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Division III
State of Washington
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No. 35792-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

DAHNDRE KAVAUGN WESTWOOD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable Judge John Knodell

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Dahndre Kavaugn Westwood accepts this opportunity to reply to the State's brief. Mr. Westwood requests the Court refer to his opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

1. The remedy for the trial court's erroneous rejection of the proposed amendment to the information and the corresponding plea agreement is to restore Mr. Westwood to the position he would have been in absent the error.

This argument pertains to Issue 1 raised in Mr. Westwood's opening brief. In Issue 1, Mr. Westwood argued the trial court erred by rejecting a proposed amendment to the information reducing the charges and a corresponding plea agreement. *See* Appellant's Opening Brief pgs. 22-28. Mr. Westwood's requested remedy was reversal of his convictions. *See* Appellant's Opening Brief pgs. 22-28.

In response, the State agrees with Mr. Westwood that the trial court abused its authority in rejecting the plea agreement, and requests this Court reverse the trial court's order rejecting the plea agreement. *See* Respondent's Brief pgs. 3-16. Mr. Westwood respectfully requests this Court accept the State's concession and hold the trial court erred in rejecting the proposed amendment to the information and the corresponding plea agreement.

The State also discusses the appropriate remedy for the trial court's error. *See* Respondent's Brief pg. 16. The State first asserts there is no basis to reverse Mr. Westwood's convictions, because "[t]here was nothing wrong with Mr. Westwood's trial that would justify granting him a new one." *See* Respondent's Brief pg. 16. The State then asserts, "[t]he normal remedy for a wrongly denied plea agreement is to remand to

require the State to reoffer the plea, and the defendant can either accept the plea or the results of the trial.” *See* Respondent’s Brief pg. 16, citing *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1382, 182 L. Ed. 2d 398 (2012). The State points out that here, there is a problem with the remedy, because Mr. Westwood was acquitted of indecent liberties with forcible compulsion, and the plea offer was to plead guilty to this charge. *See* Respondent’s Brief pg. 16. The State notes it is now prohibited by the double jeopardy clause from charging Mr. Westwood with indecent liberties with forcible compulsion. *See* Respondent’s Brief pg. 16. Therefore, the State’s suggested remedy for the trial court’s error is for the State to offer Mr. Westwood two other plea offers that were proposed in this case. *See* Respondent’s Brief pg. 16. The State does not discuss the terms of these other two plea offers. *See* Respondent’s Brief pg. 16.

The remedy is well-established under the circumstances where a defendant pleads guilty and the State then breaches a plea agreement: “[t]he defendant has the choice to either withdraw his plea and be tried anew on the original charges or receive specific performance of the agreement.” *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003). “Because a plea agreement is analogous to a contract, the defendant is entitled to a remedy which restores him to the position he occupied before the State breached.” *Id.* Likewise, where a plea agreement is based on misinformation, such as an incorrect sentencing range, “generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea.” *State v. Walsh*, 143 Wn.2d 1, 8–9, 17 P.3d 591 (2001).

Here, the circumstances are different, because after the plea agreement was erroneously rejected by the trial court, the case proceeded to a trial and a verdict. It does

not appear there are any Washington cases setting forth a specific remedy in these circumstances, because the cases where the defendant has argued the trial court erroneously rejected a proposed amendment to the information and corresponding plea agreement have been affirmed. *See State v. Haner*, 95 Wn.2d 858, 861-65, 631 P.2d 381 (1981); *State v. Lazcano*, No. 32228-9-III, 2017 WL 1030735, at *9-11 (Wash. Ct. App. Mar. 16, 2017).¹

However, the United States Supreme Court has set forth the proper remedy in an analogous situation, where ineffective assistance of counsel caused the rejection of a plea offer, leading to a jury trial and a more severe sentence. *See Lafler*, 566 U.S. at 170-175. There, “as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3 ½ times greater than he would have received under the plea.” *Lafler*, 566 U.S. at 174. The Court held “[t]he correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement.” *Id.*

The Court also recognized “[i]n some situations, it may be that resentencing alone will not be full redress for the constitutional injury.” *Id.* at 171. The Court explained:

If, for example, *an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial*, or if a mandatory sentence confines a judge’s sentencing discretion after trial, *a resentencing based on the conviction at trial may not suffice*. In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.

Id. (emphasis added) (internal citations omitted).

¹ This case is cited as persuasive authority only. *See* GR 14.1(a) (authorizes citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Washington appellate courts have acknowledged and applied this remedy set forth in *Lafler*. See *State v. Maynard*, 183 Wn.2d 253, 262, 351 P.3d 159 (2015); *State v. Drath*, 431 P.3d 1098, 1103-1106 (Wash. Ct. App. 2018); *In re Pers. Restraint of Holway*, No. 33734-1-III, 2016 WL 5540204, at *2 (Wash. Ct. App. Sept. 29, 2016);² *In re Pers. Restraint of Troit*, No. 46090-4-III, 2015 WL 3884277, at *1-4 (Wash. Ct. App. June 23, 2015).³

In *Drath*, the defendant rejected a plea offer and was convicted of eight charged counts following a jury trial. *Drath*, 431 P.3d at 1099-1103. However, during the plea negotiation process, the defendant's attorney misinformed her of the maximum sentencing range she faced if convicted. *Id.* at 1103-04. The offered plea offer involved a plea of guilty to four of the eight charged counts. *Id.* at 1102. The final offer was a guilty plea to the four counts, with an agreed recommended sentence of 50 months confinement. *Id.* at 1102-03.

On appeal, the defendant argued this misinformation constituted ineffective assistance of counsel. *Id.* at 1103-06. The court held defense counsel's deficient performance prejudiced the defendant, and reversed and remanded the case for further proceedings. *Id.* at 1104-06. Addressing the remedy, referencing *Lafler*, the court held:

[B]ecause the plea offer entailed [the defendant] pleading guilty to certain counts other than the ones for which she was convicted at trial, the appropriate remedy is to remand and require the prosecution to reoffer the final 50-month plea offer. If [the defendant] accepts, then the trial court may exercise its discretion in deciding whether to accept the plea, vacate [the defendant's] trial conviction, and sentence [the defendant] in accordance with the law. If [the defendant] rejects the plea offer or the trial court rejects the plea, then [the defendant's] trial conviction and

² See fn. 1.

³ See fn. 1.

sentence stands. If [the defendant] fails to accept the State's offer within 90 days, then her trial conviction and sentence stands.

Id. at 1106 (internal citations omitted); *see also Lafler*, 566 U.S. at 171; *Troit*, 2015 WL 3884277, at *3-4 (imposing this remedy where defense counsel did not accurately convey the plea offer to the defendant).⁴

Here, the plea offer was to amend the information in this case to one count of indecent liberties, and then allow Mr. Westwood to plead guilty to that count, along with a third degree assault charge in a separate case number. (RP (Sept. 18, 2017) 5).

Following the jury trial, Mr. Westwood was convicted of three crimes: attempted first degree rape; first degree burglary; and first degree assault. (CP 594-616; RP (Jan. 8, 2018) 36-37). The jury acquitted Mr. Westwood of indecent liberties. (CP 425, 599).

Because Mr. Westwood was offered a guilty plea to a count less serious than the ones he was convicted of after trial, the remedy here is for the State to re-offer the plea agreement. *See Lafler*, 566 U.S. at 171; *Drath*, 431 P.3d at 1106. If Mr. Westwood accepts the plea, then the trial court should accept the plea, vacate Mr. Westwood's trial convictions, and sentence Mr. Westwood in accordance with the law. *See Lafler*, 566 U.S. at 171; *Drath*, 431 P.3d at 1106. Contrary to the State's argument, there is a basis to reverse Mr. Westwood's trial convictions. *See Lafler*, 566 U.S. at 171; *Drath*, 431 P.3d at 1106. If Mr. Westwood's convictions are allowed to stand, then there would be no redress for his injury.

Mr. Westwood agrees with the State that because of double jeopardy principles, he cannot be re-offered to plea agreement to plead guilty to indecent liberties, where he was acquitted of that count. *See Respondent's Brief* pg. 16; *see also generally* RCW 10.43.050 (when acquittal is a bar to prosecution). Therefore, Mr. Westwood's proposed

⁴ *See* fn. 1.

remedy here is for the State to offer a plea offer that would restore Mr. Westwood to the position he would have been in absent the error that occurred in the trial court.

Specifically, a plea offer to a charge that carries the same class of offense and same potential punishment as the indecent liberties count, along with a plea to the third degree assault count in the separate case number, or an equivalent. *See* RCW 9A.44.100(b) (indecent liberties with forcible compulsion is a class A felony); *see also* RCW 9.94A.507 (governing sentencing of specified sex offenses, including indecent liberties with forcible compulsion). If there are any issues with the factual basis for the plea, the procedure set forth in *In re Personal Restraint of Barr* should be utilized. *See In re Pers. Restraint of Barr*, 102 Wn.2d 265, 269-71, 684 P.2d 712 (1984) (stating “[a] plea does not become invalid because an accused chooses to plead to a related lesser charge that was not committed in order to avoid certain conviction for a greater offense . . . [t]he trial court must find a factual basis to support the original charge, and determine that defendant understands the relationship of his conduct to that charge.”).

The trial court abused its discretion and violated the constitutional separation of powers in rejecting the proposed amendment to the information and the corresponding plea agreement. The remedy for the trial court’s erroneous rejection of the proposed amendment to the information and the corresponding plea agreement is to restore Mr. Westwood to the position he would have been in absent the error.

2. The trial court abused its discretion in sentencing Mr. Westwood without considering mitigating circumstances related to his age at the time of the crimes.

This argument pertains to Issue 5 raised in Mr. Westwood's opening brief. In Issue 5, Mr. Westwood argued the trial court abused its discretion in sentencing him without considering mitigating circumstances related to his age at the time of the crimes. *See* Appellant's Opening Brief pgs. 45-49.

In response, the State asserts "[t]he trial judge correctly concluded that, as a matter of law, Mr. Westwood was not entitled to a below the standard range sentence." *See* Respondent's Brief pg. 36. The State acknowledges "[t]he crimes Mr. Westwood was convicted of *do allow* for a mitigated sentence." *See* Respondent's Brief pg. 28 (emphasis added). The State then goes on to argue there were not sufficient facts presented at sentencing to impose a mitigated sentence, and "[t]his is the question the sentencing judge was answering 'no' as a matter of law." *See* Respondent's Brief pgs. 28-29.

Mr. Westwood disagrees that the trial court properly exercised its discretion and considered whether to impose a mitigated sentence based upon his youth at the time of the crimes. Mr. Westwood's argument is the trial court did not recognize youth was a lawful basis for imposing a sentence below the standard range, and therefore, the trial court did not properly exercise its discretion. *See* RP (Jan. 8, 2018) 101 (where the trial court states "[b]ecause, if it's true, that a mitigated sentence is appropriate, then I have to have some basis for imposing still a determinate sentence here and there is no basis. There's no basis given on the law.>").

“ “[W]hile no defendant is entitled to an exceptional sentence . . . , every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007) (quoting *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). “A trial court abuses discretion when ‘it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.’” *Grayson*, 154 Wn.2d at 342 (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). “A trial court errs . . . when it operates under the mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.” *State v. McFarland*, 189 Wn.2d 47, 54, 399 P.3d 1106 (2017) (internal quotation marks omitted) (citations omitted) (alteration in original). “The failure to consider an exceptional sentence is reversible error.” *Grayson*, 154 Wn.2d at 342.

The trial court has the discretion to impose an exceptional sentence below the standard range based on the Mr. Westwood’s youth at the time he committed the crimes. *See State v. Ramos*, 187 Wn.2d 420, 428, 387 P.3d 650 (2017); *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 34, 391 P.3d 409 (2017); *State v. O’Dell*, 183 Wn.2d 680, 683, 358 P.2d 359 (2015). The trial court abused its discretion when it failed to consider Mr. Westwood’s request for an exceptional sentence below the standard range.

The State also makes the following assertion based on *State v. Scott*: “[b]ecause any juvenile, regardless of the crimes of conviction, will be eligible for release after 20 years, the eighth amendment cannot be offended on account of chronological age alone by any sentence imposed in Washington Courts.” *See Respondent’s Brief* pg. 35; *see also State v. Scott*, 190 Wn.2d 586, 416 P.3d 1182 (2018). However, this is not the

holding of *Scott*. In *Scott*, our Supreme Court held that RCW 9.94A.730's parole provision was an adequate remedy for a *Miller*⁵ violation, making collateral relief via a personal restraint petition unavailable for the defendant. *Scott*, 190 Wn.2d at 588. This is because "[t]he appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances" RAP 16.4(d). *Scott* did not make the sweeping holding suggested by the State here. This is a direct appeal where the sentence imposed was unlawful, and therefore, Ms. Alltus is entitled to resentencing. See *Ramos*, 187 Wn.2d at 435-36; *Houston-Sconiers*, 188 Wn.2d at 20, 22-23.

The trial court abused its discretion in sentencing Mr. Westwood without considering mitigating circumstances related to his age at the time of the crimes. The case should be reversed and remanded for resentencing for the trial court to exercise its discretion to consider a sentence below the standard adult range based upon Mr. Westwood's age at the time of the crimes.

C. CONCLUSION

The remedy for the trial court's erroneous rejection of the proposed amendment to the information and the corresponding plea agreement is to restore Mr. Westwood to the position he would have been in absent the error. This requires reversal of Mr. Westwood's convictions and an offer to amend the information and a corresponding plea agreement to effectuate a similar outcome to the erroneously rejected offer.

In addition, Mr. Westwood's convictions should be reversed and remanded for a new trial, because he was denied his right to a fair and impartial jury, where the trial

⁵ *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

court denied his motion for a mistrial based upon jurors discussing extrinsic DNA evidence.

At a minimum, the case should be reversed and remanded for resentencing to: (1) vacate Mr. Westwood's conviction for first degree assault, because his convictions for both attempted first degree rape and first degree assault violate double jeopardy; or (2) sentence the attempted first degree rape and the first degree assault concurrent, as opposed to consecutive; and/or (3) count first degree burglary, first degree assault, and attempted first degree rape as one crime; and (3) for the trial court to exercise its discretion to consider a sentence below the standard adult range based upon Mr. Westwood's age at the time of the crimes.

Mr. Westwood also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 11th day of February, 2019.


Jill S. Reuter, WSBA #38374

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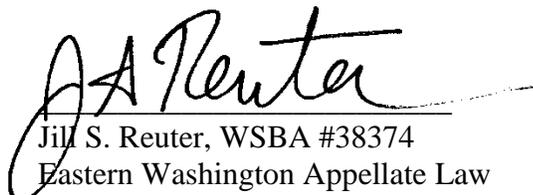
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| STATE OF WASHINGTON |) | |
| Plaintiff/Respondent |) | COA No. 35792-9-III |
| vs. |) | Grant Co. No. 16-1-00352-7 |
| |) | |
| DAHNDRE KAVAUGN WESTWOOD |) | PROOF OF SERVICE |
| Defendant/Appellant |) | |
| _____ |) | |

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 11, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

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Dated this 11th day of February, 2019.


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