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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ERNEST JACKSON KORNEGAY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 16-1-01563-6

BRIEF OF RESPONDENT

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DATED December 10, 2019, Port Orchard, WA

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Legislature intended to apply its 2019 amendment to the definition of “persistent offender” to Kornegay’s 2016 offenses?

2. Whether the evidence was insufficient to support Kornegay’s convictions for robbery & felony harassment?
[CONCESSION OF ERROR]

3. Whether Kornegay’s unpreserved *Michielli* claim should be rejected because the record fails to show either state mismanagement or any prejudice to his defense?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Ernest Jackson Kornegay was charged by second amended information¹ filed on September 15, 2017, with the following offenses:

Ct.	Offense	Date(s)²	Aggravator
1	Second-Degree Assault	5/1-8/1	DV
2	Second-Degree Assault	10/31-11/8	DV
3	Unlawful Imprisonment	10/31-11/8	DV
4	First-Degree Robbery (Firearm)	11/14-11/16	DV
5	Second-Degree Assault (Firearm)	11/1-11/16	DV
6	Felony Harassment (Firearm)	11/14-11/16	DV
7	Unlawful Possession of a Firearm	11/16	
8	Possession of a Stolen Vehicle	11/16	
9	Felony Violation of a Court Order	12/23	
10	Felony Violation of a Court Order	12/25	
11	Felony Violation of a Court Order	12/26	
12	Felony Violation of a Court Order	12/26	
13	Felony Violation of a Court Order	12/26	
14	Felony Violation of a Court Order	12/28	
15	Felony Violation of a Court Order	12/30	
16	Witness Tampering	12/22-12/30	
17	Witness Tampering	1/12	
18	Felony Violation of a Court Order	9/6/17	

CP 1. Kornegay pled guilty to Counts 7 through 17. CP 142. The case

¹ The third amended information contains the same charges with some variation as to the dates. CP 123. That amendment is not at issue in this appeal.

² All dates 2016 unless otherwise indicated.

proceeded to a bench trial on the remaining counts. The trial court found Kornegay guilty as charged as to Counts 1 through 4 and 6, and acquitted him on Count 5. CP 171-73; 370-73.

B. FACTS

On November 16, 2016, Kornegay was seen by sheriff's deputies operating a car with different license plates front and back. 1RP 52, 76. They detained him to investigate the license plate situation and he told them he had a "DOC warrant." 1RP 56. After being arrested, Kornegay told them he knew the car was likely stolen. 1RP 58. Kornegay had his girlfriend, Krystal Whitley, turn over a backpack to the deputies. 1RP 62, 79-80. Kornegay said the gun in it was his. 1RP 61, 80. Subsequent testing showed the gun was an operable firearm. 1RP 72.

Kornegay and Krystal Whitley began a dating relationship in September of 2015 and moved in together shortly after. 2RP 162-63. About seven to eight months later, the relationship changed. 2RP 164. Kornegay began to exert more control over Whitley and her movements. 2RP 164-65.

Around May 2016, she received a text message from an unknown male and could not tell Kornegay who had texted her. 2RP 167-68. Whitley went into the bathroom to avoid a dispute, but Kornegay followed and pushed Whitley against the wall and slammed her cell phone

into the wall, shattering it. 2RP 168.

One to two weeks later, Whitley and Kornegay got into another argument. 2RP 169. Whitley left the room and Kornegay pursued her and attempted to grab her. 2RP 170. Whitley then ran to the children's bedroom. 2RP 170. Kornegay had Whitley on the bed and was on top of her with both hands over her face. 2RP 170. She clarified that Kornegay's hands were over both her mouth and her nose so that she was unable to talk or breathe, and that he held his hands there until she passed out. 2RP 171.

Whitley and Kornegay moved to the Silver Street house and lived there until October 2016. 2RP 172, 174. Incidents of domestic violence between her and Kornegay continued. 2RP 175-76.

After that they moved to Marena McPherson's home and stayed there for approximately one week. 2RP 174. During this one week stay, Whitley walked in on Kornegay and McPherson in bed together. 2RP 179. An argument ensued and moved from the bedroom to the bathroom, where Kornegay pinned Whitley against a closet door and forcefully slapped the left side of her face at the ear. 2RP 179-83. Whitley immediately felt a "pop" and a "wooshing noise" in her ear and temporarily lost hearing in her left ear. 2RP 183. When she complained, he punched her in the eye. 2RP 183. The hearing loss lasted a few weeks. 2RP 185. Whitley sought

medical attention twice because of the ongoing loss of hearing. 2RP 184-85.

The physician's assistant who treated Whitley on November 8, 2016, testified that Whitley presented with a 30% rupture of the tympanic (inner ear) membrane, and a bruised (or "black") eye. 1RP 38, 41, 44. The ear showed no drainage that would have been indicative of an ear infection as cause for the rupture. 1RP 50. Damage to the tympanic membrane was consistent with being struck in the ear. 1RP 46. The noted bruising to the eye added credibility to Whitley's statement as to causation of her ear injury. 1RP 48.

Whitley ended her relationship with Kornegay after that and moved in with her friend, Kanasha Lewis. 2RP 174. A few days before Kornegay's, she received a call from Lewis warning her that Kornegay was looking for her. 2RP 186-87. Lewis warned her not to walk home. 2RP 187. Lewis gave Whitley a ride back to their apartment. 2RP 187. Kornegay was waiting at the apartment complex in his car and told her to "come here." 2RP 188. Kornegay told Whitley he wanted "money for food", which she took to mean methamphetamine. 2RP 188. Whitley refused. 2RP 188. Kornegay then showed a gun in his hand, pointed it at her, and said, "If you don't give me any money, I'm going to smoke you." 2RP 189. She was not scared. 2RP 190. She gave him the money so he

would leave. 2RP 191.

Whitley saw both Kornegay and the gun on the day he was arrested at the Safeway. 2RP 190. She earlier agreed to meet Kornegay to put some gas in his car. 2RP 192. She then went to work at Safeway. 2RP 193. Kornegay came into the store and asked her to hold his backpack. 2RP 193. After Kornegay was arrested he told her to “tell [the police] everything.” 2RP 199.

After Kornegay’s arrest, Whitley spoke with police at the Silverdale Kitsap County Sheriff’s Office. 2RP 201. She had a black eye at the time of the interview. 1RP 83, 2RP 201. She was accompanied by her mother-in-law who told police that Kornegay had been physically abusive with Whitley. 1RP 82, 2RP 201, 204.

The mother-in-law knew about the abuse because she would pick Whitley up from the Silver Street house when she “was fed up with the hitting.” 2RP 204. Whitley did not want to tell police about the abuse because she “didn’t want them in [her] business.” She went back to Kornegay time and time again because he would always promise not to hit her anymore and she “thought it would get better.” 2RP 204-05. Kornegay would strike her all the time and she “didn’t know what was behind them because I would work and come back home. If I didn’t do something he said quick enough, or looked at anyone in the house, he would get angry.”

Lewis characterized herself as Whitley's best friend. 2RP 135. She described Whitley and Kornegay's relationship as "abusive." 2RP 136. She detailed instances where Whitley had appeared with bruises on her arms, legs, and face. 2RP 137. On one occasion, Lewis met with Whitley who was unable to hear her and asked her to talk "to the opposite side" so she could hear her better. 2RP 138-39.

Lewis lent Whitley her phone to text Kornegay. Kornegay texted back: "I promise I'll never hit you again." 2RP 139-40. Lewis identified a cell phone photograph she had taken of Whitley's bruises, admitted as Exhibit 17. 2RP 140-42. After Whitley moved in with Lewis, Kornegay continued contact with her.

In one incident, Kornegay and Whitley got into an argument and that Kornegay "had his arm around [Whitley's] neck, holding her roughly" because she wouldn't give him her food stamp card. 2RP 144.

In another incident, Kornegay came to their apartment looking for Whitley. 2RP 145. Lewis was leaving for work and told him Whitley wasn't home. 2RP 146. Kornegay appeared at Lewis's workplace an hour later again looking for Whitley. Lewis told him she had not seen Whitley. 2RP 146. Kornegay was pacing and fidgety and "wasn't as nice as he was the first time." 2RP 147. He said, "I know where my bitch is" and left. 2RP 146. Lewis became concerned and called Whitley and warned her not

to walk back to their apartment; instead, she offered to pick her up and give her a ride home. 2RP 147.

When they arrived, Kornegay was already parked at their apartment complex, behind some garbage cans with his lights off. 2RP 148-49. He got out of the car and approached them. 2RP 150. Kornegay had a gun in his hand and said, “Bitch, you think I’m scared to smoke you?” to Whitley. 2RP 150. Kornegay had the gun pointed at the ground but made sure Whitley saw it. 2RP 150-51. Lewis testified that she never called law enforcement after this incident because she was afraid Whitley would “get beat up really bad.” 2RP 154, 157.

Admitted into evidence without objection was Exhibit 8A, a jail “video visit” between Kornegay and Whitley. 1RP 93-95, 100. In the video, Whitley is heard confronting Kornegay about hitting her and threatening her and states “they” saw she had a black eye. CP 170. She confirmed the incident in which Kornegay approached her with a gun but emphasized that she told police that Kornegay didn’t point it at her. CP 170.

Also admitted into evidence without objection were Exhibits 9A and 9B, two CDs of audio recordings of jail calls from Kornegay to Whitley and others. 1RP 91-92. The trial court found two call to be of “crucial importance.” CP 170-71.

During a call on December 23, 2016, Kornegay told Whitley he had learned his lesson which is to keep his hands to himself and treat his woman with respect. CP 170. Then on December 25, Whitley told Kornegay “they” made her sign over her medical records because of the damage to her ear, clarifying that she couldn’t hear from her ear because of the tear to the eardrum. CP 171.

III. ARGUMENT

A. THERE IS NO EVIDENCE THAT THE LEGISLATURE INTENDED TO APPLY ITS 2019 AMENDMENT TO THE DEFINITION OF “PERSISTENT OFFENDER” TO KORNEGAY’S 2016 OFFENSES.

Kornegay argues that he should not have been sentenced as a persistent offender because subsequent to his sentencing his prior conviction for second-degree robbery was removed as predicate offense. This claim is without merit because absent an express legislative declaration of intent, amendments to the Sentencing Reform Act only apply to offense occurring after the effective date of the amendment.

RCW 9.94A.345 provides:

Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.

RCW 10.01.040 additionally provides:

Whenever any criminal or penal statute shall be amended

or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

Kornegay relies on Laws of 2019, ch. 187, effective July 28, 2019, which eliminated second-degree robbery as a “most serious offense.” However the amendatory act contained no such express declaration of retrospective application.

The Supreme Court has explained the effect of these statutes which are known as “savings clauses”:

We have stated that “[the] ... savings clause is deemed a part of every repealing statute as if expressly inserted therein, and hence renders unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute.”

State v. Ross, 152 Wn.2d 220, 237, 95 P.3d 1225 (2004) (quoting *State v. Hanlen*, 193 Wash. 494, 497, 76 P.2d 316 (1938)). Nevertheless, the Supreme Court does not require that the legislature explicitly state its intent that amendments repealing portions penal statutes apply retroactively to pending prosecutions for crimes committed before the amendments’ effective date. Instead, such intent need only be expressed in words that fairly convey that intention. *Ross*, 152 Wn.2d at 238.

In *Ross*, which addressed changes to the drug sentencing statute, the Court found that the amendments were prospective only because unlike earlier cases such as *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970), and *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210 (1978), “the legislature has failed to express any intent” and thus the statute did not apply retrospectively. *Ross*, 152 Wn.2d at 238. In both the earlier cases, there was language, which although not explicit, at least indicated that the provision should have retrospective effect. *Ross*, 152 Wn.2d at 239.

The amendment at issue in *Ross* was completely silent in this regard. The same is true for the present amendment, which merely struck “robbery in the second degree” from the statute without further commentary. Indeed, the Legislature specifically amended the bill to delete language making it retrospective before it was enacted:

The legislature recently removed robbery in the second degree from the list of most serious offenses. Engrossed Substitute S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019). Language making this change retroactive was removed by amendment. Amend. 5288-S AMS PADD S2657.1 to Engrossed Substitute S.B. 5288.

State v. Moretti, 193 Wn.2d 809, 819, 446 P.3d 609, 613 (2019).

The cases Kornegay cites do not support his position. For example, in *State v. Jefferson*, 192 Wn.2d 225, 249, 429 P.3d 467 (2018), the

Supreme Court concluded that GR 37 relating to *Batson*³ challenges did not apply retrospectively to a voir dire proceeding that occurred before the rule's adoption. Similarly, both *State v. Blank*, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997), and *State v. Ramirez*, 191 Wn.2d 732, 748, 426 P.3d 714 (2018), addressed the application of cost statutes on direct appeal. Similarly, the question in *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130, 1135 (2007), was whether the post-*Blakely*⁴ amendments to exceptional sentencing *procedure* could be applied to offenses occurring before the effective date.

None of these case addressed the retrospective application of amendments to offense definitions or substantive sentencing provisions. The “triggering events” in all these cases was the finality of the case or the date of the sentencing hearing.⁵ None holds that the *penalty* at a sentencing proceeding is based on the law in effect at the time of sentencing or on appeal. Indeed, the cases are uniform that the “triggering event” for a *substantive* criminal law is the date of the crime, absent a determination to the contrary pursuant to the analysis set forth in *Ross*. See *State v. Gradt*, 192 Wn. App. 230, 236, 366 P.3d 462 (2016) (finding

³ *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

⁴ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

⁵ Even if the sentencing hearing were the triggering date, Kornegay was sentenced almost nine months *before* the effective date of the amendment. CP 374.

intent to apply legalization of marijuana retroactive due to intent shown in language of initiative); *State v. Rose*, 191 Wn. App. 858, 871, 365 P.3d 756 (2015) (same); *Rivard v. State*, 168 Wn.2d 775, 781, 231 P.3d 186 (2010) (reclassification of the vehicular homicide from class B offense did not apply retroactively); *In re Hegney*, 138 Wn. App. 511, 542, 158 P.3d 1193 (2007) (declining to apply change to minimum mandatory provisions absent legislative intent); *State v. McCarthy*, 112 Wn. App. 231, 236, 48 P.3d 1014 (2002) (same issue and result as *Ross*); *State v. Kane*, 101 Wn. App. 607, 612, 5 P.3d 741, 743 (2000) (savings statute applies to substantive rights and liabilities of a repealed statute; collecting cases). This claim fails the retroactivity test under *Ross*, and should be rejected.

B. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT KORNEGAY'S CONVICTIONS FOR ROBBERY & FELONY HARASSMENT.

Kornegay next claims that because Whitley testified without contradiction that she was not afraid when Kornegay displayed the gun at the apartment she shared with Lewis, and that she gave him the money to make him go away, the State failed to prove all the elements of the charges of robbery and felony harassment—intent to kill based on that incident. The State concedes he is correct. *See* RCW 9A.56.190 “A person commits robbery when he or she unlawfully takes personal property from the person of another ... *against his or her will* by the use or threatened use

of immediate force, violence, or *fear of injury to that person* or his or her property.”) (emphasis supplied); *State v. CG*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003) (State must prove that victim of felony harassment (threat to kill) is placed in reasonable fear that the threat made is the one that will be carried out).

C. BECAUSE THE RECORD FAILS TO SHOW EITHER STATE MISMANAGEMENT OR ANY PREJUDICE TO KORNEGAY’S DEFENSE HIS UNPRESERVED *MICHIELLI* CLAIM SHOULD BE REJECTED.

Kornegay next claims that the charges in Counts 1 through 4 and 6 should be dismissed due to prejudicial delay. The record fails to show either government mismanagement or any prejudice to Kornegay’s defense. This unpreserved claim should be rejected.

Under CrR 8.3(b), the “court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.” There are two requirements for a dismissal under this rule. First, the “defendant must show arbitrary action or governmental misconduct.” *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Second, the defendant must show “prejudice affecting the defendant’s right to a fair trial.” *Michielli*, 132 Wn.2d at 240.

Under this analysis, forcing the defendant to waive CrR 3.3 speedy trial rights is prejudice. *Michielli*, 132 Wn.2d at 244. In *Michielli*, the State initially charged the defendant with a single count of theft, with a potential sentencing range from 0 to 60 days. *Michielli*, 132 Wn.2d at 233. Three business days before trial, the prosecutor amended the information to add four new charges, with a potential sentencing range from 15 to 20 months. *Id.* The supreme court held that the “[d]efendant 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 (emphasis supplied).

This Court reviews “[a] court’s power to dismiss charges” under CrR 8.3 for abuse of discretion. *Michielli*, 132 Wn.2d at 240. Here, however, there is no trial court decision to review because this claim was never raised below. This Court should therefore decline to review the issue because the record was not developed below. RAP 2.5(a) limits appellate review of alleged errors that were not properly preserved:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

To establish that the error is “manifest,” an appellant must show actual prejudice. *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). The

purposes underlying RAP 2.5(a) were addressed in *State v. McFarland*:

[C]onstitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *Scott*, 110 Wn.2d at 686-87. On the other hand, “permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.” *Lynn*, 67 Wn. App. at 344.

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

As an exception to the general rule, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest” *i.e.*, it must be “truly of constitutional magnitude.” *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Where the alleged constitutional error arises from trial counsel’s failure to move to suppress, the defendant “must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice -- actual prejudice must appear in the record.” *McFarland*, 127 Wn.2d at 334. In assessing actual prejudice, the *McFarland* court noted:

In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5(a)(3).

McFarland, 127 Wn.2d at 334; *see also State v. Contreras*, 92 Wn. App. 307, 311-12, 966 P.2d 915 (1998); *State v. McNeal*, 98 Wn. App. 585, 594-95, 991 P.2d 649 (1999), *aff'd* 145 Wn.2d 352 (2002). Because there no record evidence that Kornegay was “surprised” by the charges, *Michielli*, 132 Wn.2d at 244, or waived his right to speedy trial based on that surprise, the alleged error is not manifest, and this Court should decline to review this claim.

The timeline of the case below is relevant to this claim. The original information alleging assault in the second degree was filed on December 20, 2016. CP 403. Notably, even under this charge, unlike in *Michielli*, Kornegay was already facing a sentence of life without parole as a persistent offender; none of the subsequent charges increased the potential sentence.

Moreover, the probable cause statement detailed the incidents underlying Counts 1 through 8:

On 11-16-2016 at approximately 1340 hours I was working in my capacity as a Special Investigations Unit Detective with the Kitsap County Sheriff's Office, in Silverdale, Kitsap County, WA. I observed a male, later identified as ERNEST J KORNEGAY, driving a gray Honda Civic with two different license plates on it as it travelled through the parking lot of the Safeway at 2890 Nw. Bucklin Hill Road. I also observed ERNEST pick up a passenger, later identified as KRYSTAL N. WHITLEY, KORNEGAY parked the vehicle in the Safeway parking lot and they walked away. KORNEGAY was arrested after the rear license plate was determined to be stolen. KORNEGAY

had a felony warrant for his arrest and the car was determined to be stolen, Post Miranda, KORNEGAY admitted he passed off a gun to KRYSTAL prior to law enforcement contact. KRYSTAL turned over a loaded .357 revolver at KORNEGAY's urging. Deputy T. Graham #67 made Smith and Wesson revolver safe. It was photographed and placed into KCSO evidence.

During an interview on this same day, KRYSTAL WHITLEY revealed she was assaulted by boyfriend KORNEGAY during the previous week at an address in Port Orchard. later determined to be 4053 Se. Saxon Court, Port Orchard, Kitsap County WA. WHITLEY advised KORNEGAY struck her in left side of her head, causing a black eye and causing her to lose the hearing in her left ear. A follow-up interview was conducted on 12-14-2016 and it was at that time that KRYSTAL drove myself and Detective Bowman to the the [sic] Saxon Court address. and we were able to positively ID the location of where she was struck on the side of the head. KRYSTAL also revealed that KORNEGAY has hit her approximately 5-6 times in the last 6 months.

On 12-13-2016 Detective K. Mcdonald #76 and I interviewed KRYSTAL's roommate KANESHA LEWIS. KANESHA advised that about 2 days prior to the contact at Safeway where KORNEGAY was arrested. he was at KANESHA's residence on Pioneer Lane in Port Orchard, Kitsap Co. WA and pulled a gun on KRYSTAL. KORNEGAY had been looking for KRYSTAL that day and KANESHA witnessed the gun incident, which occurred in front of KANESHA's residence on the the [sic] walkway. KORNEGAY told KRYSTAL, after pulling out a black revolver. that he was going to "smoke" KRYSTAL. KANESHA was shown photos of the firearm recovered on 11-16-2016 and she said the gun KORNEGAY pulled was similar in appearance.

KRYSTAL was interviewed on 12-14-2016 and provided a similar account. She advised KORNEGAY was looking for her because he wanted money to obtain Methamphetamine, but always states its for food. KORNEGAY was at KANESHA's residence when KANESHA drove KRYSTAL to the front of the residence on the night of the

gun pulling incident. KRYSTAL said she didn't want to talk with KORNEGAY and that he wanted money. KRYSTAL wasn't going to give KORNEGAY the money and he told her, "I'm gonna smoke you if you don't give me what I want". KRYSTAL advised KORNEGAY had a silver revolver at his waste. [sic] She eventually gave him money and he left the area because he thought KANESHA was going to call 911.

KRYSTAL provided a taped statement on 12-14-2016 regarding the gun incident in front of KANESHA's residence and also the incident where she was struck at the residence on Saxon Ct. Both incidents occurred in Port Orchard, Kitsap County, WA, around the week of 11-10-2016. It should also be noted that KRYSTAL was shown photos taken by Deputy Graham of the gun recovered at Safeway on 11-16-2016. She confirmed this was the same gun pulled on her by KORNEGAY in front of KANESHA's residence.

CP 406-07. The first amended information was filed on January 12, 2017, and added a single count of felony violation of a court order, based on the December 30, 2016, contact that eventually became Count 15. CP 409.

The probable cause for the amendment stated as follows:

On 01-05-2017 I was advised by Detective Sgt. Chad Birkenfeld #25 that Kitsap County Jail staff recently intercepted phone calls between inmate ERNEST J. KORNEGAY and KRYSTAL N. WHITLEY, a victim of domestic violence at the hands of KORNEGAY. The chief concern was witness tampering and Violation of a No Contact Order. The phone calls of concern were reportedly outgoing to two numbers: 301-877-7626 and 360-633-8019.

There is a valid No Contact Order (16-1-015636) issued out of Kitsap County, served on I 2-22-2016. The Order prevents KORNEGAY from having any contact with WHITLEY whatsoever, including contact through others or by phone.

On 01-05-2017 I logged into the Telmate system and began monitoring the phone calls brought to my attention by Detective Birkenfeld. I was able to identify two phone calls where KORNEGAY calls his mother and instructs her to utilize her cell phone to call KRYSTAL at her phone number that I have personally contacted her at during this investigation. and that she provided as her primary phone number early in this investigation.

The information on the first call to KRYSTAL WHITLEY by KORNEGAY is as follows: This first call occurs on 12/30/2016 which happens to be KRYSTAL WHITLEY'S birthday. The PIN used to make the phone call belongs to inmate AARON TUCHECK. but it is clearly ERNEST's voice as he speaks with his mother. ERNEST tells his mother to "call that girl" and to "tell her happy birthday". ERNEST's mother "PAULA" gets another cell phone out while still on the phone with ERNEST. ERNEST tells PAULA to dial 271-1681, which is KRYSTAL's known phone number. PAULA is heard in the background speaking with KRYSTAL. PAULA tells KRYSTAL who she is and wishes her Happy Birthday for ERNEST. KRYSTAL says "thank you ERNIE". At ERNIE's request PAULA relays something similar to "he loves you and hopes you have a beautiful day" before they disconnect. The call occurred at 1148 hours.

The information on the second call to KRYSTAL WHITLEY by KORNEGAY is as follows: The PIN used to make the phone call belongs to inmate REID WILLIAMS. The phone call is made on 12/28/2016 at 1137 hours. ERNEST again calls his mother. ERNEST again provides KRYSTAL's number to his mother and she calls KRYSTAL on another phone. Like the previous call mentioned above. ERNEST is speaking to his mother and telling her what to say to KRYSTAL, who is speaking with ERNEST's mother on another phone. ERNEST's mother tells KRYSTAL she is "calling for ERNIE" She also says she is his mother. ERNEST tells his mother to tell KRYSTAL that the Jail has blocked a number and he can't call KRYSTAL. ERNEST tells his mother to tell KRYSTAL that he loves her. These messages, among others, are relayed to KRYSTAL.

Based on the above information there is probable cause to believe ERNEST .I. KORNEGAY committed two counts of Violation of a No Contact Order by instructing his mother on two occasions to call KRYSTAL WHITLEY, which is a prohibited act per the above listed No Contact Order issued out of Kitsap County.

The phone calls have been placed onto a CD for placement into evidence.

CP 413-14.

After the first amended information was filed, Kornegay's counsel moved to continue trial six times: on February 13, CP 415-17, February 27, CP 419, March 6, CP 421, April 3, CP 426, May 1, CP 433, and May 30, 2017. CP 433. On June 8, defense counsel withdrew with Kornegay's consent. CP 434.

The State moved for one continuance based on an unavailable witness on July 21. CP 435-37.

On August 2, Kornegay moved for the appointment of a third attorney. State's Supp. CP (Motion Hearing 8/2/17). Then-current counsel stated he was prepared to represent Kornegay, who noted for the record that he would no longer speak to counsel. *Id.* The motion was denied. *Id.*

On August 18, the defense again moved to continue trial. CP 438. On August 29, the trial court granted Kornegay's motion to proceed pro se. State's Supp. CP (Motion Hearing 8/29/17).

At a status hearing on September 8, 2017, the State noted that it

had learned that Kornegay had been using another inmate's PIN to contact Whitley, and that it could result in further charges. State's Supp. CP (Motion Hearing 9/8/17).

On September 15, 2017, Kornegay, now acting pro se, requested another continuance, and noted he was "okay with waiting until after December for the trial." CP 441. The second amended information was then filed, and Kornegay was arraigned on it without objection. CP 441.

On November 17, 2017, Kornegay filed a motion to dismiss pursuant to CrR 8.3(b). CP 21. Unlike the present contention, that motion was based solely on the two-week delay between his arrest and the filing of the original information.⁶ CP 22. The motion was denied. RP (12/15/17) 11.

On January 5, 2018, some three and a half months after the second amended information was filed, Kornegay again moved to continue trial. State's Supp. CP (Motion Hearing 1/5/18). He also moved for the appointment of counsel. *Id.* Both motions were granted. *Id.*

Further continuances, either joint or by the defense were granted on January 26, February 23, April 13, and June 29, 2018. State's Supp CP (Motion Hearings 1/26/18, 4/13/18, 6/29/18; Order Continuing 2/23/19).

⁶ It also challenged the sufficiency of the charging document, a claim not raised on appeal. CP 26.

The case proceeded to trial on July 23, 2018. 1RP 16.

Even a cursory review of this timeline shows that any delay between the initial charging and trial lies with Kornegay, not the State. More importantly, there is no record evidence that shows State misconduct. The inferences to be drawn are to the contrary.

The undersigned can attest that the standard policy of this office is to charge the minimum offenses to which the State would be willing to accept a plea, with any remaining charges “held back” for trial. In the normal case, the defense is advised early what the held back charges will be, even though the amended charges are not filed until close to trial. *See also* Kitsap County Prosecutor, *Charging and Sentencing Standards*, www.kitsapgov.com/pros/Pages/ChargingSentencingStandards.aspx (viewed Dec. 9, 2019).

The record is devoid of any suggestion the defense was unaware of the held back charges in this case. Indeed, the opposite is suggested. It is unreasonable to suppose that either the trial court or the State would have acceded to *eight* defense continuances over an eight-month period in order to allow the defense to prepare for two charges: an assault and a violation of a court order. The reasonable inference is that the defense was well aware of the charges Kornegay would ultimately face and was diligently preparing to meet them.

The eight months of delay *before* the second amended information was filed, with a single State continuance due to witness availability are all attributable to the defense. Likewise, more than ten months passed between the filing of the amended information and trial. The record is not clear as to the reason trial was initially set over three months after the amendment was filed, but Kornegay endorsed that continuance at the time. Notably the trial court granted his motion to proceed pro se two weeks earlier. The remaining seven months of continuances were either sought by Kornegay or jointly requested. The record does not clearly state the cause of these continuances either. It would not however, be appropriate to dismiss charges under *Michielli* based on a silent record.

In short, this contention was never raised below and is devoid of record support beyond the time that passed between the filing of the first and second amended informations. The mere passage of time, however, shows neither government mismanagement nor prejudice to the defense. This Court should decline to review this speculative claim.

IV. CONCLUSION

For the foregoing reasons, Kornegay's convictions for robbery and felony harassment as charged in Counts 4 and 6 should be vacated and dismissed on remand. All other convictions and Kornegay's persistent offender sentence on Counts 1 and 2 should be affirmed.

DATED December 10, 2019.

Respectfully submitted,
CHAD M. ENRIGHT
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal line extending to the right.

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KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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Appellate Court Case Title: State of Washington, Respondent v. Ernest J. Kornegay, Appellant
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