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

STATE OF WASHINGTON, RESPONDENT

v.

AZIAS DEMETRIUS ROSS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 12-1-03305-8

Brief of Respondent

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

1. Did the trial court properly act within the mandate to resentence the defendant without exceeding the statutory maximum on Counts I and XI without conducting a full resentencing hearing on all counts?
2. Did the trial court act within its discretion in imposing a standard range sentence on an offender who was a legal adult at the time he committed his crimes and who did not request an exceptional sentence?

B. STATEMENT OF THE CASE.

On August 30, 2012, The State charged Azias Demetrius Ross, hereinafter referred to as “defendant,” by information filed in cause number 12-1-03305-8 with conspiracy to commit first degree burglary in counts I, VIII, and LXII, first degree burglary in counts II, IX, and LXIII, conspiracy to commit first degree robbery in counts III, X, and LXIV, first degree robbery in counts IV, XI, LXV, LXVI, LXVII, LXVIII, unlawful imprisonment in counts V, XII, LXXIII, LXXIV, LXXV, LXXVI, second degree assault in counts VI, LXIX, LXX, LXXI, and LXXII, first degree trafficking in stolen property in count VII, theft of a firearm in counts XIII

and XIV, and conspiracy to commit first degree stolen property in count LXXVII. All counts included a firearm sentence enhancement. CP 1 – 15, 16 - 20. Soy Oeung, Nolan Chamrouen Chouap, Alicia Vanny Ngo, and Azariah Chenas Ross were named as codefendants. CP 1 – 15, 16 - 20.

On December 23, 2013, the State filed an amended information in cause number 12-1-03305-8 charging conspiracy to commit first degree robbery and/or first degree burglary in counts I, VII, and LIX, first degree burglary in counts II, VIII, and LX, first degree robbery in counts III, IX, LXI, and LXII, second degree assault in counts IV, X, LXIII, LXIV, LXV, and LXVI, unlawful imprisonment in counts V, XI, LXVII, LXVIII, LXIX, and LXX, first degree trafficking in stolen property in counts VI, XIII, and LXXI, and theft of a firearm in count XII. CP 648 - 659. All counts, except the theft of a firearm count, included firearm or deadly weapon sentence enhancements. CP 648 - 659.

The case proceeded to trial and the jury found Ross guilty as charged, except conspiracy to commit first degree robbery as charged in counts VII and LIX and of conspiracy to commit first degree burglary as charged in count LIX. CP 62 - 134. On June 23, 2014, the court heard arguments regarding merger and same criminal conduct. The court ruled that the January robbery and the unlawful imprisonment counts merged and that the theft of a firearm and first degree burglary were the same

criminal conduct. RP 6/23/2014 2- 78. The State recommended the low end of the standard ranges plus the firearm sentence enhancements for a total of 507 months in total confinement. The trial court adopted this recommendation. RP 6/23/2014 2 – 78.

On July 18, 2014, the trial court signed an order correcting the June 23, 2014 judgment and sentence regarding Count LXXII. CP 276 – 279. Count LXXII did not actually exist and the parties recognized the scrivener’s error shortly after the judgment and sentence had entered. This order corrected the incorrect Count LXXII to reflect the proper Count, LXXI. At that time, the trial court specifically ordered “all other terms and conditions of the Judgment and Sentence shall remain in full force and effect as set forth in full herein.” CP 176 – 279.

On September 27, 2016, the Court Of Appeals affirmed the convictions but remanded Counts I and XI for resentencing with instructions to the trial court that it not exceed the statutory maximum on those specific counts. The State had conceded this issue and recommended remand for the sentences not to exceed the statutory maximum. The Court of Appeals also remanded Count LXXI for resentencing (although acknowledging the only issue to be a scrivener’s error). CP 62 – 134.

On September 20, 2017, the defendant submitted a 20 page “Resentencing Memorandum” in which he states “[b]y virtue of the

Appellate Order remanding for resentencing on Counts I and XI, this Court has discretion to fully resentence Mr. Ross on all counts.” CP 156 – 275. The State responded to this motion on November 29, 2017 and submitted a supplemental brief on January 24, 2018. CP 282 – 293, 502 – 621.

On October 6, 2017, the court signed an “Order Correcting Judgment and Sentence” that reflects, in relevant part, the following:

3) On Page 6 of the Judgment and Sentence, paragraph 4.5, states “96.75 months” for Count I, and “43 months” for Count XI, and should note “84 months” for Count I, and “42 months” for Count XI;

...

6) On pages 2, 3 and 6 of the Judgment and Sentence, paragraphs 2.1, 2.3 and 4.5, reflect “Count LXXII” and should reflect “Count LXXI;”

...

All other terms and conditions of the Judgment and Sentence are to remain in full force and effect as if set forth in full herein; and the court being in all things advised, Now, Therefore it is hereby

ORDERED. ADJUDGED and DECREED that the Judgment and Sentence granted defendant on June 23, 2014, be and the same is hereby corrected as follows:

...

3) On Page 6 of the Judgment and Sentence, paragraph 4.5:

a) “96.75 months” for Count I, and “43 months” for Count XI, is deleted; and

b) “84 months” for Count I, and “42 months” for Count XI, is inserted in its stead;

...

All other terms and conditions of the original Judgment and Sentence shall remain in full force and effect as if set forth in full herein.

RP 10/06/17 1/26/18, 1 – 13, CP 276 – 279.

The court conducted a hearing regarding the defense motion for a full resentencing on January 26, 2018. RP 10/06/17 1/26/18, 14 – 37. The court denied the defense motion and ruled that the remand directed it to correct the sentence on the counts where the statutory maximum had been exceeded. RP 10/06/17 1/26/18 33 – 34. The court entered finding of fact and conclusion of law. CP 643 – 647. The defendant filed a notice of appeal on February 6, 2018.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BECAUSE THE RESENTENCING WAS DONE WITHIN THIS COURT'S MANDATE, THE TRIAL COURT CORRECTED COUNTS I AND XI AS DIRECTED AND THE STANDARD RANGE SENTENCES IMPOSED ARE NOT APPEALABLE.

Review of resentencing by the appellate court following remand is only proper when the trial court exercises appealable discretion. *See State*

v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993); *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 110 (1997); *State v. Toney*, 149 Wn. App. 787, 791, 205 P.3d 944 (2009); RCW 9.94A.585(1). A trial court does not exercise appealable discretion when it follows a mandate issued by a higher court. *See State v. Kilgore*, 141 Wn. App. 817, 829, 172 P.3d 373 (2007). Similarly, a trial court does not exercise appealable discretion when it imposes a mandatory sentence dictated by statute. *Garcia-Martinez*, 88 Wn. App. at 329 (quoting RCW 9.94A.585(1)). Although discretion is exercised in imposing a sentence within the standard range prescribed by the legislature, the length of sentence from that discretionary act is not appealable under RCW 9.94A.585(1).

A statute is ambiguous if it can reasonably be interpreted in two or more ways. *Payseno v. Kitsap County*, 186 Wn. App. 465, 469, 346 P.3d 784 (2015). However, a statute is not ambiguous if different interpretations are conceivable. *Id.* If the statute can still be interpreted in multiple ways after a plain meaning review, then the statute is ambiguous and a court must rely on statutory construction, legislative history, and relevant case law to determine legislative intent. *State v. Rice*, 180 Wn. App. 308, 313, 320 P.3d 723 (2014). When the plain language of the statute is unambiguous, the legislative intent is apparent and a court will not construe the statute otherwise. *State v. J.P.*, 149 Wn.2d 444, 450, 69

P.3d 318 (2003). Statutory construction is a question of law that is reviewed de novo. *State v. Soto*, 177 Wn. App. 706, 713, 309 P.3d 596 (2013).

The statutes and court rules related to sentencing on remand are unambiguous. Rules of Appellate Procedure (RAP) 12.2 states, “Upon issuance of the mandate of the appellate court..., the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court.” RAP 12.2 (emphasis added). Our Supreme Court has explicitly ruled on this issue by noting that, “The trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate.” *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

Here, this court’s mandate to the trial court was clear: remand was granted to address the counts that exceeded the statutory maximum. This court instructed: “remand with instructions to resentence Ross on counts I and XI and Oeung on count XIV not to exceed the statutory maximum sentence,” Mandate CP 62 – 143.

The trial court did not exercise any appealable discretion when it resentenced the defendant. First, the court acted within the mandate of this Court. It corrected the sentence on counts I and XI to a sentence below the statutory maximum as directed. *See* CP 276 - 279.

2. THE DEFENDANT WAS AN ADULT WHEN THE CRIMES WERE COMMITTED AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A STANDARD RANGE SENTENCE.

The trial court may impose an exceptional sentence below the standard range if it finds mitigating circumstances by a preponderance of the evidence. RCW 9.94A.535(1). In *O'Dell*, the Supreme Court held that a defendant's youthfulness is a mitigating factor that may justify an exceptional sentence below statutory sentencing guidelines, even when the defendant is a legal adult. *State v. O'Dell*, 183 Wn.2d 680, 688-89, 358 P.3d 359 (2015).

The Supreme Court in, *In re Personal Restraint of Light-Roth*, 191 Wn.2d 328, 422 P.3d 444 (2018), held *O'Dell* did not constitute a "significant change in the law" for purposes of retroactivity analysis. *Light-Roth* reasoned the *O'Dell* court had explained that *State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633 (1997), "did not preclude a defendant from arguing youth as a mitigating factor but, rather, it held the defendant must show that his youthfulness relates to the commission of the crime." *State v. Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018). Hence, "RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward, and mitigation based on youth is within the trial court's discretion." *Id.* A sentencing

court abuses its discretion when the defense requests an exceptional sentence below the standard range and the court fails to consider mitigating factors raised by the defense. *O'Dell*, 183 Wn.2d at 697.

Generally, a standard range sentence is not subject to appellate review. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003); RCW 9.94A.585(1). “[S]o long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length.” *Williams*, 149 Wn.2d at 146–47. “Nevertheless, a defendant may appeal the trial court's procedure in imposing his sentence.” *State v. Knight*, 176 Wn. App. 936, 957, 309 P.3d 776 (2013).

In this case, the defendant was adult when he committed the crimes he has been convicted of. Thus, the body of law regarding the sentencing of juvenile offenders is not applicable here. *O'Dell* is distinguishable from defendant's case because *O'Dell* involved an appealable error while the defendant's case does not. A defendant may not appeal a standard range sentence unless he shows that the sentencing court either (1) categorically refused to impose an exceptional sentence downward under any circumstances or (2) relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *Garcia–Martinez*, 88 Wn. App. at 330; see RCW 9.94A.585(1). *O'Dell's* sentence

was appealable because, based on an erroneous understanding of the law, the sentencing court refused to impose *O'Dell's* requested exceptional sentence. *O'Dell*, 183 Wn.2d at 696–97.

In contrast, the defendant in this case did not request an exceptional sentence, agreed with the low end recommendation and that the firearm enhancements were required to be consecutive. While a defendant is entitled to ask the sentencing court to consider such a sentence and to have the alternative actually considered, the defendant did not ask the sentencing court to consider an exceptional sentence. A sentencing court abuses its discretion when the defense requests an exceptional sentence below the standard range and the court fails to consider mitigating factors raised by the defense. *O'Dell*, 183 Wn.2d at 697 (citing *Grayson*, 154 Wn.2d at 342). *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005).

Thus, unlike the sentencing court in *O'Dell*, the defendant's sentencing court did not err by refusing to consider a sentence based on an improper basis. In addition, it is clear from the record that the trial court would not have given the defendant an exceptional sentence under RCW 9.94A.535(1)(e) had one been requested. The trial court stated:

All right. I don't know about the proposition that the legislature assumes the State would exercise discretion. I suppose meaning that the State would charge less, drop

some, bargain some of the charges or counts. I don't know whether that's accurate or not. I kind of doubt that that was on the legislature's mind.

But I will say this: If the State were to exercise its discretion, that this is the kind of case that it would not be unreasonable for them to exercise their discretion not in a particularly helpful way to the defense, but in a harsher way, given the violence that was worked on the victims in this case and the events having gone on in their own home, kind of their last sanctuary.

I don't disagree with anyone's analysis that, under the circumstances, the low end of the range is appropriate. Again, that doesn't in any way in my mind diminish the impact on the victims. It just states the reality that this is a tough sentence to swallow for anybody. But I also want to say this (*with regard to defendant Ross*): as opposed to Ms. Oeung's situation, I would not have exercised discretion in identifying a mitigation – a mitigating reason and would not have imposed an exceptional sentence (*downward*) even if one were available based on the structure of the firearm enhancements.

RP 6/23/14, 75, 76. (Italicized by State to reflect context of statement).

The trial court did not abuse its discretion in imposing a standard range sentence in this case.

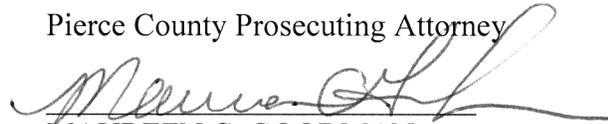
D. CONCLUSION.

Resentencing according to a mandate from a higher court is not appealable. Nor is imposing a sentence within the standard range appealable. Therefore, this Court should deny the defendant's request for remand for a full resentencing hearing. As the trial court did not exceed

the mandate of this Court, the sentences of the defendant should be affirmed.

DATED: July 12, 2019

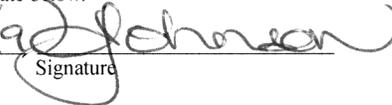
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7/12/19 
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PIERCE COUNTY PROSECUTING ATTORNEY

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