this case, are the same elements that were at issue in *Sublett*.<sup>4</sup> Settled Supreme Court precedent resolves this issue. *Id.*

The sentencing court in this case was apparently persuaded that *People v. Mai*, 22 Cal App. 4th 117, 27 Cal. Rptr. 2d 141 (1994) effected a change in California law for a period of time that rendered California robbery in the second degree convictions not comparable to Washington robbery in the second degree convictions for that period of time. 12/13/16 RP at 17-18; CP 103-08 (Defendant's Sentencing Memorandum). This conclusion was plainly wrong. *People v. Mai* was never California law. It

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<sup>3</sup> *Canha* cited the two-part comparability test set forth in *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998) (a POAA case) as the appropriate test to use when conducting comparability analysis for offender score purposes. *In re Canha*, 952 P.2d at 270.

<sup>4</sup> Cal. Penal Code § 211, the definition of robbery, has been the same since 1872. Since 1994, Cal Penal Code § 212.5(c) has stated: "All kinds of robbery other than those listed in subdivisions (a) and (b) are of the second degree." This is the same statutory language addressed in *State v. Sublett*, 176 Wn.2d at 729. Other than 2011 amendments addressing gender, RCW 9A.56.190 has been the same since at least 1975.

was an erroneous aberration. In disapproving *People v. Mai*, the California Supreme Court said:

We consistently have held that, in order to constitute robbery, property must be taken from the possession of the victim by means of force or fear. "To constitute robbery the property must be removed from the possession and immediate presence of the victim against his will, and such removal must be by force or fear." (*People v. Ramos* (1982) 30 Cal.3d 553, 589, 180 Cal.Rptr. 266, 639 P.2d 908, revd. on other grounds sub nom. *California v. Ramos* (1983) 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171.).

*People v. Nguyen*, 24 Cal. 4th 756, 761, 14 P.3d 221, 224, 102 Cal. Rptr. 2d 548, 551–52 (2000), as amended (Jan. 17, 2001). Furthermore, *Mai* was an opinion of an inferior court and the Supreme Court granted review in *Nguyen* to resolve (against the holding in *Mai*) the conflict in lower court opinions that *Mai* presented. *People v. Nguyen*, 24 Cal. 4th at 760-61. *Mai* effected no change in California law. It was a mistake that was recognized and disapproved in *People v. Nguyen*, 24 Cal. 4th at 760-61.

Because the State did not cross-appeal in this matter, the State cannot (and does not) ask this Court to address the trial court's erroneous comparability determinations. However, upon remand the State will ask the trial court to determine that the California robbery convictions are comparable. That determination will be very consequential. See CP 138 (Persistent Offender Notice).

Collateral estoppel does not preclude reexamination of the comparability of appellant's three California robbery in the second degree prior offenses on remand for resentencing because the judgment and sentence is not final. *State v. Harrison*, 148 Wn.2d 550, 561, 61 P.3d 1104, 1109 (2003).

The "no second chance" rule of *In re Cadwallader* has been superseded by RCW 9.94A.530(2) and *State v. Jones*, 182 Wn.2d 1, 8, 338 P.3d 278, 281 (2014). *State v. Cobos*, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014).

The law of the case doctrine does not bar a party from raising issues at resentencing that could have been raised in an appeal of the original sentence, as long as the appellate court vacates the original sentence and remands for unconstrained resentencing. *See State v. Rowland*, 160 Wn.App. 316, 331, 249 P.3d 635 (2011), *aff'd*, 174 Wn.2d 150 (2012) (citing cases); *State v. Toney*, 149 Wn.App. 787, 792, 205 P.3d 944 (2009). The doctrine does not apply because such a resentencing is a new proceeding resulting in an entirely new sentence. *See Toney*, 149 Wn.App. at 792.

If this case is remanded for resentencing—the relief appellant asks for—then the trial court needs to correct the mistakes that resulted from the errors of the first proceeding. *McNutt v. Delmore*, 47 Wn.2d 563,

565, 288 P.2d 848 (1955) (“When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the *erroneous* sentence, when the error is discovered.”)

5. A FULL RESENTENCING HEARING IS  
NECESSARY IN THIS CASE.

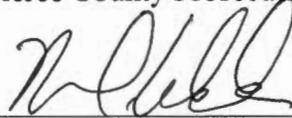
This Court generally has two choices available to it regarding remand: (1) a remand for resentencing where the sentencing court re-conducts the sentencing hearing; and (2) a ministerial remand, where the trial court is directed to take action and discretion is not implicated. *See State v. Toney*, 149 Wn.App. at 791-93. The defendant need not be present for a ministerial correction. *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011). A ministerial correction is not appropriate when a trial court was mistaken about the offender score. *Id.*; *See State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (holding that resentencing was appropriate when the trial court was mistaken about the period of community placement required by law.). In this case, no matter how the facts resolve themselves, appellant will end up with a different offender score, and either a different sentencing range or a different sentencing outcome. A ministerial remand for resentencing is not an appropriate option in this case.

D. CONCLUSION.

The State agrees that appellant's California vehicular manslaughter charge should not have been included in his offender score. Appellant's California robbery in the second degree convictions must be re-addressed because the trial court improperly addressed them at sentencing. Appellant should receive an individualized inquiry as to his ability to pay discretionary legal financial obligations on remand. This matter should be remanded for full resentencing.

DATED: October 31, 2017

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ 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.

10.31.17 Therese Kar  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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