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**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Ernest Jackson Kornegay,

Appellant.

Brief of Appellant

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1. Introduction

Under recent amendments to the persistent offender statutes, Kornegay is no longer a persistent offender. With the removal of Robbery in the second degree from the list of strike offenses, Kornegay has only one prior strike offense. The Court should reverse his life sentence and remand for resentencing under the standard sentencing grid.

Kornegay's convictions on Counts 4 and 6 were not supported by the trial court's findings of fact. The trial court correctly found that the victim was not afraid of Kornegay's threats. Kornegay could not be guilty of Robbery because the victim gave him money willingly, not out of fear, just to get him to leave. Kornegay could not be guilty of Felony Harassment because the victim was not placed in fear that the threat would be carried out. This Court should reverse the convictions and dismiss the charges.

The State unreasonably delayed charging Kornegay with Counts 1 through 4, 6, and 10-17 until the last court day before trial, forcing him to waive his speedy trial rights in order to adequately prepare to face the charges. This Court should reverse the convictions and dismiss the charges.

2. Assignments of Error

Assignments of Error

1. Kornegay's life sentence is no longer valid after the passage of Laws of 2019, Ch. 187, because he now has only one prior strike offense.
2. The trial court erred in finding Kornegay guilty of Count 4, Robbery in the first degree. The conclusion was not supported by the trial court's findings of fact.
3. The trial court erred in finding Kornegay guilty of Count 6, Felony Harassment. The conclusion was not supported by the trial court's findings of fact.
4. The trial court erred in failing to dismiss Counts 1-4 and 6, which were added to the information on the last court day before trial despite the State having knowledge of them months in advance.
5. Kornegay received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Laws of 2019, Ch. 187 removes Robbery in the second degree from the list of strike offenses for persistent offenders. New statutes that affect sentencing apply to cases that are pending on direct appeal. With this change, Kornegay has only one prior strike offense. Should this Court remand for resentencing under the standard sentencing grid? (assignment of error 1)
2. One of the essential elements of Robbery in the first degree is that property was taken against the victim's will. The trial court found that Whitley was not afraid of Kornegay's threat and gave him money just to get him to leave. Should this Court reverse the conviction because it was not supported by the trial court's findings of fact? (assignment of error 2)

3. One of the essential elements of Felony Harassment is that the threat puts the victim in reasonable fear that the threat will be carried out. The trial court found that Whitley was not afraid of Kornegay's threat. Should this Court reverse the conviction because it was not supported by the trial court's findings of fact? (assignment of error 3)
4. Adding new charges to the information on the eve of trial and forcing a defendant to choose between his rights to speedy trial or to prepared counsel is reasonable grounds to dismiss the new charges, particularly where the State provided no reason for the delay in bringing the charges. Should this court reverse conviction for Counts 1-4 and 6 and dismiss the charges? (assignments of error 4-5)

3. Statement of the Case

3.1 Kornegay assaulted Whitley on multiple occasions.

Ernest Kornegay and Krystal Whitley lived together as a couple for about one year. CP 162. Whitley testified that seven to eight months into the relationship, Kornegay began exerting control over her and her movements. CP 162.

In May or June of 2016, the two got into a heated argument. CP 162. Whitley ran to the children's bedroom, where Kornegay pinned her down with both hands over her mouth and nose until she passed out. CP 162-63.

Months later, Whitley discovered Kornegay in bed with another woman. CP 163. An argument ensued, and Kornegay slapped the left side of Whitley's face at the ear. CP 163. Whitley

immediately felt a pop and whooshing noise in her ear and temporarily lost hearing in the ear, which lasted two weeks. CP 163.

3.2 Kornegay threatened to shoot Whitley if she wouldn't give him money, but Whitley was not afraid.

Whitley moved out to live with her friend, Kaneisha Lewis. CP 163. One day, Kornegay contacted Lewis, looking for Whitley. CP 163-64, 168. Kornegay then waited at the apartment complex where Lewis lived, until Lewis and Whitley came home at the same time. CP 164, 168-69. Kornegay asked Whitley to give him money for food. CP 164. He showed Whitley a gun in his hand and said, "If you don't give me any money, I'm going to smoke you." CP 164, 169.

Whitley was not afraid. CP 164. She "was just tired of dealing with all of [his] threats." CP 164. She responded, "If that's what you're gonna do, just do it." CP 164. She gave Kornegay ten or fifteen dollars to get him to leave the apartment complex. CP 164.

3.3 Kornegay was arrested for possession of a stolen vehicle and unauthorized possession of a firearm.

The next time Whitley saw Kornegay was November 16, 2016. CP 165. She met with him briefly then went to work at Safeway. CP 165. He came into the store and asked her to hold

his backpack. CP 165. Kornegay was arrested at the store for possession of a stolen car. CP 165. Kornegay told Whitley to give the backpack to the police. CP 165. It contained the same gun that Kornegay had brandished at Whitley just days before. CP 165.

3.4 The State delayed charging Kornegay with Counts 1 through 4, 6, and 10 through 17 for nine months, until the last court day before trial, despite having knowledge of the facts within the first two months after his arrest.

Kornegay was arraigned on December 22, 2016, and his trial date set for February 13, 2017. CP 408.¹ Both defense counsel and the State made multiple requests for continuances, which the trial court granted, eventually setting the trial date to September 18, 2017, with a speedy trial deadline of October 18, 2017. CP 415-40. Kornegay objected to all of these continuances. *See, e.g.*, RP, Dec. 15, 2017, at 9-10.²

The original information charged one count, assault with a deadly weapon, occurring on or about November 1 to 16, 2016.

¹ CP numbers above 402 are part of a supplemental designation filed together with this brief. The numbers here are those expected by counsel based on the designation. If necessary, counsel will file an amended brief to correct any errors after the supplemental clerk's papers are received.

² The Verbatim Reports of the trial are numbered by volume, but the reports of pre- and post- trial hearings, including sentencing, are not. This Brief will refer to the trial reports by volume and page number, and the other reports by hearing date and page number.

CP 403-04. Under a separate case number, the state also charged Kornegay with possession of a stolen vehicle and unlawful possession of a firearm, the charges for which he had originally been arrested. *See* CP 34-35. One month later, the state amended the information to add a charge of violation of a no-contact order. CP 409-11. For nine months, these four charges were the only charges that had been brought against Kornegay.

On Friday, September 15, 2017, the last court day before trial, the State again amended the information, bringing the two cases together and adding fourteen more charges, for a total of eighteen. *See* CP 1-20. In the face of this sea change on the eve of trial, Kornegay requested a continuance. CP 441-43. Trial was set for January 8, 2018. CP 442-43.

In a brief to the court later that month, the State disclosed that it had been aware of the facts constituting Counts 1-4 and 6 (all of which were new in the second amended information) as early as the day of Kornegay's arrest in November 2016. *See* CP 446-47 (Whitley disclosed Count 2 in her initial interview the day of the arrest. She described Counts 2-6 in more detail in a subsequent interview on December 14, 2016. She disclosed the facts of Count 1 in a defense interview on May 22, 2017.).

3.5 In a bench trial, the court found Kornegay guilty of Counts 1 through 4 and 6 but specifically found insufficient evidence that Whitley was placed in fear on Count 5.

Trial was eventually held in late July 2018. 1 RP 1. The State filed a third amended information, dropping Count 18 and adjusting some dates. CP 123-41. Kornegay pled guilty to Counts 7 through 17. CP 151; 1 RP 14-15. The case was tried to the judge on Counts 1 through 6. *See* 1 RP 5, 16. Trial concluded on July 26. *See* 3 RP 225. The trial court announced its decision on August 21. *See* 3 RP 225, 249.

The trial court entered findings of fact and conclusions of law. CP 161-73, 370-73. The trial court found Kornegay guilty of Counts 1 through 4 and Count 6. CP 171-73. The trial court found Kornegay not guilty of Count 5, assault with a deadly weapon. CP 172. “The Court finds insufficient evidence of a reasonable apprehension and fear by the victim to support the charge.” CP 172.

3.6 Kornegay moved for relief from judgment and for a new trial, arguing ineffective assistance of counsel.

Prior to sentencing, Kornegay moved, pro se, for relief from judgment under CrR 7.8 and for new trial under CrR 7.5, both on the basis of ineffective assistance of trial counsel. CP 291-99. Prior to trial, counsel had agreed with Kornegay that she would aggressively cross-examine all witnesses, including

impeaching Whitley's testimony with five prior inconsistent statements. CP 294, 298. Counsel agreed to call as a witness the doctor who had seen Whitley the day after the alleged assault and diagnosed her with an ear infection with no rupture. CP 293-94, 298. Kornegay relied on these promises when he declined the State's offered plea agreement and went to trial, risking the possibility of life imprisonment. CP 293, 298.

At trial, counsel did not cross-examine Sergeant Keith Hall, 1 RP 37, asked five questions of Robert Ziemer, the physician's assistant, 1 RP 49-50, did not cross-examine Deputy Anthony Graham, 1 RP 66, did not cross-examine Detective Michael Grant, 1 RP 73, did not cross-examine Detective Cory Manchester, 1 RP 117, asked only a handful of questions of Kanisha Lewis, 2 RP 155-56, and again only a handful of questions for Whitley, 2 RP 216-17. The only attempt counsel made to impeach Whitley was to present a few pages from a single interview in which Whitley said she gave Kornegay both money and a phone during the alleged robbery, arguing, "It goes to her credibility and her ability to remember a number of things." 2 RP 219; Ex. 21.

3.7 Kornegay was sentenced to life imprisonment as a persistent offender.

Kornegay was sentenced to life imprisonment without possibility of parole, as a persistent offender under RCW 9.94A.570. *See* RP, Nov. 2, 2018, at 20; CP 377. His two prior strike offenses were Second Degree Robbery in 2003 and Second Degree Assault in 2006. CP 375-76. The trial court imposed maximum standard range sentences on all other counts. RP, Nov. 2, 2018, at 20; CP 376-77.

4. Argument

4.1 This Court should reverse Kornegay’s life sentence as a persistent offender because recent statutory amendments removed Robbery 2 from the list of strike offenses.

Under RCW 9.94A.570, “a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release.” A persistent offender is one who is convicted on three separate occasions of any felony that is listed as a “most serious offense,” colloquially known as “strike offenses.” RCW 9.94A.030(38).

At the time of Kornegay’s conviction in this case, the list of strike offenses included Assault in the second degree and Robbery in the second degree. RCW 9.94A.030(38) (2018). Kornegay has separate prior convictions of Assault in the second degree (in 2006) and Robbery in the second degree (in 2003).

CP 375-76. At the time of sentencing, the trial court properly sentenced Kornegay as a persistent offender.

However, Laws of 2019, Ch. 187, effective July 28, 2019, amends the list of strike offenses to remove Robbery in the second degree. Under this amendment, Kornegay has only one prior strike offense. If the amendment applies to Kornegay, he is not a persistent offender and must be resentenced under the standard sentencing grid.

A newly enacted statute or court rule generally applies to all cases pending on direct appeal and not yet final. *State v. Jefferson*, 192 Wn.2d 225, 246, 429 P.3d 467 (2018). Statutes apply prospectively to “triggering events” that occur after their effective date. *State v. Blank*, 131 Wn.2d 230, 248, 930 P.2d 1213 (1997). The triggering event for a statute that affects post-judgment matters (such as fees and costs or an offender’s sentence) is the termination of the case. *Jefferson*, 192 Wn.2d at 247; *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). Thus, “when the new statute concerns a postjudgment matter like the sentence ... the new statute or court rule will apply to the sentence ... while the case is pending on direct appeal, even though the charged acts have already occurred.” *Jefferson*, 192 Wn.2d at 247.

The new amendment here concerns the sentence for Kornegay’s current crimes. The fact that the persistent offender

designation originates in conduct prior to the effective date of the amendment does not render the amendment retroactive. *State v. Pillatos*, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007) (“A statute is not retroactive merely because it applies to conduct that predated its effective date”). The triggering event for the persistent offender statute is still the finality of the current sentence at the conclusion of direct appeal.

The new amendment applies to Kornegay because his case will still be pending on direct appeal after the amendment’s effective date. Under the amendment, Kornegay is not a persistent offender because he has only one prior strike offense. This Court should reverse his life sentence and remand to the trial court for resentencing under the standard sentencing grid.

4.2 This Court should reverse the convictions for Counts 4 and 6 (Robbery and Felony Harassment) because essential elements of the crimes were not supported by the trial court’s findings of fact.

The trial court correctly found Kornegay not guilty of Count 5, assault with a deadly weapon, due to the fact that Kornegay’s conduct, including brandishing a gun, failed to create in Whitley any apprehension or imminent fear of bodily injury. CP 172. Whitley was not afraid. CP 164. She was over it. She was tired of dealing with Kornegay’s threats. CP 164. She

challenged him, knowing he wouldn't follow through. CP 164.

She gave him some money to get him to leave. CP 164.

Based on these same findings of fact, the trial court should have found Kornegay not guilty of Counts 4 and 6 as well. The trial court's findings of fact do not support a conviction of Robbery in the first degree because Kornegay did not take the money against Whitley's will. The findings do not support a conviction of Felony Harassment because Kornegay did not place Whitley in fear for her life. Because these essential elements were not supported by substantial evidence, this Court should reverse and vacate the convictions on Counts 4 and 6.

4.2.1 Kornegay was not guilty of Robbery in the first degree because he did not take the money against Whitley's will.

“A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence **against his or her will** by the use or threatened use of immediate force, violence, or fear of injury. RCW 9A.56.190 (emphasis added). One of the essential elements of the crime is “that the taking **was against the person's will** by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person.” WPIC 37.02 (emphasis added); CP 371-72.

The trial court did not find that Kornegay took Whitley's money against her will by threat of force. While it may be correct to conclude that Kornegay brandishing the gun and threatening to shoot Whitley was a threatened use of immediate force, that is not enough to convict. As the trial court found, Whitley was unfazed by the threat. She was not afraid. CP 164. The threat of force did not compel her to give up her money against her will. Rather, she willfully chose to give Kornegay ten or fifteen dollars just to get him to leave. CP 164.

Because Kornegay did not take Whitley's money against her will, he could not be guilty of Robbery in the first degree. The trial court's findings do not support a finding of guilt on Count 4. Because this conviction is not supported by substantial evidence, this Court should reverse and vacate the conviction on Count 4.

4.2.2 Kornegay was not guilty of Felony Harassment because his threat did not place Whitley in fear that the threat would be carried out.

A person is guilty of Felony Harassment if they knowingly threaten to kill a person immediately or in the future and by so doing place the person threatened in fear that the threat will be carried out. RCW 9A.46.020. One of the essential elements of the crime is, "that the words or conduct of the defendant placed

[Whitley] **in reasonable fear** that the threat to kill would be carried out.” WPIC 36.07.02 (emphasis added); CP 372.

Again, the trial court did not find that Whitley was placed in fear for her life. While it may be correct to conclude that Kornegay brandishing the gun and saying, “If you don’t give me any money, I’m going to smoke you,” was a threat to kill, that is not enough to convict. The trial court expressly found that Whitley **was not afraid**. CP 164. She challenged Kornegay, **knowing that he would not follow through**: “If that’s what you’re gonna do, just do it.” CP 164. When he didn’t do anything, she gave him money to get him to go away. CP 164. Even though the trial court found that Kornegay threatened to kill Whitley, that is not enough.

Because Kornegay did not place Whitley in fear for her life, he could not be guilty of Felony Harassment. The trial court’s findings do not support a finding of guilty on Count 6. Because this conviction is not supported by substantial evidence, this Court should reverse and vacate the conviction on Count 6.

4.3 This Court should vacate the convictions on Counts 1 through 4 and 6 due to State misconduct that materially affected Kornegay’s right to a fair trial.

Under CrR 8.3(b), a trial court may, on its own motion, in the furtherance of justice, dismiss charges due to governmental misconduct when there has been prejudice to the rights of the

accused which materially affect the accused's right to a fair trial. Governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). When the State inexcusably fails to act with due diligence, and material facts are not disclosed until shortly before a crucial stage in litigation, "it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced." *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). "Such unexcused conduct by the State cannot force a defendant to choose between these rights." *Id.*

In *Michielli*, the defendant had been charged with a single count of theft. *Michielli*, 132 Wn.2d at 232-33. Three business days before the scheduled trial date, the state amended the information to include four additional counts of theft and trafficking in stolen property, all arising from the same set of facts as the original charge. *Id.* at 233. The State admitted that it had all necessary information for the additional charges at the time of the original charge. *Id.* at 243.

These facts strongly suggest that the prosecutor's delay in adding the extra charges was done to harass Defendant. There appears to be no other reasonable explanation for why the prosecutor waited until five days before trial to add the new

charges, when the prosecutor admittedly possessed all the information and evidence to support those charges in July 1993, if not earlier.

Id. at 244. “The long delay, without any justifiable explanation, suggests less than honorable motives.” *Id.*

The court held that Michielli was prejudiced, “in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days before the scheduled trial.” *Michielli*, 132 Wn.2d at 244. “The State, by adding four new charges just before the scheduled trial date, without any justification for the delay in amending the information, forced Mr. Michielli either to go to trial unprepared, or give up his speedy trial right.” *Id.* at 245.

The court held that the State’s delay in amending the charges, forcing the defendant to waive his speedy trial right in order to prepare a defense to the new charges, constituted mismanagement and prejudice justifying dismissal of the new charges under CrR 8.3(b). *Michielli*, 132 Wn.2d at 245.

The facts here are similar, but more extreme. The original information, filed December 20, 2016, charged one count, assault with a deadly weapon.³ CP 403-04. Under a separate case number, the state also charged Kornegay with possession of a stolen vehicle and unlawful possession of a firearm, the charges

³ This ultimately became Count 5. CP 6-7.

for which he had originally been arrested.⁴ *See* CP 34-35. One month later, the state amended the information to add a charge of violation of a no-contact order.⁵ CP 409-11. For **nine months**, these four charges were the only charges that were brought against Kornegay.

In the meantime, the State was sitting on knowledge of facts that supported **fourteen more charges**. In her initial interview on the day of the arrest in November 2016, Whitley had disclosed a second assault that was not charged.⁶ CP 446-47. In a subsequent interview on December 14, 2016, Whitley described both assaults in more detail, revealing the information that would ultimately become Counts 2 through 6. CP 447. In a defense interview on May 22, 2017, Whitley disclosed the assault by strangulation that ultimately became Count 1. CP 447. Counts 9 through 16 all related to recorded phone calls from jail between December 23 and December 30, 2016. CP 447-48. Count 17 related to a letter from Kornegay to Whitley, which Whitley turned over to law enforcement in February 2017.

The State had knowledge supporting all of the new charges as early as November and December of 2016 or as late as May 2017, but delayed charging Kornegay with any of the

⁴ These became Counts 7 and 8. CP 9-10.

⁵ This became Count 9. CP 10.

⁶ This would become Count 2. CP 2-3.

new charges until Friday, September 15, 2017, the last court day before trial was set to begin on the following Monday, September 18, 2017. The State delayed from four to nine months, without any apparent justification, before springing the charges on Kornegay at almost literally the last second, leaving him with no way to prepare to face the new charges at trial.

Like Michielli, Kornegay had no choice but to waive his speedy trial rights in order to prepare for trial on the new charges. *See* CP 441-43. Just as in *Michielli*, the State's delay in bringing the new charges constitutes government misconduct (mismanagement) that prejudiced Kornegay's rights to a fair trial. The new charges should have all been dismissed under CrR 8.3(b). This Court should reverse the convictions on Counts 1 through 4 and 6 and dismiss the charges.⁷

5. Conclusion

Under recent amendments to the persistent offender statutes, Kornegay is no longer a persistent offender. The Court should reverse his life sentence and remand for resentencing under the standard sentencing grid.

⁷ To the extent Kornegay may have failed to preserve this issue for appeal, this Court may consider it for the first time under RAP 2.5(a). It is manifest error affecting a constitutional right. The State's misconduct and the trial court's failure to dismiss the delayed charges prejudiced Kornegay's speedy trial right and his right to prepare an adequate defense. *See Michielli*, 132 Wn.2d at 240.

Kornegay's convictions on Counts 4 and 6 were not supported by the trial court's findings of fact. This Court should reverse the convictions and dismiss the charges.

The State unreasonably delayed charging Kornegay with Counts 1 through 4, 6, and 10-17 until the last court day before trial, forcing him to waive his speedy trial rights in order to adequately prepare to face the charges. This Court should reverse the convictions and dismiss the charges.

Respectfully submitted this 28th day of June, 2019.

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