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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33280-2-III

STATE OF WASHINGTON, Respondent,

v.

ERIC ALLEN HAGGIN, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Eric Haggin was convicted of eight crimes following a jury trial. Haggin's trial was tainted by the State's introduction of testimony that opined on his guilt by communicating the detective's belief that Haggin possessed the requisite mental state. Because the jury was not given an expert witness instruction that would have dispelled the testimony's aura of certainty by directing it to give such weight to the testimony as it saw fit, the error was not harmless and requires a new trial.

The trial court further erred in instructing the jury that Haggin was deemed to be armed if he was an accomplice to an armed participant, when Haggin was not charged as an accomplice and the jury was not instructed in the requirements of accomplice liability but evidence was presented at trial that placed firearms in his fiancée's possession. Because the instruction created a mandatory presumption without providing an adequate legal basis for the jury to evaluate its requirements, the instruction served to relieve the State of its burden to prove that Haggin was armed for purposes of a firearm enhancement.

Multiple additional errors require remand. The evidence presented at trial does not support the conviction for witness tampering when no evidence was presented that Haggin sought to induce or coerce the witness

to absent herself from the trial or to revise her testimony, but merely discussed with a third party the possibility of contacting her to see if she would drop the charges. And the sentence violates the Sentencing Reform Act in multiple ways: The imposition of consecutive sentences for counts 1 and 8 is unauthorized by RCW 9.94A.589(1)(c), the combined term of confinement and community custody on counts 3 and 4 exceeds the statutory maximum for the crime, and an appendix to the Judgment and Sentence contains language pertaining to payment of legal financial obligations that directly contradicts the terms of the Judgment and Sentence.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The State improperly solicited testimony opining on the defendant's guilt.

ASSIGNMENT OF ERROR 2: Insufficient evidence supports the conviction of witness tampering.

ASSIGNMENT OF ERROR 3: The trial court's instructions to the jury on the special verdicts relieved the State of its burden of proof.

ASSIGNMENT OF ERROR 4: The trial court erred in imposing consecutive sentences under RCW 9.94A.589(1)(c) when Haggin was not

convicted of both unlawfully possessing a firearm and possessing a stolen firearm.

ASSIGNMENT OF ERROR 5: The sentence imposed exceeds the statutory maximum for the crimes charged.

ASSIGNMENT OF ERROR 6: The LFO notice given to Haggin is inconsistent with the judgment and sentence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is testimony about whether a quantity of a substance is too much for personal use an improper opinion on the defendant's guilt?

ISSUE 2: In the absence of evidence of any attempt to induce a trial witness to recant or to absent herself from the proceedings, is evidence that the defendant discussed contacting the witness to offer compensation and ask for the charges to be dropped sufficient to support a conviction for witness tampering?

ISSUE 3: Does the trial court mislead the jury and relieve the State of its burden of proof when it instructs the jury that the defendant is armed when any accomplice is armed, when no accomplice is charged in the case, another witness testifies that the firearms were hers, and no instruction is

given to the jury to evaluate whether Haggin and the witness were accomplices?

ISSUE 4: Does the plain language of RCW 9.94A.589(1)(c) provide for consecutive sentences upon two convictions of unlawfully possessing a firearm?

ISSUE 5: Do the combined terms of confinement and community custody exceed the statutory maximum for the crimes?

ISSUE 6: Does inconsistency between the notice of LFOs and the judgment and sentence render the judgment and sentence ambiguous?

IV. STATEMENT OF THE CASE

Eric Allen Haggin was charged with two counts of unlawfully possessing a firearm, possessing stolen firearm, possessing methamphetamine and heroin with intent to deliver, two counts of using drug paraphernalia, theft in the second degree, and witness tampering. CP 48-50. The case arose when Haggin was identified on a surveillance video as having taken a considerable amount of clothing from a local laundromat. CP 12. Police obtained a warrant for his home to search for the clothing and in the course of the search, located two firearms and several quantities of methamphetamine and heroin along with

paraphernalia for ingesting methamphetamine. RP (Trial I) at 53, 61-65, 96, 99, 102-04, 126.

Before trial, police intercepted a phone call from the jail between Haggin and a female acquaintance, in which Haggin asked the woman to locate the owner of the clothes taken from the laundromat, Christy Stransky, and ask her how she wanted to be compensated for the inconvenience. RP (Trial II) at 165. Haggin further stated, “See what – if she’ll drop the charges or if – she don’t have to drop charges but if she’d be interested in being compensated whatever she wants . . . to drop charges.” RP (Trial II) at 166. Stransky testified at trial that nobody besides law enforcement ever contacted her about the case. RP (Trial I) at 31-32.

During trial, the State repeatedly solicited testimony that the amount of drugs located in Haggin’s apartment indicated they were not for personal use. RP (Trial I) at 89, RP (Trial II) at 128. A law enforcement witness further testified that Haggin’s possession of over \$800 in mostly 20 dollar bills was indicative of money from drug sales. RP (Trial II) at 136. Haggin’s counsel did not object to any of this testimony.

Haggin testified in his own defense at trial, stating that ledgers the police found in his apartment related to vehicle work he performed, that he

was a daily user but not a dealer of methamphetamine, and did not know that the guns were in the apartment. RP (Trial III) 281-85. He further testified that when he initially retrieved the laundry it did not look familiar, but he saw a pair of pajama bottoms that looked like his girlfriend's and took the clothes back to the apartment. RP (Trial III) 282-83. Haggin stated that he wanted to contact Stransky because he felt bad about the mistake and wanted to compensate her and write a letter of apology. RP (Trial III) at 285.

The defense also presented testimony from Asenet Diaz, Haggin's fiancée who lived with him in the apartment. RP (Trial II) at 228-29. Diaz testified that she previously pleaded guilty to drug and firearm charges and that the firearms in the apartment were hers. RP (Trial II) at 232-34.

Although Haggin had been charged with firearm enhancements on the charges of possession with intent to deliver, the trial court instructed the jury to determine whether Haggin was armed with a deadly weapon. CP 49, 139. The special verdict forms, however, asked the jury to find whether Haggin was armed with a firearm. CP 151, 153. The instructions further stated, "If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed,

even if only one deadly weapon is involved.” CP 139. No instruction was given defining accomplice liability for purposes of allowing the jury to evaluate whether Haggin and Diaz were accomplices to any crime.

The jury convicted Haggin of all counts except for possessing a stolen firearm, on which count Haggin was acquitted. CP 148-58. At sentencing, the trial court ran the sentences for the two unlawful possession of a firearm convictions consecutive to all other counts over Haggin’s objection that RCW 9.94A.589(1)(c) did not apply when Haggin was acquitted of possessing a stolen firearm. RP (Sentencing) 3, CP 165. The trial court also imposed 60 months on counts 3 and 4 as firearm enhancements, 12 months of community custody on counts 3 and 4, and imposed the high end of the range for all counts, resulting in a total sentence of 442 months’ confinement. CP 165-66. Lastly, the trial court imposed \$800 in legal financial obligations and ordered that they be paid at \$100 per month upon Haggin’s release. CP 167-68. But an appendix to the judgment and sentence entitled “Payment of Legal Financial Obligations” stated that “Defendant’s first payment shall be due 30 days from the date of [sic] the judgment and sentence was signed in court.” CP 174.

Haggin now appeals. CP 177.

V. ARGUMENT

A. The State violated Haggin's constitutional right to a jury trial when it offered an improper opinion on guilt.

In the present case, the ultimate factual issue was whether the drugs found in the apartment were for Haggin's personal use or for sale. To support its allegation that Haggin intended to sell them, the State solicited a law enforcement witness's opinion that the quantity of drugs was too great for personal use, and the money in his wallet looked like it came from drug sales. This conclusory testimony invaded the province of the jury and should not have been permitted.

An opinion on guilt, direct or by inference, is improper. *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008). Testimony constitutes an improper opinion on guilt when it goes to the ultimate factual issue in the case. *State v. Quaale*, 82 Wn.2d 191, 200, 340 P.3d 213 (2014). Introducing such evidence invades the exclusive fact-finding province of the jury and thereby undermines the constitutional right to a jury trial under the U.S. and Washington Constitutions. *Id.* at 199; *Montgomery*, 163 Wn.2d at 590.

Law enforcement agents may be permitted to testify to specialized knowledge obtained through training or experience, when such testimony

is helpful to the trier of fact and does not embrace the defendant's guilt, veracity, or intent. *Montgomery*, 163 Wn.2d at 590-91. Thus, for example, the State may appropriately introduce specialized information about drug use and the drug trade, which is likely beyond the ordinary experience of the jury. *U.S. v. Boissoneault*, 926 F.2d 230, 232-33 (2d Cir. 1991). However, conclusory statements as to the legal significance of the evidence, such as whether it suggests "street level distribution" of a controlled substance, are problematic and unhelpful. *Id.* at 233.

The testimony introduced here is similar to the testimony said to be problematic in *Boissoneault* and *Montgomery*. While the State was not precluded in any way from presenting relevant facts about the drug trade that would likely be outside the jury's ordinary experience, such as dosage and price, the detective's conclusions that the quantity of substances involved were too large to be for personal use and that the money in Haggin's wallet was probably from drug sales were unhelpful because the jury was capable of drawing its own conclusion about Haggin's intent in possessing the substances. *See Montgomery*, 163 Wn.2d at 595 ("But police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt.").

As in *Montgomery*, Haggin’s counsel did not object to the testimony at trial. But unlike in *Montgomery*, the error here meets the requirements of RAP 2.5(a)(3) to be reviewed as a manifest error affecting a constitutional right. The considerations affecting review under this provision are set forth in *State v. Fehr*, 185 Wn. App. 505, 511, 341 P.3d 363 (2015):

We use a three-part analysis to determine whether an issue raised for the first time on appeal can benefit from RAP 2.5(a)(3)'s manifest constitutional error exception. *State v. Grimes*, 165 Wn. App. 172, 185, 267 P.3d 454 (2011).

First, the appellant bears the burden of showing that the alleged error was “truly of constitutional dimension.” 165 Wn. App. at 186, 267 P.3d 454 (*quoting State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Second, the appellant must show that the alleged error was “manifest.” 165 Wn. App. at 186, 267 P.3d 454 (*quoting O’Hara*, 167 Wn.2d at 98, 217 P.3d 756). It is not sufficient for the appellant to “simply assert that an error occurred at trial and label the error ‘constitutional.’” 165 Wn. App. at 186, 267 P.3d 454. Instead, “the appellant must identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.” *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (alteration in original) (internal quotation marks omitted) (*quoting O’Hara*, 167 Wn.2d at 98, 217 P.3d 756). Finally, once an appellant makes this requisite showing, the burden shifts to the State to prove the error harmless beyond a reasonable doubt. *Grimes*, 165 Wn. App. at 186, 267 P.3d 454.

In *Montgomery*, the court noted that a critical inquiry into whether the error had prejudicial effects on the trial was whether the jury was instructed in their consideration of expert opinions. 163 Wn.2d at 595.

Unlike in *Montgomery*, the jury here was not given an expert witness instruction at all. CP 98-141. Uninstructed, the jury will likely give undue weight to the officer's opinion because of its aura of certainty. *See Quale*, 182 Wn.2d at 202. Also unlike in *Montgomery*, the jury here returned questions demonstrating some confusion about the mental state requirements and whether Haggin could be responsible as an accomplice. CP 142, 146. These irregularities are sufficient to demonstrate that the fairness of Haggin's trial was undermined by the introduction of damaging opinion testimony without reasonable instructions to the jury in how properly to consider it, because the jury cannot be presumed to have appropriately considered the evidence by following the instructions given.

The remedy for such error is to remand for a new trial. *Id.*

B. The State failed to prove the essential elements of witness tampering when it showed no attempt to cause the witness to recant or to absent herself from the proceeding.

To convict Haggin of witness tampering, the State was required to prove the following elements:

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason

to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or

(b) Absent himself or herself from such proceedings; or

(c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

RCW 9A.72.120. Contacting a witness for other purposes, including to apologize for the crime and to request that charges be dropped, are insufficient to support a conviction. *State v. Rempel*, 114 Wn.2d 77, 785 P.2d 1134 (1990).

As in *Rempel*, Haggin's unfruitful effort to contact Stransky did not contain a request to withhold testimony, recant, or fail to appear for court. Rather, it reflected "a lay person's perception that the complaining witness can cause a prosecution to be discontinued." *Id.* at 83. While the court may consider the context to evaluate whether a request to "drop charges" amounts to tampering, the context here is void of any actual contact with Stransky and any implied threat or inducement to violate the law. *Id.* at 83-84. Under these circumstances, *Rempel* controls.

Because the evidence of Haggin's third-party conversation about contacting Stransky to offer to pay for the lost clothes and ask her to drop the charges was insufficient to show that Haggin attempted to induce her

to testify falsely, to fail to show up for trial, or to withhold information, it cannot support the conviction and should be reversed.

C. The jury's instructions on the firearm enhancement were misleading and relieved the State of its burden of proving the essential elements of the firearm enhancement.

In the charging document and the special verdict, the State sought a finding that Haggin committed the controlled substance charges while armed with a firearm for purposes of seeking an enhanced sentence. CP 49; 151, 153. But the trial court instructed the jury in the terms of WPIC 2.07, which establishes the requirements for the jury to return a special verdict on a *deadly weapon* enhancement. CP 139. Moreover, the instruction directed the jury to consider Haggin armed if any accomplices were armed at the time, even though no accomplices were charged in the case and the jury was not instructed in the terms of accomplice liability. Because these instructions failed to ensure that the jury would not return a special verdict against Haggin based on Diaz's possession of the firearms, they relieved the State of its burden to prove the essential elements of the firearm enhancement beyond a reasonable doubt.

Jury instructions are reviewed *de novo* to evaluate whether they permit the parties to argue their theories of the case, do not mislead the

jury, and accurately explain the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). When instructions relieve the State of its burden of proof, reversal is required if the error is not harmless. *State v. Hayward*, 152 Wn. App. 632, 647, 217 P.3d 354 (2009). “Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” *Id.* (quoting *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)).

The instructions in the current case were misleading as to the essential elements because they included language that the jury was required to find Haggin was armed if he was an accomplice to an armed participant in the crime. CP 139. Haggin was not charged as an accomplice, nor were complicity instructions given. As such, the additional language was inapplicable and should have been stricken from the form instruction.

Moreover, the error served to lessen the State’s burden of proof by confusing the jury as to whether it could return a special verdict against Haggin on the basis of Diaz’s testimony. A firearm or deadly weapon enhancement requires proof of a nexus between the defendant and the firearm as well as the firearm and the crime. *State v. Schelin*, 147 Wn.2d 562, 568, 55 P.3d 632 (2002). The mere presence of an unloaded firearm

at the scene, without more, does not establish that the defendant is “armed” for purposes of the special verdict. *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). And while knowledge is not an element of a firearm enhancement, lack of awareness of the presence of a firearm is relevant in assessing whether a defendant is “armed” and able to use a weapon. *Barnes*, 153 Wn.2d at 385.

However, the enhancement instruction directed the jury that Haggin was deemed to be armed with a firearm if it concluded he was an accomplice to any participant who was armed with a firearm. CP 139. The language is obligatory, not discretionary, creating a mandatory presumption of guilt. Mandatory presumptions can create due process problems by relieving the State of its burden of proof of each of the essential elements. *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996); *Hayward*, 152 Wn. App. at 645. The instructions did so here because they misled the jury as to the legal significance of Diaz’s testimony.

Under these authorities, Haggin’s knowledge of the presence of the firearms was relevant to whether he was “armed” within the meaning of the enhancement statute. Haggin’s knowledge of the firearms provides an adequate nexus between the defendant and the firearm to sustain the

enhancements. Alternatively, the enhancements could be imposed even if Haggin did not know the firearms were present, if he and Diaz were accomplices to the crime and Diaz was armed. *Schelin*, 147 Wn.2d at 572. But the jury was not given adequate evidence or instructions to properly evaluate whether Diaz and Haggin were accomplices to Haggin's crimes. Complicity requires the parties to share knowledge of the criminal enterprise. *State v. Roberts*, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000).

The record here reflects that Diaz was convicted of a crime of solicitation of unspecified drugs while Haggin was charged with possessing methamphetamine and heroin with intent to deliver them. RP (Trial II) 232. The underlying facts of Diaz's conviction and the extent to which they overlapped with the facts supporting Haggin's conviction were not explored to any great extent at trial. Nor was the jury instructed according to WPIC 10.51 to evaluate whether Diaz and Haggin were accomplices. Thus, the jury was both invited – even directed – to consider Haggin's liability in light of Diaz's participation, while at the same time the instructions failed to educate the jurors in the requirements of accomplice liability to properly apply the enhancement instruction. This relieved the State of its burden to prove that Haggin was "armed" by inviting the jury to return a "Yes" verdict based on a finding that Diaz was armed, when the State did not prove and the instructions did not advise the

jury how to evaluate whether Diaz was an accomplice and a participant in Haggin's crime.

Furthermore, the error cannot be shown to be harmless beyond a reasonable doubt because of the jury's evident confusion surrounding the "accomplice" language. In a question to the court, the jury asked directly whether Haggin was an accomplice to Diaz, and despite Haggin's request that the court directly instruct the jury that he was not, the trial court simply referred the jury back to the inadequate instructions. CP 142; RP (Trial III) 370-74. Moreover, the nominal evidence presented of Diaz's involvement in the crimes failed to establish that she and Haggin were accomplices in the crimes charged. Although instructional error affecting the State's constitutional burden is harmless if uncontroverted evidence supports the verdict, the evidence here was disputed as to the respective knowledge and participation of Haggin and Diaz. *Hayward*, 152 Wn.2d at 646-47. As such, the State cannot show the error was harmless beyond a reasonable doubt and the firearm enhancements should be vacated.

D. The consecutive sentence was unauthorized by RCW 9.94A.589(1)(c) because Haggin was acquitted of possessing a stolen firearm.

Over defense objection, the trial court ran the sentences on the two counts of unlawful possession of a firearm consecutive to all other terms based on its conclusion that RCW 9.94A.589(1)(c) permitted it. CP 165; RP (Sentencing) 3-4, 8. Because that statute's plain language applies only when the defendant is convicted of both unlawfully possessing a firearm and stealing a firearm or possessing a stolen firearm, it does not apply here. Consequently, the consecutive sentences imposed by the trial court are unauthorized under the Sentencing Reform Act (SRA).

Trial courts generally do not have discretion to determine whether current offenses should run concurrently or consecutively; unless a specific statutory provision applies, the legislature has required that terms for current offenses run concurrently unless there are grounds to impose an exceptional sentence under RCW 9.94A.535. *State v. Jacobs*, 154 Wn.2d 596, 602-03, 115 P.3d 281 (2005) (superseded by statute on other grounds as stated in *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015)); *State v. Jones*, 137 Wn. App. 119, 123, 151 P.3d 1056 (2007). The trial court here invoked RCW 9.94A.589(1)(c) in support of imposing

consecutive sentences as to both convictions for unlawful possession of a firearm. Accordingly, the question on review is whether the trial court correctly interpreted RCW 9.94A.589(1)(c) to authorize the consecutive sentences in this case. Because the plain language excludes the trial court's interpretation, the consecutive sentences must be reversed.

When reviewing a question of statutory interpretation, the appellate court aims to determine and apply the legislative intent, determined by examining the statute's plain language and context in the statutory scheme. *Conover*, 355 P.3d at 1096. The statute at issue here reads,

If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

RCW 9.94A.589(1)(c). In the event the plain language of the statute is ambiguous, the court applies the rule of lenity to resolve the ambiguity in favor of the defendant. *Conover*, 183 Wn.2d at 1096.

Reading the plain language of the statute, the paragraph is triggered by the introductory conditional clause, “If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both . . .” (Emphasis added). Courts presume that the term “and” functions conjunctively. *State v. Kozey*, 183 Wn. App. 692, 698, 334 P.3d 1170 (2014). Accordingly, for the paragraph to apply, the plain language of the statute requires that the defendant be convicted of unlawfully possessing a firearm and either theft of a firearm, possession of a stolen firearm, or both. Absent the triggering conditions, the paragraph does not apply and RCW 9.94A.589(1)(a) controls, requiring concurrent sentences unless grounds exist to impose an exceptional sentence.

This interpretation is borne out by the legislative history of subsection (1)(c), which was adopted in 1998 as part of Engrossed Senate Bill 5695. The Final Bill Report and the House Bill Analysis, describing the effect of the new enactment, both clarify that the legislative intent is conjunctive. The Final Bill Report states, “If an offender is convicted of unlawful possession of a firearm in the first or second degree and for either theft of a firearm or possession of a stolen firearm, or both . . .” Final Bill Report, ESB 5695 (1998) (emphasis added) (attached as Exhibit

A hereto). Similarly, in the House Bill Analysis, the summary of the provision states,

Multiple firearm offenses. If a person is convicted of two or more current offenses, and also is convicted of (1) unlawful possession of a firearm in the first or second degree and (2) theft of a firearm or possession of a stolen firearm, then the person must serve consecutive sentences for each other felony offense and for each firearm unlawfully possessed.

House Bill Analysis, ESB 5695 (1998), at 2 (attached as Exhibit B hereto).

These materials illustrate the legislature's intention that a conviction of unlawful possession and a conviction relating to a stolen firearm are, by analogy, the "elements" that must be established for the consecutive sentencing terms to apply.

In the present case, because Haggin was acquitted of possessing a stolen firearm, the requirements of RCW 9.94A.589(1)(c) are not met. Further, the record reflects no grounds upon which to base an exceptional sentence under RCW 9.94A.535. Accordingly, it was error for the court to impose consecutive sentences on counts 1 and 8. The sentence should be vacated and the case remanded for resentencing.

E. The combined term of confinement and community custody imposed exceeds the statutory maximum.

Haggin was convicted in counts three and four of possessing methamphetamine and heroin with intent to deliver, both Class B felonies. RCW 69.50.401(2)(a), (b). As such, the maximum penalty that can be imposed upon conviction is 10 years. RCW 9A.20.021(1)(b). Here, the trial court imposed 120 months on each count together with 12 months of community custody. CP 165-66. This exceeds the statutory maximum for the crime and violates the Sentencing Reform Act. *See* RCW 9.94A.505(5).

Under earlier iterations of the Sentencing Reform Act, sentences thus exceeding the statutory maximum were upheld provided that the judgment and sentence specifically stated the maximum sentence and stated that the total combination of incarceration and community custody cannot exceed the maximum. *State v. Sloan*, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004). Alternatively, trial courts were allowed to impose less than the statutorily required term of community custody as an exceptional sentence to ensure the maximum term was not exceeded. *State v. Hudnall*, 116 Wn. App. 190, 197, 64 P.3d 687 (2003).

This line of authority, however, gave rise to the question whether such provisions effectively rendered the sentence indeterminate because they purported to delegate to the Department of Corrections the authority to calculate the length of the sentence, contrary to the Sentencing Reform Act. *See State v. Linderud*, 147 Wn. App. 944, 949-50, 197 P.3d 1224 (2008) (opinion withdrawn and superseded, 154 Wn. App. 1001 (2010)). Consequently, the legislature revised the Sentencing Reform Act by adopting RCW 9.94A.701(9), which states,

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Since the enactment of RCW 9.94A.701(9), the Washington Supreme Court has required the trial court, rather than the Department of Corrections, to correct the judgment and sentence to avoid exceeding the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). In *Boyd*, the case was remanded to the trial court to either amend the community custody term or resentence the defendant. *Id.*

Boyd is directly applicable here. The trial court's sentence exceeds the statutory maximum by 12 months. Accordingly, as in *Boyd*, this court

should remand the case for either resentencing or reduction of the community custody term to comply with RCW 9.94A.701(9).

F. Language from the LFO notice conflicting with the Judgment and Sentence should be stricken.

The trial court imposed \$800 in legal financial obligations and ordered that they be repaid at the rate of \$100 per month commencing upon his release. CP 168. But the “Payment of Legal Financial Obligations” notice appended to the judgment states, “Defendant’s first payment shall be due 30 days from the date of [sic] the Judgment and Sentence was signed in court.” CP 174. Because these terms directly conflict, they create ambiguity in the repayment obligation.

A court has the power and the duty to correct an erroneous sentence. *In re Call*, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). This court should either strike the conflicting language from the appended notice to eliminate the contradiction, or remand the case to the trial court to do so.

VI. CONCLUSION

For the foregoing reasons, Haggin respectfully requests that the court reverse his convictions and remand the case for a new trial; or, in the alternative, to vacate the judgment and sentence and remand the case for resentencing.

RESPECTFULLY SUBMITTED this 18th day of November,
2015.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Gregory Lee Zempel
Kittitas County Prosecuting Attorney
205 W. 5th Avenue Ste 213
Ellensburg, WA 98926

Eric Allen Haggin, DOC #786070
MCC – WSR
PO Box 777
Monroe, WA 98272-0777

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 18th day of November, 2015 in Walla Walla, Washington.


Breanna Eng

APPENDIX A

FINAL BILL REPORT

ESB 5695

C 235 L 98

Synopsis as Enacted

Brief Description: Increasing sentences for crimes involving firearms.

Sponsors: Senators Roach, Long, Oke, Schow, Morton, Benton and Hochstatter.

Senate Committee on Law & Justice

House Committee on Criminal Justice & Corrections

Background: For most all felony crimes, if a court finds that the criminal or an accomplice was armed with a deadly weapon at the time of the crime, an additional penalty is added to the standard range sentence. There are different length enhancements for firearms and other deadly weapons. The enhancement cannot cause the criminal to serve more than the maximum penalty for the crimes committed.

A dispute has arisen over how the weapon enhancements are to be applied when a criminal is sentenced for multiple offenses and a weapon finding has been made on one of the counts. The enhancement may be applied to the entire package of crimes at the end of the standard sentence. The enhancement may, instead, be applied to the particular crime where a weapon was used. Where it is applied can affect the length of the criminal's sentence.

Summary: When an offender is being sentenced for two or more crimes encompassing the same criminal conduct where a firearm or deadly weapon finding has been made on at least one of the crimes, the enhancement is applied to the end of the total period of confinement, regardless of which underlying offense was subject to the enhancement.

Firearm and deadly weapon enhancements are to be served consecutive to all other sentencing provisions, including other firearm and deadly weapon enhancements.

When an underlying sentence plus an enhancement would exceed the statutory maximum if both were served, the full enhancement must be served and the underlying sentence reduced so that the total does not exceed the statutory maximum.

If an offender is convicted of unlawful possession of a firearm in the first or second degree and for either theft of a firearm or possession of a stolen firearm, or both, the offender must serve consecutive sentences for each conviction and for each firearm unlawfully possessed.

Votes on Final Passage:

Senate	42 7
House	96 0

Effective: June 11, 1998

APPENDIX B

HOUSE BILL ANALYSIS
ESB 5695

Title: An act relating to crimes involving firearms.

Brief Description: Increasing sentences for crimes involving firearms.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Roach, Long, Oke, Schow, Morton, Benton, and Hochstatter).

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND CORRECTIONS

Hearing Date: February 20, 1998.

Prepared By: Mark G. Hamilton, Counsel (786-7310).

Background: *Mandatory Sentencing Enhancements for Deadly Weapons.* The state's sentencing guidelines provide a standard range of imprisonment to which courts must sentence criminals convicted of felonies, based on the seriousness of the current crime, as well as other factors, such as prior criminal convictions. The Hard Time for Armed Crime Act (Initiative Measure No. 159) requires mandatory sentencing increases of up to five years which must be added to the sentence of a person convicted of a committing felony while using a firearm or deadly weapon. (RCW 9.94A.310(3) & (4).)

However, the underlying sentence, combined with the enhancement, cannot exceed the maximum presumptive sentence under the guidelines, unless the offender is classified as a persistent offender. (RCW 9.94A.310(3)(g) & (4)(g).)

The law is unclear, with regard to multiple concurrent convictions, whether a weapon enhancement must be applied to the underlying crime (*i.e.*, the crime in which the weapon was used) or may be applied separately at the end of the total term for all the offenses combined. This may affect the length of the sentence imposed. The Washington Court of Appeals has held that A firearms enhancement must run consecutively to the sentence imposed on the underlying crime and to any other mandatory sentences imposed under the statute; *i.e.*, each firearm enhancement for multiple current offenses must run consecutively. (*State v. Lewis*, 86 Wash.App. 716, 937 P.2d 1325 (1997).)

Summary: *Enhancement Added to End of Total Sentence.* If an offender is convicted of more than one offense, and there is a firearm or deadly weapon enhancement for at least one of those offenses, then the enhancement must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to the firearm or deadly weapon enhancement. (Amends RCW 9.94A.310(3) & (4).)

Mandatory Confinement and Consecutive Terms. The firearm and deadly weapon enhancements are mandatory, must be served in total confinement,

and must be served consecutively to all other sentencing provisions, including other weapon enhancements. (Amends RCW 9.94A.310(3)(e) & (4)(e).)

No Reduction of Enhancement. If the firearm or deadly weapon enhancement, when added to the sentence for the underlying crime, would exceed the statutory maximum allowed for the offense, the enhancement may not be reduced. (Amends RCW 9.94A.310(3)(g) & (4)(g).)

Multiple Firearm Offenses. If a person is convicted of two or more current offenses, and also is convicted of (1) unlawful possession of a firearm in the first or second degree and (2) theft of a firearm or possession of a stolen firearm, then the person must serve consecutive sentences for each other felony offense and for each firearm unlawfully possessed. (Amends RCW 9.94A.400(1)(c).)

Rules Authority: No.

Fiscal Note: Requested on February 16, 1998. (Available for prior versions of the bill.)

Effective Date: Ninety days after adjournment of session in which bill is passed.