

No. 47238-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

LIA TRICOMO,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 13-1-00655-7

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 2

 1. Tricomo's conviction of second degree murder and three counts of second degree assault do not constitute double jeopardy. Under the facts of this case, the assaults and the murder are not the same course of conduct. 2

 2. Tricomo was correctly advised of both the statutory maximum sentences and the standard range sentences for her offenses before she entered her guilty pleas. 16

 3. The court considered all relevant evidence at sentencing. It did not exclude any information of substance..... 21

D. CONCLUSION..... 28

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Adel</u> , 136 Wn.2d 629, 965 P.2d 1072 (1998)	3
<u>State v. Bobic</u> , 140 Wn.2d 250, 996 P.2d 610 (2000)	6
<u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995)	13
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005)	13
<u>State v. Gocken</u> , 127 Wn.2d 95, 896 P.2d 1267 (1995)	3, 13, 14
<u>State v. Grayson</u> , 154 Wn.2d 333, 111 P.3d 1183 (2005)	27
<u>State v. Knight</u> , 162 Wn.2d 806, 174 P.3d 1167 (2008)	11
<u>State v. Leyda</u> , 157 Wn.2d 335, 138 P.3d 610 (2006)	3, 4
<u>State v. Mendoza</u> , 157 Wn.2d 582, 141 P.3d 49 (2006)	17
<u>State v. Villanueva-Gonzalez</u> , 180 Wn.2d 975, 329 P.3d 78 (2014)	3, 5, 6, 10
<u>State v. Womac</u> , 160 Wn.2d 643, 160 P.3d 40 (2007)	14, 15

Decisions Of The Court Of Appeals

<u>In re Pers Restraint of Bybee,</u> 142 Wn. App. 260, 175 P.3d 589 (2007).....	26
<u>In re Pers. Restraint of Newlun,</u> 158 Wn. App. 28, 240 P.3d 795 (2010).....	11
<u>State v. Cole,</u> 117 Wn. App. 870, 73 P.3d 411 (2003).....	14
<u>State v. Kennar,</u> 135 Wn. App. 68, 143 P.3d 326 (2006), <i>review denied</i> , 161 Wn.2d 1013 (2007)	19, 20, 21
<u>State v. Knotek,</u> 136 Wn. App. 412, 149 P.3d 676 (2006), <i>review denied</i> , 161 Wn.2d 1013 (2007)	17, 18, 19
<u>State v. Lazcano,</u> 188 Wn. App. 338, _____ P.3d _____ (2015).....	4, 5
<u>State v. Moreno,</u> 173 Wn. App. 479, 294 P.3d 812, <i>review denied</i> , 177 Wn.2d 1021, 304 P.3d 115 (2013)	13
<u>State v. Slemmer,</u> 48 Wn. App. 48, 738 P.2d 281 (1987).....	12

U.S. Supreme Court Decisions

<u>Apprendi v. New Jersey,</u> 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).....	20
<u>Blakely v. Washington,</u> 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	17, 20
<u>Blockburger v. United States,</u> 284 U.S. 299, 52 C. Ct. 180, 76 L. Ed. 306 (1932).....	13

Statutes and Rules

CrR 4.2(g) 19, 20

RAP 2.5(a) 4, 17, 22

RCW 9.94A.530(2)..... 24, 25

RCW 9.94A.701(9)..... 21

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Tricomo's convictions for second degree murder and three counts of second degree assault violate the constitutional guarantee against double jeopardy.

2. Whether Tricomo was misinformed about the maximum sentence in her Statement of Defendant on Plea of Guilty.

3. Whether the sentencing court failed to consider mitigating information when imposing the sentence.

B. STATEMENT OF THE CASE.

The State generally accepts the appellant's statement of the case. It is important to note that most, if not all, of the information about Tricomo's life before the murder came from her and little of it is subject to corroboration. The mitigation report prepared by Dhyana Fernandez indicates that Fernandez interviewed Tricomo's mother, sister, junior high school music teacher, and a friend, but the report itself does not identify the source of any specific piece of information. CP 51-58. Fernandez listed a number of sources of the information she reviewed, CP 51, but those sources largely repeat Tricomo's version of her life.

There were two psychological evaluations conducted. In her statement of the case, Tricomo points to the report of Dr. David Dixon, in which he opined that her withdrawal from the drug Paxil may have diminished her ability to form intent. CP 78. The second

psychological evaluation, conducted by Dr. Delton W. Young, disagreed, based upon the fact that Tricomo had been taking Paxil regularly up to the day of the murder. There was no withdrawal. CP 94. Tricomo cites to Hernandez's report of the violent side effects of the use of Paxil, but in fact Hernandez only listed several titles of articles from scientific journals, Time Magazine, the New York Times, and websites of a doctor's group, a prescription drug website, a lawyers' website, and unidentified watchdog groups. CP 56-57. No actual information about Paxil was presented in the report.

C. ARGUMENT.

1. Tricomo's conviction of second degree murder and three counts of second degree assault do not constitute double jeopardy. Under the facts of this case, the assaults and the murder are not the same course of conduct.

Tricomo argues that the acts underlying the three counts of second degree assault and one count of second degree murder all constitute the same course of conduct. If they were one course of conduct, she maintains, then there was only one unit of prosecution of assault, the murder occurred during an assault, and therefore the four convictions violate her constitutional protection against double jeopardy. The State disputes this characterization of her actions.

Under the circumstances of this case, the separate assaults and murder were not a single course of conduct, and there is no double jeopardy violation.

Double jeopardy claims are reviewed de novo. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). The Fifth Amendment to the United States Constitution and Washington Constitution art. I, § 9, provide coextensive protection against being twice prosecuted for the same offense. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). That protection precludes more than one punishment for the same offense. Villanueva-Gonzalez, 180 Wn.2d at 980.

Whether a defendant has been punished more than once for the same crime depends on what the legislature intended as the punishable act. State v. Leyda, 157 Wn.2d 335, 343, 138 P.3d 610 (2006). When a defendant has been convicted of multiple counts of the same statute, the question is what the legislature intended to be the unit of prosecution. Villanueva-Gonzalez, 180 Wn.2d at 980. If only one unit of prosecution of the crime has been committed, there can be only one punishment. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). If the statute does not define the unit of prosecution, or if the intent of the legislature is not clear, the

ambiguity must be resolved in favor of the defendant. Lyeda, 157 Wn.2d at 343.

Tricomo was charged with three counts of second degree assault and one count of second degree murder against the same victim on the same date. CP 25-26. One count of second degree assault alleges that she used a razor to inflict neck wounds (Count II), one count alleges she used a razor to inflict facial wounds (Count III), and one count alleges she used a razor knife to inflict hand wounds (Count IV). *Id.* Tricomo pled guilty to all of these charges and did not raise a double jeopardy claim in the trial court.

Courts will generally decline to consider issues that were not raised in the trial court. RAP 2.5(a). However, RAP 2.5(a)(3) provides an exception where there is a manifest error affecting a constitutional right. The right to be free of double jeopardy is clearly of constitutional magnitude. Tricomo has not offered an argument as to why this "error" is manifest. "The manifest error exception is a narrow one. . . We particularly decline to consider a double jeopardy argument to automatically be manifest error in circumstances where the record lacks specificity for review." State v. Lazcano, 188 Wn. App. 338, 360, ___ P.3d ___ (2015) (internal cite omitted). The court in Laczano reviewed a number of

Washington cases which considered a double jeopardy claim for the first time on appeal, some of which did not address manifest error, and concluded that “[n]o Washington decision has held that the accused need not show manifest constitutional error on double jeopardy claims not asserted below.” Id. at 360. The State maintains that the record does not contain facts upon which a manifest error can be identified, and the facts that are in the record support a finding that there is no double jeopardy. The insufficiency of the record will be further addressed below.

The Washington Supreme Court has addressed the unit of prosecution of assault, and concluded that it is a course of conduct crime. Villanueva-Gonzalez, 180 Wn.2d at 983. It reached this result after determining that the legislature did not specify a unit of prosecution and then examining the common law. Id. at 986. Based upon the ambiguity of the common law definition of assault and after considering authority from other jurisdictions, the court applied the rule of lenity and adopted the interpretation most favorable to the defendant. Id. The court said that this interpretation avoids “the risk of a defendant being ‘convicted for every punch thrown in a fistfight.’” Id. at 985, quoting State v. Tili, 139 Wn.2d 107, 116, 985 P.2d 365 (1999).

Once the court determines the unit of prosecution, it must then conduct a factual analysis to determine if the facts show one or more than one unit of prosecution. State v. Bobic, 140 Wn.2d 250, 266, 996 P.2d 610 (2000). The court in Villanueva-Gonzalez, having determined that assault is a course of conduct crime, said:

There is no bright-line rule for when multiple assaultive acts constitute one course of conduct. While any analysis of this issue is highly dependent on the facts, courts in other jurisdictions generally take the following factors into account:

--The length of time over which the assaultive acts took place,

--Whether the assaultive acts took place in the same location,

--The defendant's intent or motivation for the different assaultive acts,

--Whether the acts were uninterrupted or whether there were any intervening acts or events, and

--Whether there was an opportunity for the defendant to reconsider his or her actions.

We find these factors useful for determining whether multiple assaultive acts constitute one course of conduct. However, no one factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors.

Villanueva-Gonzalez, 180 Wn.2d at 985.

Because Tricomo pled guilty to the charges, there was no trial and no testimony. At the plea hearing, she agreed that the court could rely on the statement of probable cause to establish the

factual basis for the plea. CP 34; 11/06/14 RP 10-11. At sentencing, Tricomo presented a sentencing brief including materials which she asked the court to consider. CP 42-120. The State objected to the report of the mitigation specialist and Tricomo's attorney argued that it should be considered. 01/29/15 RP 30-38. The defendant's sentencing brief contains substantial information regarding Tricomo's version of events.

According to Sgt. Brady, one of the investigating officers, the crime scene was one of the most horrific he had seen in his experience of more than 30 homicide investigations. He said that the amount of blood throughout the house indicated that the incident had lasted for a long period of time. 01/28/15 RP 53. The probable cause statement described the large amount of blood in the house. CP 4-5. Tricomo spoke to the police and told them that after sexual acts that began approximately 6:00 p.m. on April 29, 2013, she had used a razor knife to slit the victim's throat six times. After that "he walked around the house trying to stop the bleeding for what she described as hours." CP 5. Tricomo said she followed him to make sure he didn't leave the house. She said that there was a struggle for the knife near the front door and during that struggle she cut the victim's wrists. CP 5. The victim "eventually"

went upstairs and lay on the floor bleeding. CP 5. There was a large pool of blood near the bed, indicating that the victim had lain there for "quite some time." CP 4. At some later time, Tricomo used an electrical cord to strangle the victim. CP 5.

Tricomo was evaluated psychologically by two different psychologists. CP 60-80, 82-96. She told Dr. Young, as she told the police, that she had taken the razor knife into the bedroom before a sexual encounter and hidden it. CP 5, 92. "I had a vision that I would cut him open . . . that's it, on his neck. I don't know if the plan was for him to die." "I hid the razor 'cause I was thinking of cutting him open. I don't know why." CP 92. "I didn't want him to kiss me. I felt kind of trapped in there, so my plan was to cut him open. He reached out and I cut him five or six times, deep. There was lots of blood." CP 93. She explained she followed the victim downstairs because she was afraid he'd obtain a weapon to use against her. CP 93. When the victim tried to take the razor knife away from her she cut his hand and wrist "because I wanted him to stay . . . because we were supposed to have sex and he would walk all over the house." CP 93. At some time during the evening the victim got dressed and told Tricomo to go to bed, refusing her request to sleep with him. This caused her to feel rejected and she

strangled him with the electrical cord. "I wanted him dead because he didn't want to sleep with me." CP 93.

Tricomo argues that all of these actions were one unbroken chain of events driven by a single intent to kill. The available evidence does not support that assertion. While it is unclear from the record when the cuts to the victim's face occurred, it is clear that the cuts to the neck and the cuts to the hand occurred at different times in different parts of the house. Tricomo cut the victim's neck in the bedroom and his hand downstairs. Tricomo herself told the police that there was a period of hours between the time she cut his neck and his eventual death, and the record supports the implication that there was a substantial period of time between her cutting his neck and cutting his hand. CP 5. Nor did she ever say she had the intent to kill the victim when she cut him with the razor knife. Tricomo said she didn't know whether she meant for him to die when she cut his neck. CP 92. She cut his hands in the struggle over the knife because she didn't want him to leave. CP 93. It was only when she strangled him with the electrical cord that she "wanted him dead because he didn't want to sleep with me." CP 93.

Applying the factors identified by the court in Villanueva-Gonzalez, there is a solid basis for characterizing these three assaults as separate events rather than a continuing course of conduct. First, the length of time over which the acts took place is extraordinarily long. Tricomo said it lasted for hours. CP 5. At least two of the acts occurred in different places, albeit in the same house. One was in the upstairs bedroom and the other downstairs. CP 5; 92-93. The intent for the different assaults was different. The cutting of the victim's neck was because "he was a creep." The cuts to the hand occurred because the victim was trying to disarm Tricomo. CP 5. The acts were not uninterrupted. Although the entire account of what occurred comes from Tricomo, she said that the two walked around the house for some time, the victim trying to stop the bleeding and Tricomo making sure he didn't leave. CP 5. There was ample opportunity for Tricomo to reconsider her actions and not only stop following the victim and refrain from further assaults, but to summon aid for a dying man.

The court in Villanueva-Gonzalez said that no one factor is dispositive, and the determination as to whether a series of actions are a continuing course of conduct depends on the totality of the circumstances. Villanueva-Gonzalez, 180 Wn.2d at 985. The

totality of these circumstances supports a conclusion that these assaults were not a continuing course of action. Where they are separate incidents they are separate units of prosecution, and Tricomo is not being punished more than once for the same crime.

It is important to remember that Tricomo pled guilty to these charges; there was no trial. The parties spent much time in negotiations. 10/29/14 RP 5, 7. Because this was a guilty plea, a claim of double jeopardy is waived unless the violation is clear from the record presented on appeal. State v. Knight, 162 Wn.2d 806, 811-12, 174 P.3d 1167 (2008); In re Pers. Restraint of Newlun, 158 Wn. App. 28, 34, 240 P.3d 795 (2010). In Tricomo's case, no double jeopardy violation is clear from the record. The record is silent as to the assault resulting in cuts to the victim's face. A defendant may not expand the record to establish a double jeopardy violation. Knight, 162 Wn.2d at 811-12. The assaults resulting in cuts to the victim's neck and hand occurred at different times on different floors of the house and for different reasons. There was more than enough time for Tricomo to reconsider her actions and form a different intent. Therefore, each count of second degree assault should be considered a separate crime

rather than constituting one continuous course of action. Tricomo is not being punished more than once for a single act.

Tricomo also argues that her act of strangling the victim was merely part of a continuous course of conduct. However, the unit of prosecution analysis applies only when there are multiple counts of the same crime. Second degree murder is not the same offense as second degree assault. Tricomo also argues that the second degree assaults merge into the murder, claiming that there was a single intent to cause the victim's death and that he would have eventually bled to death had she not strangled him with an electrical cord. She was not charged with assault for the strangulation.

The judicially created merger doctrine occurs in several contexts, but it may be applied to determine whether the legislature intended more than one punishment for a single act. State v. Slemmer, 48 Wn. App. 48, 56, 738 P.2d 281 (1987). It is not of constitutional magnitude. Id. at 57. Nor can it be raised for the first time on appeal. Id.

Two crimes merge when one crime is elevated to a higher degree by committing another act that the criminal statutes also define as a crime. If one crime (unlawful possession of a firearm) need not be committed to elevate another crime [here first degree

assault] to a higher degree, the two crimes at issue do not merge.

State v. Moreno, 173 Wn. App. 479, 498, 294 P.3d 812, *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013), internal cites omitted.

The victim did not bleed to death. He died of asphyxia due to strangulation. The argument that the assaults merged into the murder because they would have eventually been fatal by themselves makes little sense. Even disregarding the possibility that the victim might have sought medical attention for the bleeding before it was too late, it is illogical to argue that he because he could have died in a manner which he did not, the crimes constitute the same offense.

Where there is a claim that convictions under two different statutes constitute double jeopardy, the test articulated in Blockburger v. United States, 284 U.S. 299, 304, 52 C. Ct. 180, 76 L. Ed. 306 (1932), applies. State v. Freeman, 153 Wn.2d 765, 772, 108 P.3d 753 (2005). That test analyzes the statutory elements, not the facts of the case itself. Gocken, 127 Wn.2d at 107. The offenses must be the "same in law and in fact." State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (quoting State v. Vladovic,

99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Double jeopardy is not violated if each offense requires proof of a fact that the other offense does not. Gocken, 127 Wn.2d at 100-01. When two crimes contain different legal elements, there is a “strong presumption” that the legislature intended separate punishments. State v. Cole, 117 Wn. App. 870, 875, 73 P.3d 411 (2003).

Tricomo cites to State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), for the proposition that when the charges are based upon the same conduct, murder and assault constitute the same criminal conduct. Womac, however, is not only distinguishable from the present case, but it did not hold that the underlying felony always merges into felony murder. Womac’s four-month-old son died from head injuries; Womac was subsequently charged and convicted of homicide by abuse, second degree felony murder, and first degree assault, all as separate crimes rather than in the alternative. The Supreme Court held that there had been a single crime against a single victim, but it resulted in three convictions. Under the facts of that case, that is true; the assault was the cause of death, for which Womac was convicted of two different homicide crimes.

In Tricomo's case, however, the second degree assaults to which she pled guilty were not part of the murder. The victim died because she tightened an electrical cord around his neck until he stopped breathing. ". . . I pulled hard to be sure he was dead. . . I could tell he was dead 'cause he wasn't breathing." CP 93. The victim may have been weakened by loss of blood, and, left untreated, may have died eventually from blood loss had Tricomo not strangled him, but the fact remains that he died of strangulation. Tricomo was not charged with assault by pulling the cord around the victim's neck, nor was she charged with first degree felony murder. She was charged with, and pled guilty to, first degree intentional murder. CP 25-27. Further, as argued above, Tricomo did not say she had the intent to kill the victim when she cut him with the knife. She did say she wanted him dead when she strangled him. The intents are not the same. CP 5-6, 92-93.

"The double jeopardy doctrine protects defendants against 'prosecution oppression.'" Womac, 160 Wn.2d at 650, quoting 5 Wayne R. LaFare, Jerold H. Israel & Nancy J. King, Criminal Procedure § 25.1(b), at 630 (2d ed. 1999). Tricomo's convictions resulted from guilty pleas to charges agreed on after lengthy negotiations. She was represented by counsel during the entire

pendency of the case. CP 24, Verbatim Report of Proceedings generally. She admitted to the conduct that resulted in the charges. There can be no concern in her case of "prosecution oppression."

There is no double jeopardy violation.

2. Tricomo was correctly advised of both the statutory maximum sentences and the standard range sentences for her offenses before she entered her guilty pleas.

Tricomo completed a Statement of Defendant on Plea of Guilty prior to her plea. CP 27-35. For each of the five charges to which she pled guilty, the form listed both a standard sentencing range and a statutory maximum for both the term of confinement and the monetary fine that could be imposed. CP 28. At the sentencing hearing, the court ascertained that Tricomo had read the entire document, had discussed it with her attorney, and that all of her questions had been answered. 11/06/14 RP 5-6. The court further determined that Tricomo understood her offender score for each of the counts and the standard range, as well as the statutory maximum, for each. *Id.* at 6-7. Tricomo now claims on appeal not that she failed to understand this information, but that it was incorrect and therefore she was misinformed.

Tricomo did not raise this claim at sentencing. Nevertheless, a defendant may challenge the voluntariness of a guilty plea for the first time on appeal where she claims she was misinformed about the direct consequences of her plea. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). A misunderstanding of the consequences of the sentence is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); Mendoza, 157 Wn.2d at 589.

The State does not dispute that it bears the burden of proving that a guilty plea was entered intelligently and voluntarily, which includes knowledge of the maximum sentence. State v. Knotek, 136 Wn. App. 412, 423, 149 P.3d 676 (2006), *review denied*, 161 Wn.2d 1013 (2007).

Tricomo argues that the inclusion of the statutory maximum of life in prison for the murder charge and ten years for the remaining charges was incorrect because, under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the statutory maximum that the court may impose, without a jury finding of aggravating factors, is the top of the standard range. She cited to Knotek as being "directly on point." Appellant's Opening Brief at 16. In Knotek, however, the defendant pled guilty in June of 2004 to second degree murder and first degree

manslaughter. Knotek, 136 Wn. App. at 419. She was advised that she faced the possibility of an exceptional sentence above the standard range on each count. Id. at 420. Less than a week later, and before Knotek's sentencing in August, 2004, the Blakely opinion was issued. Id. at 420-21. At sentencing, the court and both parties were aware that, because there had been no finding of aggravating circumstances by a jury, she could not receive an exceptional sentence higher than the standard range. Id. at 421. Knotek sought to withdraw her plea eight months later, alleging she had been misinformed about the sentencing consequences of her plea and that her counsel rendered ineffective assistance. Id. at 422. She appealed the trial court's denial of that motion. Id.

The Court of Appeals affirmed. It held that because Knotek clearly understood before sentencing that Blakely had removed any possibility of an exceptional sentence and still chose to proceed with her plea, "knowing that if she went to trial, she would face the possibility of two life sentences," she could not withdraw it. Id. at 425-26. Notably, regarding the effect of Blakely on the plea, the Knotek court said

Contrary to Knotek's assertion, Blakely, . . . does not nullify life imprisonment as the statutory maximum for a class A offense. Rather, Blakely, outlined the

procedure by which a life term for a class A offense may be imposed in the state of Washington: A life sentence is possible for a class A felony only if the trier of fact specifically finds beyond a reasonable doubt, or the defendant admits to, aggravating facts supporting an exceptional life sentence. Otherwise, the effective maximum for a class A felony is the top end of the standard sentencing range . . .

Knotek, 136 Wn. App. at 425.

Another division of the Court of Appeals carried the analysis further. In State v. Kennar, 135 Wn. App. 68, 143 P.3d 326 (2006), *review denied*, 161 Wn.2d 1013 (2007), the defendant made the same argument that Tricomo makes here. Id. at 74 (“In short, he insists that the court should have told him less, not more.”) The court first discussed CrR 4.2, the rule covering entry of guilty pleas. That rule was adopted by the Washington Supreme Court to ensure that guilty pleas met the constitutional requirement of being voluntary, knowing, and intelligent. Kennar, 135 Wn. App. at 73. CrR 4.2(g) requires that both the statutory maximum sentence and the applicable standard ranges be included in the Statement of Defendant on Plea of Guilty. Citing to State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001), *overruled on other grounds by State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), the Kennar court found that the intent of the Supreme Court, as expressed in CrR

4.2, is that a defendant should be informed of both the standard sentencing range and the statutory maximum range set by the legislature. Kennar, 135 Wn. App. at 74. Both are direct consequences of pleading guilty and the defendant must be informed of both. Id. at 74-75.

Blakely applies to sentencing, not to guilty pleas. It clarified Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), which held that any facts which increase the penalty above the statutory maximum must be proved beyond a reasonable doubt and found by a jury. Blakely held that for these purposes, the statutory maximum is the sentence the court may impose based upon facts "reflected in the jury verdict or admitted by the defendant." Kennar, 135 Wn. App. at 75. quoting Blakely, 542 U.S. at 303.

CrR 4.2(g) includes a warning that if new crimes are discovered before sentencing, the standard sentencing range specified in the guilty plea form may change, as well as the State's recommendation, but that the plea is still binding.

Thus, the procedure advocated by Kennar would often result in defendants being misadvised to their maximum peril. Because a defendant's offender score and standard range sentence are not finally determined by the court until the time of sentencing,

the Sixth Amendment concerns addressed in Blakely do not apply until that time.

Kennar, 135 Wn. app. at 76.

Even though the court was required to sentence Tricomo within the standard range, the statutory maximum sentence was still critical information for her to have. RCW 9.94A.701 (9) requires that if the standard range sentence, combined with the term of community custody, exceeds the statutory maximum as provided in RCW 9A.20.021, the sentencing court must reduce the length of the community custody. A defendant needs to know what that statutory maximum is.

Tricomo was not wrongly advised of the sentencing consequences of her plea.

3. The court considered all relevant evidence at sentencing. It did not exclude any information of substance.

Tricomo submitted a 79-page sentencing brief to the court before her sentencing hearing. CP 42-120. It included psychological evaluations by Dr. David Dixon, on Tricomo's behalf, CP 60-80, and Dr. Delton Young, chosen by the State. CP 82-96. There were letters from a number of Tricomo's friends, CP 98-112, and news articles and material regarding a concert in which

Tricomo played the violin. CP 114-20. There was a six-page mitigation report by Dhyana Fernandez, along with Fernandez's declaration regarding her qualifications. CP 50-58. Tricomo separately filed a five-page document titled "Allocution of Lia Tricomo." CP 208-12.

The State objected to the court considering the mitigation report prepared by Fernandez. CP 131-33; 01/28/15 RP 30-34. The court ruled that it would consider all of the background information contained in the mitigation report, but not a section regarding Paxil. The court found that Fernandez had no expertise in that subject and did nothing but provide a list of articles which she suggested might be relevant. The court also said it would not consider Fernandez's opinion as to the length of the sentence. 01/28/15 RP 39. There was no such opinion offered. 01/28/15 RP 35; CP 50-58. Tricomo did not object to the court's ruling.

For the first time on appeal, Tricomo claims that the court improperly limited the information it considered when imposing a sentence. As argued in the previous sections of this response brief, failure to make an objection in the lower court waives the right to appeal the issue, unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3).

Further, Tricomo misconstrues the statements of the sentencing court. She claims that the judge "strictly limited" its consideration of the mitigation report. Appellant's Opening Brief at 18. In fact, the court excluded only Fernandez's opinion about the sentence, which was not even contained in the report, and the portion of her report dealing with Paxil. That section, which begins at the bottom of CP 56 and takes up approximately three-quarters of the page of CP 57, actually says nothing of substance. It repeats Tricomo's report of her experience with Paxil, and then lists the titles of several articles from scientific journals, although she never identified the journals themselves. CP 56-57. That list is followed by a second list of titles of articles "by watchdog groups, a doctors (sic) website, Time Magazine, a prescription drug website, a lawyer and settlement website, and the New York Times." CP 57. No specific source is identified for any article. Fernandez then offers that an unidentified physician wrote a book in 2001 about the dangers of antidepressants, and that the website for the drug Paxil contains a warning that patients taking the medication should immediately contact their health care providers if they feel aggressive, violent, or suicidal. CP 57.

In her declaration, Fernandez identified herself as a mitigation specialist in death penalty cases and described her training, all of which was in legal, not medical, areas. CP 50. Yet Tricomo now seeks a new sentencing because the trial court declined to consider this non-information. The court did not exclude from consideration the reports of doctors Dixon or Young, both of whom discussed Tricomo's use of Paxil. See CP 68-69, 77, 78, 88, 91, 94. Tricomo does not explain why a court is required to take seriously every piece of information, no matter how dubious the source, when sentencing a defendant.

RCW 9.94A.530(2) addresses the information the court may consider in deciding upon a sentence.

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. . . .

RCW 9.94A.530(2), in relevant part. It would seem to follow that the information the court considers should be something actually useful in making a sentencing decision.

Tricomo also claims that the court declined to consider Fernandez's nonexistent opinion and nonexistent information about

Paxil because it believed it could not, when imposing a standard range sentence, consider mitigation evidence. Appellant's Opening Brief at 18. While the court recognized that it was not being asked to impose an exceptional sentence either above or below the standard range, it said nothing to indicate it would not consider mitigating factors when deciding where, in the 100-month range of the standard range sentence, to place the defendant. 01/28/15 RP 39-40.

Tricomo points to a second instance where the trial court mentioned the requirements of RCW 9.94A.530, or the real facts doctrine. Appellant's Opening Brief at 18; 01/28/15 RP 43. The court was inquiring into the necessity for testimony from one of the investigating officers, noting that Tricomo had said she was acknowledging the facts in the State's declaration of probable cause, and that those were the facts that the court would consider. 01/28/15 RP 43-44. That is not at all the same as the court saying it would not consider information about Tricomo's background. It had already said that it would. 01/28/15 RP 39. The court was only declining to consider further evidence about the crime itself, which is exactly what RCW 9.94A.530(2) requires.

Tricomo also takes issue with the sentencing court's point that her ability to form intent was not an issue before it at sentencing. The court was correct.

[A] guilty plea waives or renders irrelevant all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to the government's legal power to prosecute regardless of factual guilt. . . . By pleading guilty, a defendant admits factual and legal guilt for the charged crime. The guilty plea thus provides a sufficient and independent factual basis for the conviction and punishment. . . . A claim that potential trial evidence, never presented because the defendant pleaded guilty, would have been constitutionally insufficient is therefore irrelevant and precluded by the guilty plea.

In re Pers. Restraint of Bybee, 142 Wn. App. 260, 268, 175 P.3d 589 (2007) (cites omitted).

Tricomo equates the court's recognition that intent was not at issue with a refusal by the court to consider any factors that might bear on the standard range sentence that should be imposed. The court never indicated it would not consider the effect of her mental health on her conduct or whether she fully appreciated the wrongfulness of her conduct, as her counsel argued it should. 01/28/15 RP 83-84, 92. The court did list the following sources of information it considered: Tricomo's allocution

statement, the probable cause statement, her statements to mental health evaluators, two reports from Western State Hospital, and reports from forensic psychologists. 01/28/15 RP 86-87, 91. "I've done my best to take into account lots of facts." 01/28/15 RP 93. Among those facts were Tricomo's "difficult upbringing," mental health issues, alcohol consumption, Paxil, the gruesomeness of the crime, the victim's failure to call for help, and "lots of other factors I've considered." 01/28/15 RP 93-94.

"Within the statutory and constitutional guidelines, judges may exercise their discretion to give a fair and just sentence." State v. Grayson, 154 Wn.2d 333, 349, 111 P.3d 1183 (2005). Tricomo has not identified any statutory or constitutional guideline that the sentencing court failed to observe. It did not, as she claims, simply ignore her mitigation evidence. It did, however, find that evidence insufficient to merit a sentence at the low end of the standard range. The court found that Tricomo's voluntary alcohol use created at least some of her mental issues. 01/28/15 RP 93. It placed significant weight on the fact that the assaults took place over a long period of time, and involved painful, debilitating injuries, as well as the implication that Tricomo prevented the victim from leaving the house. 01/28/15 RP 93-94.

The fact that the court sentenced Tricomo to the top of the standard range is not an indication that it failed to consider her mitigating information. Her claim is not supported by the record. It is an indication that the court found that it did not merit a lower sentence. "This is justice as far as this Court is concerned."
01/28/15 RP 97.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Tricomo's convictions.

Respectfully submitted this 9th day of October, 2015.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

A copy of the State's Brief of Respondent was filed electronically with a copy of the uploaded file sent to the appellant's attorney on October 9, 2015, to the following address:

Gregory C. Link
greg@washapp.org

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

Dated this 9th day of October, 2015, at Olympia, Washington.



Tonya Malava
Paralegal, Thurston County PAO

THURSTON COUNTY PROSECUTOR

October 09, 2015 - 11:35 AM

Transmittal Letter

Document Uploaded: 3-472384-Respondent's Brief.pdf

Case Name: State of Washington v. Lia Tricomo

Court of Appeals Case Number: 47238-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tonya M Maiava - Email: maiavat@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:

greg@washapp.org