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NO. 53767-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FROST,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. **ISSUES PRESENTED**

1. The doctrine of prosecutorial vindictiveness dictates that the State may not retaliate against a defendant for exercising procedural rights. However, controlling precedent holds that this doctrine does not apply to legitimate plea bargaining. Thus, it is constitutionally permissible for a prosecutor to charge additional and more serious crimes when a plea offer has been rejected, provided that the new charges are supported by the evidence.

In this case, the prosecutor made a plea offer and gave notice that additional charges would be filed if the offer were rejected. The defendant rejected the offer, and the new charges were filed. The new charges were fully supported by the evidence. Should this court reject the defendant's claim of prosecutorial vindictiveness?

2. The State bears the burden of proving that a defendant's custodial statements were made knowingly and voluntarily after a proper advisement of rights. In some cases, the State may fail to carry its burden if important police witnesses fail to testify during a pretrial suppression hearing. Specifically, when a witness's absence is unexplained, and when no other evidence supports the

conclusion that a statement is admissible, the statement may be suppressed.

In this case, a police witness did not testify during the pretrial suppression hearing. However, the witness was unavailable because she was out of the country, and independent evidence proved that the defendant's statements were admissible. Should this court reject the defendant's claim that the State failed to meet its burden during the suppression hearing?

3. A defendant who claims duress necessarily admits the elements of the charged crimes. Duress is an affirmative defense that the defendant must prove by a preponderance of the evidence. Under Washington law, duress is wholly inconsistent with other defenses that negate an element of the crime charged.

In this case, the defendant claimed he participated in a series of robberies under duress. In accord with Washington law, the trial court ruled that the defendant could not claim duress *and* general denial, and that he should choose one defense or the other for each crime charged. Should this court affirm that ruling?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Joshua Frost, and his co-defendants, Matthew Williams and Alexander Shelton, were initially charged with first-degree burglary and three counts of first-degree robbery for a series of crimes occurring in April 2003. CP 1-11. Shortly thereafter, the defendants were charged with a fourth count of first-degree robbery, as well as a first-degree robbery under a different cause number. All but one of these crimes included firearm enhancements. CP 12-18; 8/26/03 RP 4-5.

The prosecutor offered each defendant the opportunity to plead guilty to three counts of first-degree robbery with firearm enhancements in exchange for dismissing the remaining counts and enhancements. He also gave notice to each defendant that several more crimes and enhancements would be charged before trial if the plea offer were rejected. 7/11/03 RP 4-5; 1/30/04 RP 3-4. Williams and Shelton accepted the plea bargain; Williams received a sentence totaling 309 months, and Shelton's sentence totaled 240 months.¹ Frost considered the prosecutor's offer with the

¹ By agreement of the parties, the judgments for Williams and Shelton have been made part of the record on appeal.

assistance of counsel. 7/11/03 RP 2-3. Frost rejected the offer, and elected to go to trial. 8/26/03 RP 16-17.

The final amended information included the following charges:

Count I: Burglary in the First Degree, with firearm enhancement (victim Gapp).

Count II: Robbery in the First Degree, with firearm enhancement (victim Gapp).

Count III: Robbery in the First Degree, with firearm enhancement (victim Summerson, Taco Time).

Count IV: Robbery in the First Degree, with firearm enhancement (victim Chen/Kim, Ronnie's Market).

Count VI: Robbery in the First Degree, with firearm enhancement (victim Nyjar, 7/Seven).

Count VII: Assault in the Second Degree, with firearm enhancement (victim Sears, 7/Seven).

Count VIII: Assault in the Second Degree, with firearm enhancement (victim Palu, 7/Seven).

Count IX: Robbery in the First Degree, with firearm enhancement (victim Randhawa, 7/Seven).

Count X: Assault in the Second Degree, with firearm enhancement (victim Chen/Kim, Ronnie's Market).

Count XI: Attempted Robbery in the First Degree, with firearm enhancement (victim Rangel, Taco Time).

Count XII: Robbery in the First Degree, with firearm enhancement (victim Wiley, T & A Video).

CP 131-37. Counts I through VI were charged initially, and Count XII was charged initially under a separate cause number; Counts VII through XII and the enhancement on Count III were added at the conclusion of plea bargaining.

Frost was tried before the Honorable Catherine Shaffer between November 12 and December 11, 2003. The jury found Frost guilty of all charges and enhancements with the exception of Count VII. CP 210-14.

Frost was sentenced on January 30, 2004. 1/30/04 RP. He received a standard-range sentence totaling 657 months. CP 236-46. This timely appeal follows. CP 247-59.

2. SUBSTANTIVE FACTS

Lloyd and Verna Gapp, aged 75 and 72 respectively, were relaxing in their Burien home on April 9, 2003 when they heard a knock on the door at 8:40 p.m. 12/3/03 RP 132-33, 144. Lloyd answered the door, and three masked intruders – Frost, Williams and Shelton – burst into their home. Williams kicked Lloyd and put a gun to his head. 12/3/03 RP 134-35, 145. One of the intruders hit Verna in the face and almost broke her nose. 12/3/03 RP 145-46. Williams and Frost took Lloyd to a back bedroom at gunpoint while Shelton stood guard over Verna. 12/3/03 RP 135; 12/11/03

RP 38. They made Lloyd open his safe, and they stole money, handguns, and legal documents. 12/3/03 RP 136; Ex. 70, p.14. They also stole the money from Lloyd's wallet and his wedding ring. They tried to steal Verna's wedding ring, but could not remove it because her hands were swollen due to arthritis. 12/3/03 RP 138; 148. They ripped the telephones out of the wall, instructed the Gapps to given them 20 seconds before calling the police, and left. 12/3/03 RP 138.

The Gapps were chosen as victims because Frost was acquainted with their grandson and had been to their house. Ex. 70, p.5. Frost knew that the Gapps had a safe, and he had heard that they kept substantial amounts of money in it. Ex. 70, p.5-6; 12/3/03 RP 153. Frost drove to the Gapps' house the night of the robbery, and had also driven to the house the night before to case the scene. Ex. 70, p.6-7.

On April 12, 2003, just before 11:00 p.m., Joseph Summerson and Andrea Rangel were taking out the trash at the Burien Taco Time where they worked, and were getting ready to go home for the night. 12/8/03 RP 78-79. Just then, two men with bandannas covering their faces – Williams and Shelton – pointed handguns at them and forced them back inside the restaurant.

12/3/03 RP 158-59. They took Summerson and Rangel back to the office; Williams pointed his gun at Rangel's head and told Summerson to "open the safe or the girl gets it." Summerson complied, and gave them the money. 12/3/03 RP 159. They also took money from Summerson's wallet and smashed his cellular phone. 12/3/03 RP 161-62. They ordered Rangel to empty her purse; she did not have any money, so they did not steal anything from her. 12/8/03 RP 83. They ransacked the office, smashed the telephone and fax machine, and left. 12/3/03 RP 162.

Frost, who had driven Williams and Shelton to the Taco Time, was waiting in his car behind the restaurant. 12/11/03 RP 50. Frost drove Williams and Shelton to his house after the robbery. 12/11/03 RP 50-51. Frost's girlfriend worked at the Taco Time that they robbed, and Frost had worked at a different Taco Time in the past; therefore, he was familiar with the restaurant's procedures and security systems. Ex. 62, p.4-6.

On April 15, 2003, Hannah Wiley was working as a clerk at T& A Video in Federal Way. 12/8/03 RP 12. Just before closing, at about 11:55 p.m., three men carrying guns and wearing bandannas

on their faces – Williams, Shelton and Jason DaFoe² – came into the store and ordered her to back up against the wall. 12/8/03 RP 13. They threatened to shoot her and ordered her to open the safe. 12/8/03 RP 15. They tried to open the cash register, but they smashed it and rendered it inoperable. Williams also took Wiley's wallet. 12/8/03 RP 17. The robbers took the cash register, the money from the safe, and left. 12/8/03 RP 18.

Frost was parked nearby, waiting to drive the others away from the scene. 12/11/03 RP 53, 55-56. Frost drove them to his house after the robbery. 12/11/03 RP 58. In addition, Frost and Dafoe had gone inside T & A Video approximately two hours before the robbery to case the store. Ex. 72, p.9. Frost asked Wiley what time the store closed. 12/8/03 RP 20-21. Wiley remembered Frost because he was "loud and obnoxious." 12/8/03 RP 25.

On April 17, 2003 at approximately 2:00 a.m., Neil Nyjar and Satdam Randhawa were working at a 7/Eleven in West Seattle. 12/8/03 RP 39-41. Two men wearing masks and brandishing handguns – Williams and Shelton – came into the store, ordered Randhawa to lie on the floor, and told Nyjar to open the cash

² DaFoe was not charged.

registers. They complied. 12/8/03 RP 44-45, 47. While the robbery was in progress, Kurt Sears and Annette Palu pulled up in Sears's car and parked in front of the store. 12/8/03 RP 63-64. Williams told Shelton to go outside, and Shelton pointed the gun into the car. 12/8/03 RP 48. Shelton said, "do you want to have a good day or a bad day," and Palu replied, "good[.]" 12/8/03 RP 75. Shelton told them to "get the hell out of here," and Sears and Palu drove away. They went to a nearby Safeway store and called the police. 12/8/03 RP 75. While Sears testified that he was not afraid he would be shot, Palu was very frightened.³ 12/8/03 RP 64, 67. Shelton then went back into the store, and he and Williams made Nyjar and Randhawa lie on the floor. 12/8/03 RP 49. In addition to the money from the cash registers, they took cigarettes, Nyjar's wallet, and Randhawa's watch. 12/8/03 RP 49-51.

Frost was waiting in his car, which he had parked so that it could not be seen from inside the store. 12/11/03 RP 61. Frost drove Williams and Shelton away from 7/Eleven and started driving toward his house in Burien. On the way, Williams decided to rob

³ Sears's testimony that he was not afraid is almost certainly the reason that the jury acquitted Frost of Count VII.

another store because they had not received much money from 7/Eleven. 12/11/03 RP 63-64.

Huor Long and his cousin, Heng Chen (aka Heng Kim), were working at Ronnie's Market in Burien on April 17, 2003. Two men with guns and masks – Williams and Shelton – came into the store and made Long lie on the floor. 12/8/03 RP 90. Long heard a gunshot, then heard his cousin screaming. Williams and Shelton ran out of the store with the money from the cash register. 12/8/03 RP 91-92. Williams had shot Chen in the hand. 12/8/03 RP 92. Frost was waiting in the getaway car. He drove Williams and Shelton to his house after the robbery. 12/11/03 RP 66.

On April 20, 2003, Williams and Shelton committed a robbery without Frost's assistance, although they borrowed Frost's car. CP 5-6. They brought the proceeds – a large safe – to Frost's house to open it. Ex. 62, p.11. Eddie Shaw, who had been staying at the house with Frost's roommate, watched Frost, Williams, Shelton and DaFoe trying to open the safe. Shaw asked Frost if they were involved in the robbery spree, which had been on the news. Frost admitted they were the perpetrators, and explained that "he has to do what he has to do" because he did not have a job. 12/9/03 RP 30-33.

Shaw went to the Burien precinct of the King County Sheriff's Office and reported what he had learned. 12/9/03 RP 35. Shaw tried to make a deal regarding some pending charges he had, but was unsuccessful. He provided the information anyway. 12/9/03 RP 35-36. Based on the information Shaw provided, Detective Eleanor Broggi obtained a search warrant for Frost's house and car, and Frost and the others were arrested. 11/12/03 RP 25-26; 12/8/03 RP 119. Evidence recovered from Frost's house and car included bandannas, ski masks, latex gloves, three safes, a cash register, bank bags, and loaded handguns. 12/8/03 RP 124-25, 130-37; 12/9/03 RP 51-52, 88, 91.

Deputy Steven Lysaght advised Frost of his rights immediately after his arrest, and Frost said that he understood. 11/12/03 RP 26-27. After Frost was transported to the precinct, Detective Scott Tompkins again advised Frost of his rights, which Frost acknowledged and waived. 11/12/03 RP 36, 39-40. After asking some background questions, Tompkins asked a direct question about one of the robberies; Frost denied any knowledge and asked for an attorney. 11/12/03 RP 40-42. Tompkins stopped questioning Frost, and told him he should re-contact police after obtaining an attorney because, in Tompkins's opinion, Frost was

“not cut out for prison[.]” 11/12/03 RP 42. Tompkins placed Frost in Deputy Trine Hansen’s patrol car while the other suspects were being interviewed. 11/12/03 RP 50.

Later on, Frost told Deputy Hansen that he wanted to give a statement to Sergeant James Corey. Corey took a taped statement from Frost, who acknowledged that it was his decision to reinitiate contact with the police and waive his right to an attorney. Ex. 62. Subsequently, Frost gave a statement to Detectives Decker and Anderson on April 21, 2003, and he gave a statement to Detectives Robinson and Gordon on April 30, 2003. Ex. 70; Ex. 72. In these statements, Frost admitted his involvement in the robberies.

During the CrR 3.5 hearing, Frost claimed that he had been threatened and coerced by Detective Tompkins and Deputy Hansen, and that these threats and coercion led him to waive his rights and speak with Sergeant Corey. 11/13/03 RP 45-50. The trial court found that Frost’s testimony conflicted with other evidence, including his own taped statements, and that Frost was not credible. 11/13/03 RP 85-90. The court concluded that Frost’s statements were admissible. CP 220-27.

At trial, Frost claimed that he had participated in the robberies under duress, and he denied any participation in the

assaults. Frost claimed that Williams had threatened to harm him and his family if he did not assist in the crime spree. 12/11/03 RP 30, 36, 50-51, 65. The jury rejected Frost's defenses. CP 210-14.

C. **ARGUMENT**

1. **DUE PROCESS DOES NOT PRECLUDE THE STATE FROM FILING CHARGES SUPPORTED BY THE EVIDENCE TO ACCURATELY DESCRIBE THE SCOPE OF A DEFENDANT'S CRIMINAL CONDUCT.**

Frost first claims that his due process rights were violated when he was charged with additional crimes prior to trial. He claims that because he went to trial, while his co-defendants did not, the additional charges were the product of prosecutorial vindictiveness. He claims that this court should dismiss the charges and enhancements added in the final amended information, and that his case should be remanded for the trial court to dismiss further charges as a deterrent to the State. Amended Brief of Appellant, at 32-43.

These claims should be rejected. The prosecutor did not act vindictively; rather, he tendered the same plea offer to all three defendants, and informed all three defendants that the information would be amended for trial. The fact that Frost is the only defendant who rejected the plea offer does not *ipso facto* render

the prosecutor's actions vindictive. To the contrary, the charges in the amended information accurately describe the scope of Frost's criminal conduct, and are amply supported by the evidence. No due process violation occurred, and Frost's convictions should be affirmed.

Prosecutorial vindictiveness is a doctrine that arises from the principle that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort[.]" Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). Accordingly, in order to protect a defendant from retaliation due to a successful appeal or collateral attack, a presumption of vindictiveness arises when a defendant is charged with more serious crimes upon retrial or remand. Blackledge v. Perry, 417 U.S. 21, 27-29, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974).

But when additional or more serious crimes are charged *before* trial, no presumption of vindictiveness arises. In the pretrial context, courts do not place such constraints on the discretion of the prosecutor to file charges that are justified by the evidence. As the United States Supreme Court has explained,

A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

United States v. Goodwin, 457 U.S. 368, 382, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) (footnotes omitted). Therefore, in the pretrial setting, a defendant must show that the prosecutor's *actual* vindictiveness has resulted in a due process violation, or that there is at least a "realistic likelihood" of vindictiveness. Goodwin, 457 U.S. at 382-84; State v. Lee, 69 Wn. App. 31, 37, 847 P.2d 25, review denied, 122 Wn.2d 1003 (1993); State v. Bonisisio, 92 Wn. App. 783, 791, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024 (1999).

But vindictiveness does *not* include the filing of additional charges that are fully supported by the evidence at the conclusion of unsuccessful plea negotiations. Bordenkircher, 434 U.S. at 364-65; Bonisisio, 92 Wn. App. at 790-92. To the contrary, as this court has observed,

Plea bargaining is a legitimate process, so long as it is carried out openly and above the table, between prosecutors and defendants who are represented by counsel and fully informed. That a

prosecutor may offer “hardball” choices to a defendant does not make the process constitutionally unfair, so long as the choices are realistically based upon evidence and options known to both sides.

Lee, 69 Wn. App. at 36. Indeed, in a case where the defendant faced a five-year sentence under the prosecutor’s plea offer, but received a *life* sentence when he rejected that offer and went to trial, the Supreme Court articulated its reasoning even more strongly than this court did in Lee:

While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable – and permissible – attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.

Bordenkircher, 434 U.S. at 364 (citations and internal quotations omitted) (alteration in original). Thus, where the prosecutor “no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution,” the filing of additional charges does not violate due process. Id. at 365. Moreover, while the disparate treatment of similarly situated defendants may indicate

vindictiveness in some cases, such disparate treatment is indicative of vindictiveness only when the prosecutor has treated multiple defendants *who have rejected a plea bargain* differently. See Bonisisio, 92 Wn. App. at 792.

In short, due process is satisfied when a prosecutor tenders a plea offer, gives proper notice of legitimate charges that will be filed in the event that the offer is rejected, and is true to his or her word when the offer is, in fact, rejected. Absent a showing of vindictiveness based on motives unrelated to legitimate plea bargaining,⁴ “there is no violation of due process merely because a prosecutor ‘ups the ante’ by amending to a higher charge” in the pretrial context. Lee, 69 Wn. App. at 37. That is precisely what happened in this case.

In this case, there is no dispute that the prosecutor tendered a plea offer to Frost, and that Frost was represented by counsel to advise him in considering that offer. 7/11/03 RP 2-5. There is also no dispute that the prosecutor gave proper notice of the charges that would be filed if Frost rejected the offer. 7/11/03 RP 4-5; 8/26/03 RP 17. It is undisputed that these additional charges were

⁴ Such motives may include basing a charging decision on a defendant’s race or religion. See Bordenkircher, 434 U.S. at 365.

supported by the evidence. 8/26/03 RP 15-16. Moreover, there is no dispute that the prosecutor tendered the same plea offer to Williams, Shelton and Frost, and that he informed all three of them that the information would be amended in the same manner if the offer were rejected. 1/30/03 RP 3-4.

This record does not demonstrate vindictiveness. To the contrary, this record demonstrates nothing more or less than legitimate plea bargaining by a prosecutor “acting forthrightly in his dealings with the defense” who treated all the defendants precisely the same. Bordenkircher, 434 U.S. at 365. Thus, Frost has not carried his burden of demonstrating vindictiveness. Rather, “in the ‘give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.” Id. at 363. The fact that Frost rejected the prosecutor’s offer while his co-defendants accepted it does not establish vindictiveness, but rather the exercise of choice. Frost’s due process claim is without merit, and his convictions should be affirmed.

Nonetheless, Frost argues that vindictiveness may be shown by the mere filing of additional charges and the resulting longer sentence. He argues that, as an accomplice to the robberies, he is

less culpable than Williams and Shelton, and due process requires that the amended charges be dismissed and his sentence be reduced accordingly. He relies primarily on State v. Korum, 120 Wn. App. 686, 86 P.3d 166, review granted, 152 Wn.2d 1021 (2004),⁵ in making these claims. These claims should be rejected.

In Korum, the defendant was initially charged with 16 counts of burglary, robbery, kidnapping and assault based on his participation in “a conspiracy with friends to rob drug dealers in a series of non-injury home invasions.”⁶ Korum, 120 Wn. App. at 689, 693. Korum initially reached a plea bargain with the prosecutor, pled guilty to one count of kidnapping and one count of unlawful possession of a firearm, and received a 132-month sentence. Id. at 694. However, he later withdrew his guilty plea on grounds that he was misinformed regarding mandatory community placement. Id. at 695. In response, the prosecutor filed an amended information alleging 32 counts of burglary, robbery,

⁵ Oral argument before the Washington Supreme Court is scheduled for February 10, 2005.

⁶ These so-called “non-injury home invasions” involved Korum and his co-defendants wearing masks and camouflage, identifying themselves as police, bursting into homes, binding victims (including children) with duct tape, threatening them with guns, and stealing their property. Id. at 690-92.

kidnapping and assault, and the case proceeded to trial. Korum was convicted of all but two charges, and was sentenced to 1,208 months in prison. Id. at 695-700.

Division Two of this court concluded that a presumption of vindictiveness arose on the basis of four factors: 1) the “stacking” or “pyramiding” of charges, including kidnapping charges that were “incidental to the robberies”; 2) the filing of numerous charges not contained in the original, 16-count information; 3) the “exponential” increase in Korum’s sentence; and 4) the disparity between Korum’s sentence and that of his co-defendants. Korum, 120 Wn. App. at 702-16. As a result, the court fashioned a three-part remedy: 1) dismissal of the “incidental” kidnapping charges; 2) dismissal of all charges not contained in the original, 16-count information, and 3) remand to the trial court for dismissal of further charges “to provide a deterrent” to the State. Id. at 718-20.

Korum is inapplicable for several reasons. First, the most troubling fact for the Korum court was the “stacking” or “pyramiding” of “incidental” charges, i.e., adding a count of kidnapping for each victim present during each incident on top of numerous counts of

burglary, robbery and assault.⁷ This “pyramiding” of charges resulted in multiple charged crimes per victim. In this case, by contrast, the prosecutor judiciously selected one or, at most, two crimes for each victim that most accurately described the harm each victim had suffered based on the evidence. CP 131-37. Therefore, unlike Korum, the prosecutor in this case did not unfairly stack the charges. Rather, he charged the crimes that were necessary to adequately describe the scope of the defendants’ conduct.

Furthermore, the reasoning of Korum is suspect in several respects. For instance, it appears that the court considered Korum to be in a pretrial posture, yet the court did not require a showing of actual vindictiveness. Korum, 120 Wn. App. at 710. In support of this point, the court relied upon Blackledge v. Perry, *supra*, and Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979) – cases applying a *presumption* of vindictiveness where the defendant had exercised the right to *appeal*. As discussed above, filing more serious charges upon retrial following appeal is fundamentally different from filing such charges pretrial. See Goodwin, 457 U.S. at 375 (“the

⁷ In addition, because first-degree kidnapping is a “serious violent offense,” Korum’s “incidental” kidnapping charges resulted in consecutive sentences. RCW 9.94A.030(37).

problem of increased punishment upon retrial after appeal” implies retaliation, whereas the pretrial filing of more serious charges does not). Thus, in a pretrial context, a different standard applies:

The possibility that a prosecutor would respond to a defendant’s pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness certainly is not warranted.

Goodwin, 457 U.S. at 384 (emphasis in original).

Moreover, the Korum court seems to have disregarded Bordenkircher, Lee and Bonisisio, which hold that a prosecutor may file additional or more serious charges as supported by the evidence when a defendant rejects a plea offer. Indeed, the Korum court stated that the prosecutor had violated due process for that very reason:

Here, the State made no effort to hide its reason for upping the ante against Korum. Rather, it was clearly following through on its *plea-negotiation threat* to file a 32-count amendment if Korum exercised his right to trial.

Korum, 120 Wn. App. at 711 (emphasis supplied). But the prosecutor in Bordenkircher similarly “made no effort to hide its reason for upping the ante.” Nonetheless, the Supreme Court concluded that “so long as the prosecutor has probable cause to

believe that the accused committed an offense defined by statute,” the filing of additional charges as promised at the conclusion of plea negotiations is a constitutionally valid practice. Bordenkircher, 434 U.S. at 364. While this practice undoubtedly discourages trials – indeed, such is the point of plea bargaining – it is entirely appropriate “so long as the accused is free to accept or reject the prosecution’s offer.” Id. at 363.

The Korum court was also concerned that the State had not only refiled charges that were dismissed as part of the plea agreement, but filed new charges as well. Korum, 120 Wn. App. at 708. The court held that when a defendant withdraws a guilty plea or obtains reversal on appeal, the prosecutor is generally constrained to filing charges “within the limits set by the original indictment.” Id. (quoting Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977)). While such a rule may apply in the post-appellate context, such constraints do not apply pretrial. See Lee, 69 Wn. App. at 36. Moreover, Korum cites Bordenkircher for the proposition that a prosecutor may only “recharge” previously dismissed counts. Korum, 120 Wn. App. at 709 n.20. This fundamentally misstates the holding of Bordenkircher, where the prosecutor *added* a habitual offender charge that subjected the

defendant to a mandatory life sentence. Bordenkircher, 434 U.S. at 358-59.

Korum also found that the prosecution had violated RCW 9.94A.411(a)(ii) by overcharging the defendant to obtain a guilty plea. The court implied that a due process violation could be found based on the statute. Korum, 120 Wn. App. at 701-02. But the statute does not provide Frost with a basis for relief for two reasons: 1) unlike Korum, the prosecutor in this case selected crimes that were necessary to obtain restitution for every victim and to describe the scope of the criminal conduct under RCW 9.94A.411(a)(i)(B) and 9.94A.411(a)(ii); and 2) the legislature specified that the statute “may not be relied upon to create a right or benefit, substantive or procedural” for a defendant. RCW 9.94A.401.

Finally, Korum's reasoning regarding disproportionate sentencing is unpersuasive here for several reasons. First, Korum is factually distinguishable. Under the plea agreement, Korum received a 132-month sentence, but received a 1,208-month sentence following trial. In this case, by contrast, Frost would have received a sentence between 231 and 248 months if he had

accepted the prosecutor's offer,⁸ and he received a sentence totaling 657 months following trial. CP 239. Although this difference is substantial, it is nothing like the disparity in Korum.⁹

Additionally, while the Korum court was concerned with the disparity between Korum's sentence and that of his co-conspirators, this concern is not a basis to reverse in this case. With the exception of Korum, Washington law has consistently held that when co-defendants are convicted of different crimes, or when some plead guilty while others do not, disparate sentences are constitutionally permissible. State v. Handley, 115 Wn.2d 275, 292-93, 796 P.2d 1266 (1990); State v. Connors, 90 Wn. App. 48, 52-53, 950 P.2d 519, review denied, 136 Wn.2d 1004 (1998). Moreover, while a defendant's status as an accomplice may justify a more lenient sentence in some cases, Frost's participation in these crimes is not as minimal as he suggests.

⁸ See Alexander Shelton's Judgment and Sentence, attached as appendix to the original Brief of Appellant.

⁹ Korum's reasoning is suspect in this respect as well. See Bordenkircher, 434 U.S. at 358-59 (difference between five years under the plea agreement and life imprisonment after trial was not constitutionally impermissible).

As the trial court found at sentencing: 1) Lloyd and Verna Gapp were chosen as victims of a terrifying home invasion because Frost knew them and knew they had money in their home; 2) the Taco Time was likely chosen because Frost's girlfriend worked there; 3) Frost cased the T & A Video store before it was robbed; 4) guns, masks, safes and other evidence from the robberies were found at Frost's house; 5) Frost's car was used in each robbery, and 6) Frost and his co-defendants "enjoyed their celebrity" when these crimes were in the news. 1/30/04 RP 21-26. Furthermore, as the trial court found, Frost's post-trial letters to Matthew Williams demonstrate that he was not merely a reluctant accomplice. Rather, these letters indicate that Frost was using his co-defendants as "tools." 1/30/04 RP 26-28; CP 274-285.

In sum, Frost has failed to demonstrate that any due process violation has occurred. Legitimate plea bargaining does not constitute prosecutorial vindictiveness. As this court has held,

Although [the defendant] argues that the prosecutor "overcharged" him, the fact that his otherwise unchallenged conviction is supported by substantial evidence belies that claim. [He] rejected an offer to plead guilty to a lesser included charge. Having rejected that offer and suffered the consequences, he asks this court to reverse and remand "for the filing of the proper charge." There

being no support in fact or in law for this request, we reject it.

Lee, 69 Wn. App. at 38 (citation omitted). This court should similarly reject Frost's claim, and affirm.

2. **THE TRIAL COURT'S CONCLUSION THAT FROST'S CUSTODIAL STATEMENTS WERE VOLUNTARY AND ADMISSIBLE SHOULD BE AFFIRMED.**

Frost next claims that the trial court erred in admitting his custodial statements. Specifically, he claims that the trial court should have drawn a negative inference from the State's failure to call Deputy Hansen as a witness during the CrR 3.5 hearing, and that the court should have concluded that Frost's statement to Sergeant Corey was coerced. He also claims that his subsequent custodial statements should have been suppressed under the "cat out of the bag" doctrine. Amended Brief of Appellant, at 45-52. These claims are without merit.

First, the trial court was under no obligation to draw the negative inference Frost now urges – an argument he did not make at trial – because Deputy Hansen's absence was not unexplained. Rather, the record demonstrates that she was unavailable to testify. Second, ample evidence in the record independently supports the trial court's conclusion that Frost was not coerced. Third, the trial

court specifically found that Frost's testimony at the CrR 3.5 hearing was not credible. Such credibility findings cannot be reviewed on appeal. Finally, because the trial court did not err in finding Frost's first custodial statement admissible, the "cat out of the bag" doctrine is irrelevant. Frost is not entitled to a new trial on this basis, and his convictions should be affirmed.

Before a defendant's custodial statements may be admitted at trial, the State must establish by a preponderance of the evidence that the defendant was fully advised of his rights, and that the defendant knowingly and intelligently waived those rights. State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973). The State must also establish that the defendant's statement was voluntary, and not the product of unlawful coercion. Miranda v. Arizona, 384 U.S. 436, 476, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

When a defendant initially invokes his rights, but subsequently changes his mind and waives them, courts should consider the following factors to determine whether the subsequent waiver is valid: 1) whether the police scrupulously honored the initial invocation of rights; 2) whether the police interrogated the defendant before obtaining the subsequent waiver; 3) whether the police engaged in coercive tactics to obtain the subsequent waiver;

and 4) whether the subsequent waiver was knowing and voluntary.

State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987).

When the defendant initially invokes the right to counsel, interrogation may resume if the defendant initiates further communication with the police of his own accord without a lawyer present. State v. Aten, 130 Wn.2d 640, 666, 927 P.2d 210 (1996).

In this case, Frost was fully advised of his Miranda rights by Deputy Lysagt and by Detective Tompkins. CP 223; 11/12/03 RP 26-27, 36, 39. Frost initially agreed to speak with Detective Tompkins. CP 223; 11/12/03 RP 40-41. When Tompkins asked Frost about one of the robberies, Frost denied any knowledge and asked for an attorney. Tompkins immediately ceased questioning, and told Frost he should re-contact the police after obtaining an attorney because it did not appear that Frost was "cut out for prison[.]" 11/12/03 RP 41-42. Tompkins placed Frost in Deputy Hansen's patrol car, and some time later, Frost asked to speak with Sergeant Corey. 11/12/03 RP 21-22. Corey advised Frost of his rights again and took a taped statement; Frost acknowledged that he had reinitiated contact with the police of his own accord and that his statement was voluntary. Ex. 62, p. 2.

The only disputed issue at the CrR 3.5 hearing was whether Frost's subsequent waiver was valid, or whether he was coerced to change his mind about invoking his right to counsel. Frost now contends, for the first time on appeal, that the trial court should have drawn a negative inference from the State's failure to call Deputy Hansen as a witness, and that the trial court should have presumed that Hansen employed coercive tactics as Frost claimed during his own testimony. 11/13/03 RP 47-49. On this basis, Frost claims that all three of his taped statements should have been suppressed: the first due to coercion, and the latter two due to the taint from the first.

As Frost correctly notes, Washington case law indicates that a negative inference may be drawn from an important police witness's failure to testify at a pretrial suppression hearing. But such an inference applies only in cases where the State's failure to produce the witness is *unexplained*. State v. Davis, 73 Wn.2d 271, 288, 438 P.2d 185 (1968); State v. Erho, 77 Wn.2d 553, 559, 463 P.2d 779 (1970). As this court has observed, the rationale in these cases "is akin to the 'missing witness rule'" as set forth in WPIC 5.20. State v. Haack, 88 Wn. App. 423, 433, 958 P.2d 1001 (1997), review denied, 134 Wn.2d 1016 (1998). Accordingly, the

State's failure to explain the witness's absence *and* a lack of other evidence supporting admissibility are key factors in applying such an inference in the defendant's favor:

In the context of a suppression hearing based on *Miranda*, that [negative] inference is sufficient to tip the scales in favor of the accused, *where the State offers no explanation of its failure to call the witness*. In such instances, the State cannot meet its burden as a matter of law, *unless there is sufficient other evidence to overcome the inference*.

Haack, 88 Wn. App. at 434 (emphasis supplied).

In this case, Deputy Hansen's absence was not unexplained. To the contrary, the State had planned to call her as a witness, but discovered during the pretrial hearing that she was out of the country and unavailable to testify. 11/12/03 RP 62-63; 11/13/03 RP 6. Indeed, this is likely why defense counsel did not argue the missing witness doctrine at trial. This fact alone defeats Frost's claim on appeal, as the witness's unexplained absence is a condition precedent to drawing any inference in Frost's favor.

Furthermore, there is ample evidence in the record – most notably Frost's own statements – proving that Frost was not coerced and that his statements were voluntary. For instance, Frost told Sergeant Corey that he had decided on his own to re-

contact the police after initially invoking his right to an attorney, and confirmed that he was making his statement voluntarily:

DET: Okay, now JOSHUA, just so that there's some clarification, you were already advised of your rights earlier this afternoon, and at that time you said you wanted to speak to an attorney, correct?

SUS: Yes.

DET: Okay, but you have since changed your mind, that's correct?

SUS: Yeah, I still wanna be represented by an attorney, but I'll give you a statement without one present.

DET: Okay, but, but I wanna make sure that, that we're very clear that you're the one that wanted to reinitiate . . .

SUS: Yes.

DET: . . . the contact?

SUS: Yes.

DET: Okay, all right. I'm gonna read you the Waiver of Constitutional Rights:
I have read the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at this time. The following statement is made freely and voluntarily without threats promises (sic) of any kind. Do you understand that right?

SUS: Yes, I do.

DET: Okay, if you agree with this waiver, go ahead and sign that.

Ex. 62, p.2. Frost made similar statements to Detectives Decker and Anderson the following day:

DET: Okay, and um, JOSH uh, just for the record here, I know when you were contacted by detectives yesterday and you didn't really wanna say much at first, but then you came forward . . .

SUS: Well the one, first detective that I talked to just started insulting me . . .

DET: Okay.

SUS: . . . outside. Wasn't gonna talk to him.

DET: And then you went to another detective is that correct?

SUS: Correct.

DET: And said, I've got some information that I wanna give you?

SUS: Yes.

Ex. 70, p.2. Frost again acknowledged that he was making his statement freely and voluntarily. Ex. 70, p.52. And although Frost claimed for the first time in his third taped statement that he had participated in the robberies under duress, he again acknowledged that he was making his statement "without any threats or promises of any kind." Ex. 72, p.2.

As the trial court observed, Frost's taped statements directly contradicted his testimony during the pretrial hearing. Frost stated on tape that he did not want to talk to Detective Tompkins, but decided on his own that he wanted to talk to Sergeant Corey. He made no mention of coercion in any of his taped statements; to the contrary, he affirmed that his statements were made freely and voluntarily, without threats or promises of any kind. Therefore, the record supports the trial court's conclusion that Frost was not coerced into speaking with Sergeant Corey. The trial court may also be affirmed on this basis.

But further, the trial court made detailed findings regarding Frost's credibility – or rather, the lack thereof – that cannot be reviewed on appeal. As this court has observed, trial courts must weigh conflicting testimony between police witnesses and defendants in determining whether custodial statements are admissible:

The weight to be given to witnesses' conflicting testimony is inextricably tied to the trier of fact's credibility assessment. Here the trial court found the detective to be a credible witness but that [the defendant] was not credible, due to what appeared to be his "selective" memory, and due to [his] demeanor during the hearing. Credibility determinations are for the trier of fact and are not subject to review by this court.

Haack, 88 Wn. App. at 435 (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). Similarly, the trial court in this case found that Frost was not credible based on a number of factors, including: 1) Frost's rehearsed demeanor and "flat affect" while testifying; 2) inconsistencies between Frost's taped statements and his pretrial testimony; 3) internal inconsistencies between Frost's direct testimony and his answers during cross examination; 4) internal inconsistencies between Frost's three taped statements, and 5) aspects of Frost's testimony that simply did not make sense.

11/13/03 RP 86-94.

Indeed, the trial court could not have been clearer in its assessment of Frost's credibility as a witness:

I've rarely seen a defendant so comfortable with giving inconsistent statements under oath in a short amount of time. I find Mr. Frost incredible and I do not believe that things happened as he described them[.]

11/13/03 RP 89. The court made similarly unambiguous findings regarding Frost's claim that Deputy Hansen had coerced him into speaking with Sergeant Corey, and that Detective Tompkins had threatened and shackled him:

I disbelieve everything Mr. Frost said about what Deputy Hansen said to him. I'm convinced that Mr. Frost was fabricating that set of claims based on his demeanor and based on his completely inconsistent statements on tape to not one, not two, but three separate officers at two different times.

There is no way to reconcile Mr. Frost's allegations about Deputy Hansen with his affirmation that he was neither threatened or promised anything, and there is no way to reconcile his statements on tape about why it was that he chose not to speak to Detective Tompkins but decided to go ahead and speak again later to the detectives with his current claims about Deputy Hansen. Therefore, I don't accept his version of events with regard to what happened in the patrol car.

11/13/03 RP 92. The trial court's findings in this regard are grounded not only in the court's firsthand observation of the testimony – observations that cannot be revisited on appeal – but in objective evidence in the record that Frost was not coerced. The trial court should be affirmed.

In sum, no negative inference flows from Deputy Hansen's failure to testify for three reasons: 1) Hansen's absence was not unexplained; 2) independent evidence in the record supports the trial court's decision to admit Frost's statements; and 3) the trial court's credibility findings cannot be reviewed. Thus, Frost's statement to Sergeant Corey is admissible based on the evidence and the applicable law. Accordingly, the "cat out of the bag"

doctrine is irrelevant to the admissibility of Frost's subsequent statements.¹⁰ Frost's claims to the contrary are without merit, and should be rejected.

3. THE TRIAL COURT CORRECTLY RULED THAT THE DURESS DEFENSE REQUIRES A DEFENDANT TO ADMIT THAT HE COMMITTED THE CRIMES IN QUESTION.

Frost also claims that he was deprived of his constitutional right to counsel because the trial court ruled that he could not argue duress and a lack of accomplice liability as alternative defenses to the same charge. Amended Brief of Appellant, at 52-55. This claim is without merit. The trial court's ruling was correct based on Washington case law. Furthermore, any possible error was harmless beyond a reasonable doubt. Frost is not entitled to reversal on this basis, and his convictions should be affirmed.

Duress is codified in RCW 9A.16.060. It "derives from the common law and is premised on the notion that it is excusable for

¹⁰ It is not clear that the "cat out of the bag" doctrine applies in these circumstances even if Frost's first taped statement were the product of coercion. The passage of time, a change in location, different interrogators, and fresh Miranda warnings are all factors that may serve to purge the primary taint of a coerced confession and render a subsequent confession voluntary and admissible. Oregon v. Elstad, 470 U.S. 298, 310, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1986). However, because there is no basis to reverse the trial court's conclusion that Frost's first statement was voluntary, this issue need not be considered further.

someone to break the law if he or she is compelled to do so by threat of imminent death or serious bodily injury.” State v. Mannering, 150 Wn.2d 277, 281, 75 P.3d 961 (2003). In order to pursue a duress defense, a defendant admits the elements of crime charged, but claims the threat of immediate harm as an excuse for his or her conduct. State v. Riker, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994). Put another way, “[t]he duress defense, unlike self-defense or alibi, does not negate an element of an offense, but pardons the conduct even though it violates the literal language of the law.” Riker, 123 Wn.2d at 368. Accordingly, duress is an affirmative defense that the defendant must prove by a preponderance of the evidence. Id. at 368-69.

Because duress requires a defendant to admit the crime in question, a defense that seeks to *negate* an element of the crime is inconsistent with duress. As the Supreme Court observed in Mannering,

If Mannering had had pursued a duress defense for the burglary charge, she would have admitted that she entered [the victim’s] residence with the intent to commit murder. But Mannering’s defense was that she lacked the intent to commit the attempted murder. *Lack of intent and duress are, therefore, inconsistent with one another.*

Mannering, 150 Wn.2d at 287 (emphasis supplied).

Based on these precedents, the trial court correctly observed that duress *and* a lack of complicity for the same crime are inconsistent with one another. Accordingly, the court instructed Frost's counsel that he could argue duress for some crimes, and lack of complicity for others, but not both for the same crime. 12/10/03 RP 40-41, 49. The defense initially agreed, but then disputed the court's position. 12/10/03 RP 50-53. After Frost had testified, the trial court ruled that the duress instruction would apply to all crimes except the three counts of second-degree assault. 12/11/03 RP 124-25. Again, the defense initially agreed that the court's ruling was correct, but then objected. 12/11/03 RP 125-27. The court, quoting from Riker, reiterated its ruling. 12/11/03 RP 128.

Based on Riker and Mannering, the trial court's ruling was correct. Frost was not deprived of counsel due to the trial court's ruling. Rather, as in Mannering, the trial court correctly told counsel to choose a defense to each charge and not to argue defenses that were wholly inconsistent with one another under the controlling case law. Indeed, rather than depriving Frost of counsel as he now claims, the trial court's ruling directed counsel to be effective. See

Mannering, 150 Wn.2d at 286-87. Frost is not entitled to a new trial on this basis.

But even if this court were to agree with Frost that the trial court erred, his convictions should be affirmed nonetheless. When a constitutional right of the defendant has been abridged during trial, reversal is not required if the error is harmless beyond a reasonable doubt or the evidence of guilt is so overwhelming that no rational conclusion other than guilt can be reached. In re Personal Restraint of Davis, ___ Wn.2d ___, 101 P.3d 1, 27 (2004). In this case, any error is harmless beyond a reasonable doubt *and* the evidence of guilt is overwhelming.

The State produced ample evidence at trial, including Frost's statements, that established the elements of the crimes charged beyond a reasonable doubt. 12/3/03 RP 132 – 12/10/03 RP 4. But perhaps most damning, and certainly rendering any possible error harmless, was Frost's own testimony at trial.

Frost admitted telling Williams that the Gapps kept money in their home, and he admitted that he drove Williams, Shelton and himself to the Gapps' home knowing they were going to rob them and knowing Williams was armed with a gun. 12/11/03 RP 33, 97, 106. Frost admitted driving Williams and Shelton to Taco Time,

where Frost's girlfriend worked, knowing they were going to rob the restaurant and knowing they had guns. 12/11/03 RP 44-50, 106. Frost admitted casing the T& A Video store, and admitted driving Williams, Shelton and DaFoe to T & A Video knowing they were going to rob it and knowing they were armed with guns. 12/11/03 RP 54-56, 106-07. He admitted that he drove Williams and Shelton to 7/Eleven knowing they were going to commit armed robbery, and he made the same admissions regarding Ronnie's Market, which they robbed later that same morning. 12/11/03 RP 60-65, 107.

By the defendant's own testimony, he admitted accomplice liability for every robbery, and admitted liability as a principal in the burglary and robbery of the Gapps. As the trial court correctly observed, Frost admitted that he had participated in all of the crimes charged except for the second-degree assaults. 12/11/03 RP 124-25. Accordingly, Frost's trial counsel argued that the State had failed to prove Frost's participation in those assaults, and that the State had failed to prove he was armed for purposes of the firearm enhancements. 12/11/03 RP 173, 176-77, 185-89. Though he argued duress for all of the robberies except the Gapp incident, defense counsel conceded that the jury would find Frost guilty of some of them. 12/11/03 RP 171, 182, 185-89.

Given the evidence – particularly Frost’s admissions – there is no possibility that the result would have been different if Frost’s counsel had argued in the alternative, and the evidence is so overwhelming that no rational conclusion other than guilt could be reached. Any possible error in the trial court’s ruling is harmless beyond a reasonable doubt.

D. CONCLUSION

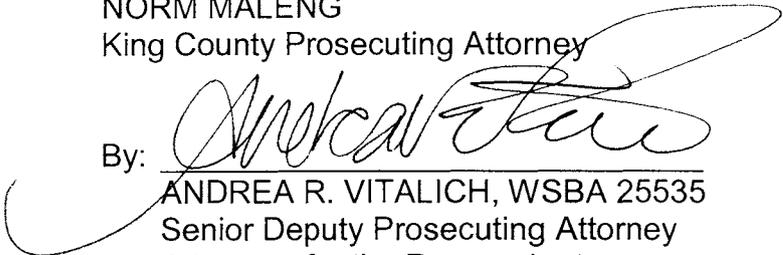
The defendant’s due process rights were not violated when the State prosecuted the defendant for charges that accurately described the scope of his criminal conduct. Moreover, the trial court did not err in concluding that the defendant’s custodial statements were admissible. The trial court also correctly ruled that by raising a duress defense, the defendant necessarily admitted that he committed the crimes in question.

For all of the foregoing reasons, the defendant’s convictions and sentence should be affirmed.

DATED this 18th day of January, 2005.

RESPECTFULLY submitted,

NORM MALENG
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By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JOSHUA FROST, Cause No. 53767-9-1, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

1/18/05
Date

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