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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

QIUORDAI TAYLOR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doornick

No. 14-1-04698-9

Brief of Respondent

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

1. Whether the trial court properly recognized that its sentencing discretion was constrained by the Court of Appeals mandate to correct the judgement and sentence?
2. Whether defendant has failed to show his counsel was ineffective in failing to ask the court to resentence defendant where the Court of Appeals ordered only a correction to the judgment and sentence?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On November 24, 2014, the Pierce County Prosecuting Attorney charged Qiuordai Lewis Taylor, hereinafter “defendant,” with one count of manslaughter in the first degree, two counts of assault in the first degree, two counts of robbery in the first degree, two counts of kidnapping in the first degree, one count of burglary in the first degree, and three counts of assault in the second degree. CP 1-6.

The case proceeded to a jury trial before the Honorable Judge Kitty-Ann van Doorninck. The jury found defendant guilty on all counts. CP 19-20. Defendant was sentenced to 102 months on Count I (1st degree manslaughter) and 0 months on the remaining counts. CP 25. The court imposed consecutive firearm enhancements on each count for a total sentence of 666 months. *Id.*

Defendant subsequently appealed his conviction, arguing insufficient evidence supported the convictions for first degree assault, first degree manslaughter, and the firearm enhancements, the trial court failed to instruct the jury on the duty to render aid, the convictions for knife assault (Count XI) and first degree robbery (Count V) violated double jeopardy, and the trial court erred in finding that the manslaughter (Count I) and first degree assault (Count II) were not the same criminal conduct.

The Court of Appeals found insufficient evidence supported the firearm sentencing enhancement on the manslaughter conviction (Count I) and a scrivener's error listed a firearm sentencing enhancement on the second degree assault with a knife (Count XI) where it was charged as a deadly weapon enhancement and rejected defendant's other claims, holding,

[W]e affirm Wilson’s and Taylor’s convictions, but we dismiss the firearm sentencing enhancements on the manslaughter convictions with prejudice. We also sua sponte remand for correction of the judgment and sentences to reflect that one of Wilson’s and Taylor’s convictions was subject to a deadly weapon enhancement, not a firearm sentencing enhancement.

State v. Taylor, No. 48796-9-II, 2018 WL 509086, at *1 (Wash. Ct. App. Jan. 23, 2018), *review denied*, 190 Wn.2d 1022, 418 P.3d 803 (2018); CP 50. Defendant also sought discretionary review from the Supreme Court of Washington. *State v. Taylor*, 190 Wn.2d 1022, 418 P.3d 803 (2018). The Supreme Court denied the petition. *Id.*

On remand, the court and the parties agreed that the Court of Appeals mandated a correction of the judgment and sentence, to reflect the dismissed 60 month firearm enhancement on Count I and the deadly weapon enhancement on Count XI, rather than a resentencing. 2RP 7-8.¹ The court stated, “I will say, for the record, I’ve had other cases with the Court of Appeals says (sic), ‘and do a resentencing hearing,’ meaning hearing from everybody again. That’s not what it said this time; it’s pretty direct.” 2RP 8. The court reduced defendant’s sentence by 60 months and corrected the judgment and sentence as to Count XI. *Id.*, CP 101, 105.

¹ 2RP refers to the Verbatim Report of Proceedings dated September 14, 2018, transcribing the remand hearing.

Defendant's was sentenced to 606 months. CP 106. Defendant appealed. CP 116-134.

2. FACTS

The following facts are taken from the Court of Appeals opinion following defendant's first appeal. *Taylor*, 2018 WL 509086, at *20; CP 50-93.

On November 18, 2014, Harry Lodholm heard a knock at his front door. CP 55. As he unlocked the door, defendant, Duprea Wilson, and Taijon Voorhees forced their way into the home, pushing Harry to the floor and striking him in the back of the head twice with the butt of a pistol. CP 53, 55. Smacking Harry's head and sticking their fingers in the wounds on his head, the men demanded money, marijuana, and gold. CP 55. The men had traveled from Seattle to Lakewood intending to rob the home of a marijuana dealer, but mistakenly entered the home of Harry and Janice Lodholm. CP 53.

Janice Lodholm was taking a bath when one of the intruders kicked in the door wielding a knife and advanced at Janice. CP 55. When Janice defensively raised her hand in front of her face, the man sliced Janice's hand with the knife. *Id.* She was punched and dragged to the living room, where Harry was crouched on the floor. *Id.* The men pointed

a gun with a long barrel at Janice, demanded money, marijuana, and gold, and ordered her to the floor, holding the gun to her head. *Id.*

The men tied Harry and Janice Lodholm up and began ransacking the home. CP 56. One of the men said, “Just shoot her in the head, shoot her in the head now,” to which another replied, “No, not yet.” *Id.* When the men left the home, Harry untied himself and Janice and locked the front door. *Id.* Harry heard a gunshot fired near the front door where he was standing. *Id.* The Lodholms retreated to the bedroom to call 911 and Harry retrieved his pistol. *Id.*

The intruders reentered the home and broke through the bedroom door. *Id.* Harry shot Taijon Voorhees as he attempted to enter the bedroom. *Id.* Harry heard defendant or Wilson say, “We got to get out of here,” and the intruders left. *Id.* Defendant and Duprea Wilson drove around with a wounded Taijon Voorhees in their vehicle for some time, as Voorhees cried out in pain and begged the men to keep speaking to him. CP 58.

Eventually, defendant and Wilson dropped Voorhees in the parking lot of an apartment complex and called 911, fabricating a report of a shooting at the apartment complex. *Id.* The next day, Wilson told Voorhees’ girlfriend that Voorhees was already dead when they left him. *Id.* Despite the fact that there was at least one emergency room located

near the Lodholm's home, defendant and Wilson decided against taking Voorhees to the hospital, because they were fearful of questioning. *Id.*, CP 57.

The medical examiner who performed the autopsy on Voorhees opined that with medical attention, he would have survived the injury. CP 57. If someone had applied pressure to his wounds, he would have survived for hours, but without any attempt to stop the bleeding, he would have survived for minutes. *Id.* Voorhees bled to death about an hour after the Lodholms had called 911. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY RECOGNIZED THAT ITS SENTENCING DISCRETION WAS CONSTRAINED BY THE COURT OF APPEALS MANDATE TO CORRECT THE JUDGMENT AND SENTENCE.

An appellate court's mandate is binding on the lower court and must be strictly followed. *Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 189, 311 P.3d 594 (2013). “The finality of [the] portion of the judgment and sentence that was correct and valid at the time it was pronounced” is unaffected by the correction of the erroneous portion of a

sentence. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980) (citing *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), *overruled in part on other grounds* by *State v. Sampson*, 82 Wn.2d 663, 513 P.2d 60 (1973)).

In this case, the trial court properly followed the mandate of the Court of Appeals on remand. Following defendant's first appeal, the Court of Appeals opinion stated "[W]e dismiss the firearm sentencing enhancements on the manslaughter convictions with prejudice. We also sua sponte remand for correction of the judgment and sentences to reflect that one of Wilson's and Taylor's convictions was subject to a deadly weapon enhancement, not a firearm sentencing enhancement." CP 50.² The Court of Appeals directed the trial court to correct the judgment and sentence, not to conduct a resentencing hearing. *Id.*

The Court of Appeals dismissed the firearm enhancement on Count I, so the only remaining act for the trial court was non-discretionary: to correct the judgment and sentence to reflect that defendant's sentence was reduced by 60 months and fix the scrivener's

² The Court of Appeals opinion also later stated that the firearm sentencing enhancement on Count I "should be dismissed." CP 92. Such language reflects a legal conclusion rather than a directive order. Accordingly, the Court of Appeals mandate did not order the trial court to dismiss the enhancement on remand, because the Court of Appeals had already dismissed the enhancement on its own when it stated "we dismiss the firearm sentencing enhancements on the manslaughter convictions with prejudice." CP 50.

error on Count XI as to the deadly weapon enhancement.³ Therefore, the trial court was bound to only correct the judgment and sentence. The Court of Appeals did not give the trial court discretion to resentence defendant on remand.

Notably, the trial court pointed out, “I’ve had other cases with the Court of Appeals says, (sic) ‘and do a resentencing hearing,’ meaning hearing from everybody again. That’s not what it said this time; it’s pretty direct.” 2RP 8. Had resentencing been ordered, the court could have considered a new exceptional sentence under *State v. Houston-Sconiers*, 188 Wn. 2d 1, 391 P.3d 409 (2018). However, that is not what happened here. The Court of Appeals remanded for merely ministerial corrections, thus the trial court did not abuse its discretion in failing to consider a new exceptional sentence on remand. CP 50, 92.

The law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844, 848 (2005). RAP 2.5(c)(1)

³ A reviewing court may dismiss a charge on its own without remanding for a trial court to dismiss the charge. See, RAP 12.2 (Appellate court may reverse, affirm, or modify decision and take any other actions as the interest of justice may require); *State v. Dallas*, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995) (“As a matter of judicial economy, we dismiss the case with prejudice...[There is] no reason to allow this case to go back to the trial court.” (citing *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987))).

expresses an exception to the law of the case doctrine, in which trial courts are permitted to revisit an issue on remand that was not the subject of the earlier appeal, but only where the trial court exercises its independent judgment on remand. *State v. Kilgore*, 167 Wn.2d 28, 38, 216 P.3d 393 (2009).

On a second appeal, a defendant may raise sentencing issues not raised in a first appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). “Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.” *Kilgore*, 167 Wn.2d at 37.

Accordingly, defendant cannot challenge his sentence on the grounds he claims here, because he failed to raise the issue in his first appeal, and the trial court did not exercise independent discretion on remand. RAP 2.5(c) says that courts *may* consider issues that were not the subject of an earlier appeal, but only where the trial court exercises its independent judgment on remand. *Kilgore*, 167 Wn.2d at 38 (emphasis added). Defendant did not challenge the exceptional sentence in his first appeal, nor did the trial court exercise independent discretion when it

corrected the judgment and sentence on remand, so RAP 2.5(c) does not provide an exception to the law of the case doctrine in this case.

In *State v. Traicoff*, 93 Wn. App. 248, 251, 967 P.2d 1277 (1998), the Court of Appeals reversed a deadly weapon enhancement on the defendant's conviction for second degree assault, and the trial court entered a new judgment and sentence on remand, striking the enhancement. When the defendant sought to challenge his community custody conditions for the first time on a second appeal, the court declined to consider his claim under RAP 2.5(c), because the trial court had not exercised discretion on remand in striking the deadly weapon enhancement. *Id.* at 257-58.

Similarly here, when the trial court corrected the judgment and sentence on remand, it did not exercise independent discretion. The Court of Appeals unequivocally remanded for the trial court to merely correct the judgment and sentence, so the trial court did not have discretion to resentence defendant. CP 92; *See, Toney*, 149 Wn. App 179 (The court had broad discretion to resentence on all counts where the appeals court unequivocally ordered the court to resentence.) Accordingly, the exception to the law of the case doctrine provided by RAP 2.5(c) does not apply here, because he did not raise it in his first appeal, and the trial court did not exercise independent discretion on remand.

In *Greene v. Rothschild*, 68 Wn.2d 1, 8, 414 P.2d 1013, 1015 (1966), our Supreme Court outlined that a court may elect not to apply the law of the case doctrine in circumstances where perpetuating a prior erroneous appellate decision would result in a manifest injustice. The court noted, “an appellate court's power to depart from its own ruling on a former appeal may be invoked not as a matter of right, but of grace and discretion, and should be exercised only sparingly or rarely, and for cogent reasons.” *Id.* The court also made clear, “a decision rendered on a prior appeal, whether ‘right or wrong,’ becomes the law of the case.” *Id.*

Even if this Court erred in ordering a correction of the judgment and sentence rather than a resentencing, this Court should not make an exception to the doctrine in this case, because defendant could have argued this issue in an earlier appeal, but did not. In *Greene*, the court overruled its prior decision, because it found that application of the doctrine would result in unfairness to the litigants, and noted that the issue was “earnestly argued” below. *Id.* at 10. Thus, the court found the appellant had not waived its objection to the prior decision. *Id.* This Court should not make an exception to doctrine here, because defendant failed to raise this issue in his first appeal. A court’s decision to overrule its prior decision is discretionary and should be exercised sparingly. *Id.* at 8.

Furthermore, even if this case is sent back to the trial court for resentencing, the record does not show that the trial court would impose a different sentence. Under *State v. McFarland*, 189 Wn.2d 47, 59, 399 P.3d 1106 (2017), resentencing is warranted where the record suggests a possibility that a sentencing court would have imposed a different sentence had it recognized its discretion to. Here, at the time of the first sentencing, although the court acknowledged its lack of discretion in imposing flat time firearm enhancements, it indicated it would not have departed further downward if it could have. 1RP 64.⁴

At sentencing, counsel for defendant argued for an exceptional sentence based on youth under *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015). 1RP 56-57. Finding that the presumptive sentence of 99 years was clearly excessive, the court imposed an exceptional sentence downward, imposing 0 months on Counts II-XI. However, the court imposed 102 months on Count I, “balancing the safety of the community.” 1RP 64. The trial court considered defendant’s youth when it initially imposed his sentence, but nonetheless imposed 102 months. *Id.* Even if the trial court had exercised discretion and resented defendant on remand, the record suggests it would have imposed the same sentence, in order to

⁴ 1RP refers to the Verbatim Report of Proceedings dated March 25, 2016, transcribing defendant’s first sentencing hearing.

account for the interests of the community in which defendant committed heinous crimes. *Id.* Accordingly, sending this case back to the trial court for resentencing is not warranted.

The trial court properly followed the Court of Appeals mandate to correct the judgment and sentence. Defendant failed to raise this issue in his first appeal, and the trial court did not exercise independent discretion on remand, so this Court should apply the law of the case doctrine to bar review of defendant's claim. Even if the trial court had discretion to resentence defendant, the record does not show that it would have imposed a different sentence. Accordingly, this Court should affirm defendant's convictions and sentence.

2. HAS DEFENDANT FAILED TO PROVE HIS COUNSEL WAS INEFFECTIVE IN FAILING TO ASK THE COURT TO RESENTENCE DEFENDANT WHERE THE COURT OF APPEALS ORDERED ONLY A CORRECTION TO THE JUDGMENT AND SENTENCE?

Claims of ineffective assistance of counsel require a showing of a two-prong test for which the defendant bears the burden. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2050, 80 L.Ed.2d 674 (1984). The defendant must prove both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.* at 687. A failure to satisfy either prong is fatal to a claim of ineffective assistance of

counsel. *State v. McLean*, 178 Wn. App. 236, 246, 313 P.3d 1181 (2013), review denied, 179 Wn.2d 1026 (2014).

Counsel's performance is only deficient where it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. The reasonableness of trial counsel's performance is reviewed in light of all the circumstances of the case at the time of counsel's conduct. *Strickland*, 466 U.S. at 688, *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). The defendant bears the burden of establishing the absence of any conceivable, legitimate strategy or tactic explaining counsel's performance to rebut this presumption. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

The second prong, prejudice, is only met when a defendant shows a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 669. "Counsel's failure to make a motion does not support an ineffective assistance of counsel claim unless the defendant can show that the motion would properly have been granted." *State v. Price*, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005). Prejudice is not shown when counsel declines to request an exceptional sentence if the record suggests the court would not have imposed one. *State v. Hernandez-Hernandez*, 104 Wn. App. 263, 266, 15 P.3d 719 (2001).

Courts engage in a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335; *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *McFarland*, 127 Wn.2d at 335; *State v. Blight*, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

In this case, counsel was not deficient, because he had no duty to ask the court to impose a new exceptional sentence where the mandate from the Court of Appeals ordered a ministerial correction, rather than a resentencing. CP 92. At the remand hearing, counsel for defendant apprised the court of the change in law under *Houston-Sconiers*. 2RP 4-5; 188 Wn.2d 1. However, all of the parties agreed that the Court of Appeals remanded for the trial court to merely correct the judgment and sentence as to Counts I and XI, rather than hold a resentencing hearing. 2RP 5-7.

The court explained,

Frankly, I thought there might be an agreement between the parties and we would judge have a corrected Judgment and Sentence... I don't think it's a resentencing. I think it's a, correct the Judgment and Sentence... I will say, for the record, I've had other cases with the Court of Appeals (sic) says, "and do a resentencing hearing," meaning hearing from everybody again. That's not what it said this time; it's pretty direct.

2RP 5-8.

Counsel for defendant responded, “I don’t disagree with the Court at all.” 2RP 8. Although counsel for defendant apprised the court of the change in law under *Houston-Sconiers*, the Court of Appeals mandate was clear, thus counsel had no duty to object to the court’s action in merely correcting the judgment and sentence, which was consistent with the Court of Appeals mandate. 188 Wn.2d 1; CP 50.

Furthermore, defendant cannot show he was prejudiced by counsel’s performance, because the record suggests the court would not have imposed a new exceptional sentence, even if counsel had asked for one. Counsel initially apprised the court of its discretion under *Houston-Sconiers*. 2RP 4-5; 188 Wn.2d 1. However, the court pushed back, stating numerous times that it’s interpretation of the Court of Appeals mandate was to merely correct the judgment and sentence. 2RP 5-8; CP 92. Thus, even if counsel had asked the court to resentence defendant, the record does not show that the court would have done so. 2RP 5-8. The Court of Appeals mandate ordered a correction of the judgment and sentence, so the trial court was proper to not resentence defendant. CP 50.

Additionally, defendant was not prejudiced, because the record does not suggest the trial court would have sentenced defendant further downward even if it had the discretion to resentence defendant. As explained above, at the time of the first sentencing, the trial court imposed

102 months on Count I, in order to account for the interests of the community in which defendant committed his crimes. 1RP 63. The trial court could have departed further downward from the standard range based on age mitigation on Count I under *O'Dell*, which counsel argued for at the first sentencing. *O'Dell*, 183 Wn.2d at 696; 1RP 56-57.

While the court acknowledged defendant's youth, the court nonetheless felt it was necessary to impose at least some time aside from the mandatory firearm enhancements, imposing 102 months on Count I. 1RP 63. Therefore, there was no prejudice here, because there was no reasonable possibility that the court would have given defendant a different exceptional sentence on remand, even if counsel had asked for a full resentencing on remand.

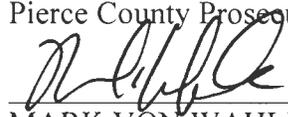
Defendant has failed to show counsel was deficient, because there was no reason to ask the court to resentence defendant when the Court of Appeals mandate ordered only a correction to the judgment and sentence, not a resentencing. Similarly, defendant was not prejudiced by counsel's performance, because the record shows the court would not have imposed a new sentence had counsel requested one. Accordingly, defendant's claim of ineffective assistance of counsel fails. This Court should affirm defendant's convictions.

D. CONCLUSION.

The trial court in this case imposed defendant's sentence not because it misunderstood its discretion, but rather, to account for the seriousness of defendant's reprehensible crimes. Accordingly, there is and was no reason to remand for resentencing where the record shows the trial court would impose the same sentence. On remand, the trial court was bound by the Court of Appeals mandate to only correct the judgment and sentence. Accordingly, counsel was not ineffective for failing to argue for resentencing on remand. For all of these reasons, the State respectfully requests that this Court affirm defendant's convictions.

DATED: June 24, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



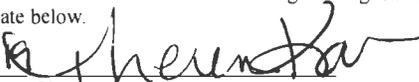
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6-24-19 

Date

Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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