

71204-7

71204-7

NO. 71204-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MILORD GELIN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

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**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. A criminal defendant has a right to appeal a “final judgment,” so long as the notice of appeal is filed within 30 days of entry of the judgment. Gelin’s judgment and sentence was filed on September 7, 2010. His convictions were affirmed on appeal. The amendment that is the subject of this appeal did nothing more than correct scrivener’s errors on the judgment and sentence. Is Gelin’s present appeal of his convictions untimely?

2. An issue that a defendant failed to raise in his first appeal is not reviewable in a subsequent appeal unless the trial court, on remand, exercised independent judgment and ruled on the issue. Gelin never challenged the sufficiency of the evidence in his first appeal. When he appeared most recently in court for correction of scrivener’s errors on his judgment and sentence, he did not ask the trial court to address sufficiency, nor did it do so. Even if Gelin’s present appeal is properly before this Court, is he precluded from challenging the sufficiency of the evidence?

3. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Although her bedroom was only dimly

lit, the victim believed that Gelin had attacked her with a hammer. Several medical professionals noted the circular nature of the victim's injuries, and testified that they were consistent with being struck by a hammer. Was there sufficient evidence to support the jury's conclusion that Gelin was armed with a deadly weapon – specifically a hammer – when he assaulted the victim?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Defendant Milord Gelin was charged by amended information with Burglary in the First Degree (Count I), Attempted Murder in the First Degree (Count II), Assault in the First Degree (Count III), and Theft of a Motor Vehicle (Count IV). A domestic-violence allegation was attached to each of these crimes. Counts I-III carried two additional allegations: 1) that Gelin was armed with a deadly weapon (hammer) when he committed these crimes, and 2) that the crimes involved domestic violence and were committed within sight or sound of the victim's minor child (under 18) (aggravated domestic violence). The victim of these crimes was Gelin's former girlfriend, Laurie Williams. CP 1-18.

A jury found Gelin guilty of all of these crimes except attempted murder. CP 19. The jury further found that Gelin was armed with a deadly weapon when he burglarized Williams's home and assaulted her, and that these two crimes were aggravated domestic violence crimes. CP 20.

Gelin's standard range for the first-degree assault conviction (the highest of the three convictions), including the deadly-weapon enhancement of 24 months, was 144-184 months. CP 20. The trial court, noting that "[i]t's hard to imagine a more serious burglary in the first degree, a more serious assault in the first degree, or even a more serious auto theft," and finding nothing in mitigation of Gelin's crimes, imposed an exceptional sentence of 300 months. RP (9-3-10) 40-44.<sup>1</sup>

Gelin appealed, challenging the jury instructions for the special verdict forms under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), overruled by State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012). In his Statement of Additional Grounds, he added

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<sup>1</sup> This Court granted Gelin's motion to transfer the verbatim report of proceedings (VRP) from No. 66006-3-I (Gelin's first appeal of these convictions) to the present appeal. The VRP consists of seven consecutively-paginated volumes, which will be referred to herein simply as "RP" followed by the page number. The sentencing hearing, held on September 3, 2010, is paginated separately, and will be referred to as "RP (9-3-10)" followed by the page number. The most recent hearing, held on October 2, 2013, will be referred to as "RP (10-2-13)" followed by the page number.

arguments that trial counsel was ineffective. The Court of Appeals affirmed the judgment and sentence, and the mandate issued on June 7, 2013. CP 30-38.

On October 2, 2013, the parties appeared in the trial court. At the State's request, and with no objection from the defense, the court corrected several scrivener's errors in the judgment and sentence. RP (10-2-13) 5-7. On that same date, a document entitled "Amended Judgment and Sentence Felony" was filed in the superior court. CP 39- 45. On November 21, 2013, Gelin filed a pro se notice of appeal, signed by him on November 12, 2013.<sup>2</sup>

## **2. SUBSTANTIVE FACTS**

Sometime between 3:00 and 3:30 a.m. on October 12, 2009, Laurie Williams awoke from a sound sleep to find a man sitting on her bed; he had a stocking or something similar over his face, and she did not recognize him. RP 163-64, 258, 338-39, 395, 405. The man said nothing to her. RP 339.

Williams leaped out of bed toward the window, and started screaming as loudly as she could. RP 339-40. She was hit several times on the head with some sort of object. RP 340. She was hit

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<sup>2</sup> By order dated March 19, 2014, a Commissioner of this Court granted Gelin's motion to enlarge the time within which to file his notice of appeal.

on the mouth and the torso with what she believed was a hammer; she also sustained injuries to her hand and arm as she tried to block the blows and protect her head. RP 340-46.

Several neighbors heard Williams screaming, and one yelled out that 911 had been called. RP 164, 295, 343, 395-96. T.W., Williams's 14-year-old daughter, was also awakened by her mother screaming for help and yelling that someone was trying to kill her. RP 249, 258. When T.W. reached her own bedroom doorway, she saw Milord Gelin, her mother's former live-in boyfriend, running down the hall toward her from her mother's bedroom. RP 249-53, 259.

Responding police found a large hole in the wall between the attached garage and the downstairs bathroom where the drywall had been removed. RP 168-69, 186-87, 265, 349. Williams and T.W. identified a jacket found on the living room floor as Gelin's; DNA evidence corroborated this. RP 264, 348-49, 409, 237-39.

Williams's bedroom had blood on the walls, on an overturned table, and around the window. RP 200-01, 214-15, 261, 408, 430-32. There was a piece of white cable and a section of seatbelt



approximately 5'10" long on the bed.<sup>3</sup> RP 198, 210-12, 266-67.

Gelin's fingerprint was found on a doorknob on the hallway side of the front bedroom, and his palm print was found on a second-floor window.<sup>4</sup> RP 734, 738-39.

Shortly after the attack, while police were still at the house, Gelin called T.W. on her cell phone. RP 267. He seemed angry, upset, and frantic. Id. He said that he knew he was going to jail. RP 268. T.W. handed the phone to a police officer, who spoke briefly with Gelin. RP 268-69, 593-94. Gelin told the officer that he was going to a hotel, but that he would come and talk to police in the morning. RP 594-95.

Williams, who was injured and bloody, was taken to the emergency room. RP 179-82, 265-66, 296-97, 350, 407, 512-13, 625, 629-30. Photos taken at the hospital showed several bruises that were circular in shape, and about the size of a quarter or a half-dollar. RP 525, 527-28, 530, 534, 543. Medical personnel

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<sup>3</sup> Gelin stole Williams's Mitsubishi Montero from the driveway that night; when the car was recovered, the seatbelts had been cut out of it. RP 350-51, 357-58, 818, 837-38.

<sup>4</sup> Williams and her daughter had moved into their present home after Williams had broken off her relationship with Gelin; he had never lived in the home, although he had visited once for a few minutes to pick up his son. RP 253-54, 316-18, 332-33.

consistently described the injuries as circular or hemispherical, and agreed that the wounds were consistent with Williams having been struck with a hammer. RP 466, 469-70, 631-32, 639, 756. The emergency-room physician described the wounds to Williams's hand, forearm and armpit as defensive in nature and inflicted with such force that, had they landed on Williams's head, they would likely have been fatal. RP 634, 672.

Gelin was apprehended at a bus station in Eugene, Oregon two days later by federal marshals. RP 710-12, 722. Gelin told the marshals, "I know I'm going to prison, but she broke my heart." RP 716, 724.

Gelin testified in his own behalf. He said that he went over to Williams's house on October 12<sup>th</sup> to get his tools.<sup>5</sup> RP 814. He went at 3:00 a.m. because he knew Williams did not want him coming to her home, and he thought that she would not see him at that time. RP 816-18. He went into the Mitsubishi Montero to locate the garage-door opener that was kept in the car, and he used the opener to get into the garage. RP 820. He looked

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<sup>5</sup> Williams testified that she did not have anything at her new home that belonged to Gelin, and that he had never mentioned any items that he needed to pick up. RP 320-21, 331.

through a number of boxes in the garage and found some items of clothing and toys that belonged to himself and his son. RP 822-23. He claimed that he took the seatbelt from the Mitsubishi so that he could use it to tie up a box. RP 840.

In addition to tools, Gelin said that he was looking for his important papers, including insurance papers and his passport. RP 833, 842. He did not find his papers in the garage, so he entered the house. RP 833-34. He broke through the garage wall into the house because the door was locked. RP 825. Gelin said that he used his hands and feet to break through the sheetrock. RP 826, 829-32.

When Gelin did not find his important documents downstairs, he went upstairs to Williams's bedroom, where he believed that he would find them in a box under the bed. RP 841-43. Williams woke up when Gelin tried to retrieve the box. RP 849. Frightened, she jumped out of bed and fell to the floor. RP 849-50. She opened the window and began to scream. RP 850. When Gelin tried to explain, Williams pushed him against the wall. RP 850. Gelin "held her very strongly" so that she would not open the window any wider. RP 850-51. He was frightened, and only wanted to leave. RP 851.

Gelin said that, while Williams was trying to hold him against the wall, she fell on a table and "bounced really hard."<sup>6</sup> RP 855. Gelin denied ever striking Williams, or hitting her with a hammer. RP 855. He insisted that he never had a hammer in his possession that night. RP 834-35, 855.

**C. ARGUMENT**

**1. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE OCTOBER 2, 2013 AMENDMENT TO THE JUDGMENT AND SENTENCE IS NOT AN APPEALABLE ORDER**

The Rules of Appellate Procedure ("RAP") limit the decisions that may be appealed, and include in this category a "final judgment." RAP 2.2(a)(1). A "final judgment" is one that ends the litigation, settling the rights of the parties and disposing of all issues in controversy, leaving nothing for the court to do but execute the judgment. State v. Taylor, 150 Wn.2d 599, 601-02, 80 P.3d 605 (2003). The judgment and sentence entered on September 7, 2010 is the "final order" for these purposes. The order entered on October 2, 2013 added nothing to "execute."

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<sup>6</sup> The emergency-room physician said that the wheels on the table were not consistent with the circular sites of impact on Williams's body. RP 645-48.

Nor is it dispositive that the order entered on October 2, 2013 is entitled “Amended Judgment and Sentence Felony.” CP 39. In determining the nature of a court order, substance controls over form. Rhodes v. D&D Enterprises, 16 Wn. App. 175, 177-78, 554 P.2d 390 (1976). “[T]he court looks not to the title of the instrument but to its content.” Id. Here, the only difference between the original judgment and sentence and the amended version is, as the trial court noted, the correction of scrivener’s errors. RP (10-2-13) 5-6. Specifically, the following changes were made:

- 1) In ¶ 2.5 (Exceptional Sentence), Count III was substituted for Count II (Gelin was not convicted on Count II);
- 2) In ¶ 4.4, the same error as to counts was fixed;
- 3) ¶ 4.4 was also modified to “fix the math”; i.e., the term of months on Count III was lowered by 24 months (from 276 to 252) so that, when 48 months was added for the two deadly weapon findings, the total would be 300 months.<sup>7</sup>

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<sup>7</sup> Gelin frames the error as the court’s failure to order that the deadly weapon enhancements be served consecutively to each other and consecutively to the base sentence. AOB at 5. This is inaccurate. The change was limited to clarifying the arguably ambiguous “24 months counts I & II” (as stated in the original) to “24 months each on count I and III (total 48 months)” (as stated in the amended). The consecutive nature of these enhancements (“which term(s) shall run consecutive with each other and with all base term(s) above”) was unchanged from one document to the next.

The total term of confinement imposed – 300 months – remained constant from the original judgment and sentence to the amended version.

Given that the only changes in the amended judgment and sentence were to correct scrivener’s errors, there was nothing to appeal. The “final judgment,” imposing 300 months of confinement, was imposed on September 7, 2010. This appeal is untimely.

**2. GELIN IS BARRED FROM CHALLENGING THE SUFFICIENCY OF THE EVIDENCE FOR THE FIRST TIME IN THIS SUBSEQUENT APPEAL**

“Even though an appeal raises issues of constitutional import, at some point the appellate process must stop.” State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983). The Rules of Appellate Procedure restrict the “law of the case” doctrine in the appellate context:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5(c)(1).

The rule has been interpreted narrowly by the Washington Supreme Court, however:

This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. *Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.*

State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993) (italics added).

Gelin never challenged the sufficiency of the evidence in his first appeal. He did not raise this challenge when he was before the trial court for the signing of the order out of which this appeal arises. The trial court was not asked to, and did not, exercise independent judgment, review and rule upon this issue. This Court should accordingly decline to review Gelin's claim of insufficient evidence to support the jury's finding that he armed himself with a hammer when he assaulted Laurie Williams.

**3. THERE WAS SUFFICIENT EVIDENCE THAT  
GELIN USED A HAMMER AS A DEADLY  
WEAPON IN ASSAULTING WILLIAMS**

In any event, even if this Court were to reach the merits of Gelin's claim, his convictions should nevertheless be affirmed. The

evidence that he attacked Williams with a hammer was more than sufficient.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably may be drawn from that evidence. Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

On the night in question, Laurie Williams awoke to see a man sitting on her bed. RP 338-39. In the dim light of her bedroom, Williams saw the shadow of a hammer. RP 341, 374-75. She felt both the claw of the hammer and the head of the hammer hitting her. RP 340-41. Later that same night, Williams told the emergency room physician that her ex-boyfriend had broken into her house and assaulted her with a hammer. RP 628.

The observations of the emergency room physician supported Williams's report. Dr. Whorton testified that the point of impact was circular, suggesting a circular instrument as the cause.



RP 631-32. The doctor testified that the circular nature of the areas of impact was consistent with the injuries having been inflicted with a hammer. RP 639. The detective who responded to the emergency room and photographed Williams's injuries similarly described them as circular, curved at the top, and between a quarter and a half-dollar in size. RP 525, 527-28, 530, 543.

The hand surgeon who subsequently treated Williams was in accord. Dr. Peterson said that a wound on Williams's forearm had a hemispherical arc to it, possibly consistent with a hammer blow. RP 466. The doctor said that a laceration on Williams's hand "quite possibly" could have been caused by the claw end of a hammer. RP 469-70.

Finally, the dentist who helped repair Williams's damaged teeth described the injury as resulting from blunt force trauma. RP 753. The area of injury was small, limited to about an inch and a quarter. RP 755. Based on his observations of the damage, Dr. Pong believed that the injury was caused by some kind of implement. RP 756. He believed that a hammer was an ideal candidate as the cause of the damage. RP 756.

Based on the victim's own observations, as well as the observations of the responding detective and medical personnel,

the jury had ample evidence on which to conclude that Gelin attacked Williams with a hammer. His convictions should be affirmed.


D. **CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm the judgment and sentence.

DATED this 6th day of March, 2015.

Respectfully submitted,

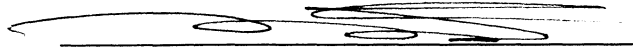
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, **Maureen M. Cyr**, containing a copy of the **Brief of Respondent**, in **STATE V. MILORD GELIN**, Cause No. **71204-7-I**, 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.



Name  
Done in Seattle, Washington

03/26/15  
Date