

No. 35331-8-II

DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
JACOB MELVIN KORUM,
Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
MONTPELIER, VT
APR 11 1996

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 97-1-04649-3

REPLY BRIEF

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I. STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in his opening brief.

A. REPLY TO RESPONDENT'S PRESENTATION OF FACTS

Jacob Korum, at his sentencing hearing, fully acknowledged the gravity of his conduct, took responsibility for his actions and expressed his regret for the pain he had caused the victims of his crimes. RP 50. His many friends and family members who addressed the court focused on the progress Mr. Korum had made while incarcerated and their reasons for believing he was ready to become an asset to the community upon his release from prison. RP 37-47.

The state's emphasis on the phrase "stupid mistake" buried in two letters written by Mr. Korum's supporters, used in the context of indicating that Mr. Korum would be able to reach out to troubled teens, demonstrates how hard the court had to look to find something negative to say about Mr. Korum's conduct since his last sentencing. Brief of Respondent (BOR) 17-18.

Neither the state nor the court suggested in what way an expression by two of Mr. Korum's many

supporters could possibly justify increasing Mr. Korum's sentence by 21 months. RP 55-56.

The state also omits that in pronouncing sentence, the court not only ignored Mr. Korum's allocution and focused on a phrase used by two of his supporters, but also ruled against his rehabilitation, his good behavior in prison, and safety of the community as factors the court would or could consider in imposing sentence. RP 58-59.

The state further omits that the court's statement at sentencing that it had "determined [at the prior sentencing] it made no difference whatsoever as a practical matter whether on the robbery count Mr. Korum was sentenced to 129 months or 171 months or anywhere in between that," was belied by the record at the prior sentencing. RP 56.

At the prior sentencing hearing, the court expressly considered and rejected the prosecutor's argument that exceptional sentences or sentences at the top of the standard range should be imposed in case something happened on appeal to alter the lengthy consecutive sentences on kidnapping

counts. The prosecutor specifically noted that the case would be appealed:

MR. McCANN: It wouldn't increase the sentence.

THE COURT: So what is the practical reason for making that request?

MR. McCANN: Well, Your Honor, obviously the case goes on after this point. The purpose of the sentencing guidelines are to ensure punishment accounting for all the crimes that he's committed. . . . I can't anticipate what happens after this leaves this courtroom, and I think the sentence is appropriate.

RP (6/8/01) 64-65.

In response to the state's requests for exceptional sentences or sentences at the top of the standard range the court ruled that there were no substantial and compelling reasons for an exceptional sentence and no grounds for sentences above the low end of the standard range for the robberies and assaults. RP (6/8/01) 96.

Finally, the state omits that it obtained multiple convictions for all of the robbery victims even with the kidnapping convictions vacated.¹ Mr. Korum remains convicted of 20 crimes. Those 20 counts include burglary or

¹ See Appendix 1

attempted burglary convictions for each incident and robbery or attempted robbery victim; a separate assault conviction for every victim of a robbery or attempted robbery; and, with two exceptions, an assault conviction for every alleged kidnapping victim. CP 343-357.

II. ARGUMENT

A. THE INCREASED SENTENCES ON REMAND EXCEEDED THE TRIAL COURT'S AUTHORITY.

The state argues that by increasing Mr. Korum's sentences the trial court followed the mandate of the Supreme Court in State v. Korum, 157 Wn.2d 614, 141 P.3d 12 (2006), to remand for dismissal of the kidnapping charges and resentence Mr. Korum "based on a correct [lower] offender score." BOR 10.

In fact, the trial court exceeded the scope of the mandate in increasing the sentences. The Court's mandate was to impose judgment and sentence consistent with dismissing the kidnapping counts and upholding the remaining counts: "We affirm the Court of Appeals dismissal of counts 2, 3, 8-12, 18, 19 and 25 . . . and reverse its dismissal of counts 17-22 and 24-32"

Therefore, as indicated by the attached Appendix A, which we incorporate by reference, *we uphold Korum's convictions on counts 1, 4-7, 13-17, 20-24, 26-27 and 30-32.* Thus, we affirm the Court of Appeals in part, reverse in part, and remand for resentencing consistent with this opinion." Korum, 157 Wn.2d at 653 (emphasis added).

The corrected offender score did not alter the standard ranges, and did not require any reconsideration of whether a lower sentence should be imposed. Certainly nothing in correcting the offender score mandated an increase in the sentences imposed.

In State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992), the trial court, after a successful appeal, considered the same factors it had previously considered and rejected, and sentenced the defendant to an exceptional sentence on remand. In reversing, the Supreme Court noted: Having declared in the original sentencing that an exceptional sentence was not warranted, and operating at the re-sentencing under the mandate to "re-determine the offender score," the trial court could not, at re-sentencing, impose an

exceptional sentence based on aggravating factors which were considered in the prior sentencing and rejected as a basis for an exceptional sentence. Collicott, 118 Wn.2d at 272. The court reiterated that RAP 12.2 restricts the authority of the trial court, and when the mandate directs the trial court to conduct "further proceedings in accordance with . . . the opinion," it does not have the authority to go outside the mandate.

In State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003), the court distinguished Collicott, because the trial court in Tili had declined to impose an exceptional sentence at the original sentencing only because it erroneously believed that Tili's sentences would be served consecutively and that therefore an exceptional sentence was unnecessary. The Tili court allowed for reconsideration of an exceptional sentence on remand given that the trial judge was mistaken in his reason for rejecting the exceptional sentence. The opinion remanding the case had expressly held that the defendant's "sentence . . . [was] statutorily required to be served concurrently unless an exceptional sentence [was] imposed."

Consequently, Tili allowed for re-sentencing including the imposition of an exceptional sentence.

The state fails to acknowledge this difference in the scope of the mandate in Tili and in Mr. Korum's case. BOR 15-16. The state also fails entirely to address Mr. Korum's argument that the state was collaterally estopped from seeking an increase in Mr. Korum's sentence on remand.

As set out in Mr. Korum's Opening Brief of Appellant (AOB), in Collicott, the court found that collateral estoppel applied on remand because the judge had previously determined that he would not impose an exceptional sentence, and, subsequently, could not change his mind based on the same record as at the first sentencing.

Collateral estoppel applies in this situation. The state argued for a sentence at the top of the standard range based on exactly the same record at the first sentencing. The trial court rejected the state's arguments, including the argument that circumstances might change on appeal, and declined to give anything other than

the low end of the sentencing range. Given that, the court at resentencing was estopped from imposing a higher sentence.

The principle of finality in judgments underlying the requirement of adhering to the scope of the mandate and the doctrine of collateral estoppel is reflected directly in the Sentencing Reform Act (SRA) itself. As held by the court in State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989), the SRA requires the imposition of a determinate sentence with actual months of custody set forth exactly; such a sentence, if it is valid, is not subject to subsequent modification just because the sentencing judge may have rethought an earlier decision. As the Shove court held, at the time of sentence, the judge has the information relevant to the sentencing decision available -- criminal history and the particular facts of the crime of conviction. There is no need to modify the sentence after it is imposed.

The state argues nevertheless that the court was entitled to increase Mr. Korum's sentences upheld on appeal because the "context" was

different in Mr. Korum's case on remand. In support of its argument, the state relies on a federal case from the Second Circuit Court of Appeals, United States v. Atehortva, 69 F.3d 679 (2nd Cir. 1995), *cert. denied*, 517 U.S. 1249 (1996). Federal sentencing is different, however, from sentencing in Washington under the SRA. In Atehortva, the Circuit Court allowed the trial court to impose a sentence above the guideline range on remand based on the court's determination that a federal prisoner has notice of a risk of having a sentence increased for a conviction which is, under the federal guidelines, inextricably intertwined with other convictions. Atehortva, 69 F.3d at 685-686.

In contrast, under the SRA, other current convictions are relevant only to the degree that they help determine the standard range for the conviction. RCW 9.94A.525. Once the standard range is determined, the fact of the other current convictions is not relevant to a determination of the length of a standard range sentence. Otherwise, other current convictions may be relevant to the overall length of sentence only if

they run consecutively to the crime of conviction. RCW 9.94A.589. Convictions are not generally inextricably intertwined.

In Tili, the sentencing court mistakenly believed that the convictions ran consecutively to one another as a matter of law. On appeal, the Supreme Court held that since the sentences did not run consecutively as a matter of law, there had to be grounds for an exceptional sentence to obtain that result. Consecutive sentences, however, are not at issue in Mr. Korum's case. Therefore, the only relevance of the dismissed kidnapping counts was that they lowered the offender score.

The state, in addition to rearguing that the kidnapping counts should not have been dismissed on appeal, BOR 8, n.8, 16-17 n. 15, argues that "[a]t resentencing, moreover, the court had to consider that multiple individuals were restrained during all but one robbery." BOR 17. No authority is cited for this proposition and certainly nothing in the mandate issued by the Supreme Court authorized such a consideration. Such an argument, unsupported by legal authority,

should simply be disregarded. State v. Halstein, 122 Wn.2d 109, 130, 857 P.2d 270 (1993).

As set out above, Mr. Korum was punished by a conviction for virtually every victim through a separate assault conviction; and, in the case of the robbery and attempted robbery victims, by separate burglary and assault convictions.

The trial court's increasing Mr. Korum's sentences on remand was an improper increase of a valid sentence, beyond the scope of the mandate and a violation of the doctrine of collateral estoppel. Mr. Korum's sentences should therefore be reversed and his case remanded for imposition of sentences at the bottom of the standard ranges.

B. THE INCREASED SENTENCES ON REMAND WERE VINDICTIVE.

The state argues that increasing Mr. Korum's sentences which were affirmed on appeal is not vindictive because the presumption of vindictiveness goes not arise where "the greater sentence (1) is based on new evidence at retrial; (2) is determined by a different jury; (3) follows a trial de novo; (4) follows a trial when the first sentence was imposed after a guilty plea; (5) is imposed by a different sentencing judge, or

(6) follows a change in the law governing sentencing." BOR 12-13 (citations omitted).

None of these exceptions, however, apply to Mr. Korum's resentencing. And, as set out above, the robbery, burglary, and assault accounts were not inextricably intertwined with one another under the federal sentencing guidelines. See BOR at 13.

As set out in Mr. Korum's opening brief, where, as here, the record does not provide a justification for an increased sentence after appeal, the presumption of vindictiveness is not rebutted. State v. Ameline, 118 Wn.App. 128, 75 P.3d 589 (2003). For this reason, Mr. Korum's judgment and sentence should be reversed and his case remanded for imposition of sentences at the low end of the standard range, as previously imposed and upheld by the Supreme Court.

C. THE TRIAL COURT ERRED IN IMPOSING A 60-MONTH FIREARM ENHANCEMENT RATHER THAN A 24-MONTH DEADLY WEAPON ENHANCEMENT.

Mr. Korum's argument on appeal is that the trial court had no authority to make the firearm determination instead of the jury. The issue is not one of harmless error, but one of the trial

court's authority at sentencing or resentencing to make a finding instead of having the jury make the finding. The error was in imposing a firearm enhancement where the jury was never asked to find that Mr. Korum was armed with a firearm, only whether he was armed with a deadly weapon.

Thus, the state's extended Gunwall analysis of whether the state due process clause should be interpreted as more protective than the federal due process clause with respect to harmless error analysis is simply beside the point.

In RCW 9.94A.602, the Legislature set out a procedure for alleging and submitting to a jury the issue of whether the defendant was armed with a deadly weapon. In contrast, no analogous procedure has ever been enacted for alleging and submitting to the jury the question of whether the defendant was armed with a firearm. RCW 9.94A.533(3). Absent such an enacted procedure, neither the trial court nor the appellate court has the power to create a procedure. State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980); State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981).

In State v. Fleming, COA 33405-4-II (January 17, 2007), the Court of Appeals decided that RCW 9.94A.602 does authorize a procedure for submitting the firearm question to the jury because the statute's "list of per se deadly weapons specifically includes firearms." Slip op. at 5-6.

This decision of the Court of Appeals highlights rather than resolves the problem. RCW 9.94A.602 authorizes the court to submit the question of whether the defendant was armed with a firearm for the purpose of imposing a deadly weapon enhancement. Being armed with a firearm is simply one of the ways in which a person can be found to be armed with a deadly weapon. RCW 9.94A.602 leads to a deadly weapon enhancement if the jury finds the defendant was armed with a firearm, not a firearm enhancement.

Thus, a jury's finding that Mr. Korum was armed with a firearm should have resulted in the imposition of a deadly weapon enhancement. At the very least there is an ambiguity that under the rule of lenity must be resolved in Mr. Korum's favor. State v. Jacobs, 154 Wn.2d 596, 115 P.3d

281 (2005). The error in imposing the firearm enhancement cannot be harmless because there was no procedure for submitting the firearm verdict to the jury.

The state, at BOR at 31, of its brief stated that neither party ever asserted to the jury that any deadly weapon, other than a firearm, was utilized. In fact, the record, in several places, sets out testimony heard by the jury that other arguably deadly weapons were possessed by co-conspirators, Michael Bybee, Ethan Durden, Brian Mellick, and Zachary Phillips, including a knife and muratic acid. RP 489:8-25; 498:12-499:10; 548:9-12; 549:21-24; 550:4-10; 560:17-561:8; 566:15-567:12; 582:10-13; 617:9-14; 650: 803:25-804:13; 838:6-21; 865:10-15; 906:7-16; 1212:6-11; 1215:5-12.

Moreover, the court's instruction informed the jurors only that deadly weapon included a firearm. "Include" means "to contain or encompass as part of the whole; to place as part of a category." Webster's College Dictionary (2nd revised 2001). Thus, the verdict did not preclude

the jury finding a deadly weapon based on something other than a firearm.

Mr. Korum has not argued that the state's due process should be interpreted more protectively than the federal due process clause with regard to harmless error analysis. For that reason the state's Gunwall analysis on that issue is beside the point. Mr. Korum has set out in detail a Gunwall analysis arguing that the Washington constitution is more protective of the right to a jury trial than the federal constitutional right, and therefore the deprivation of any kind of a jury verdict on the enhancement is impermissible. That analysis is not rebutted by the state's analysis which ignores cases holding the Washington constitution is more protective of the right to a jury trial. See AOB at 40-46.

The imposition of 60-month enhancements was error because there was no procedure for imposing firearm enhancements and no jury verdict to uphold. Under Washington law, Mr. Korum was entitled to have a jury verdict on the issue.

III. CONCLUSION

Appellant respectfully submits that his judgment and sentences should be reversed and his case remanded for resentencing before a different judge.

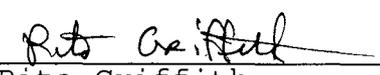
RESPECTFULLY SUBMITTED this 13th day of March, 2007.

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON
BY _____
DEPUTY

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 13th day
of March, 2007.



Lee Ann Mathews

CHARGES BY INCIDENT/ VICTIM

BINGHAM STREET*

Burglary of Beaty home (I)

Judy Beaty: robbery (VI), assault (IV)**; *kidnap* (II)

Jennifer McDonald: assault (V); attempt rob ((XVI); *kidnap* (III)

Burglary of Molina trailer

Tonya Molina: attempt robbery (XVI), assault (XIV); *kidnap* (IX)

Sherrita Vernon-Thompson: assault (XIII); *kidnap* (VIII)

Robert Warner: assault (XV); *kidnap* (X)

Brandon Vernon-Thompson: *kidnap* (XI)

Miguel Lopez: *kidnap* (XII)

152nd STREET

Burglary (XVIII)

Angela Campbell: robbery (XX); assault (XXI); *kidnap* (XIX)

Adrich Fox: assault (XXII); *kidnap* (XVIII)

112th STREET

Burglary

Gregory Smith: attempted robbery (XXVII); Assault (XXV); *kidnap* (XXV)

FIFTH STREET*

Attempted burglary (XXVIII: XXXI) – acquitted XXVII

Tami Tegge: attempted robbery (XXIX, XXXII—acquitted XXXIX); assault (XXX)

*Jacob Korum was alleged to have remained in the car during these incidents

** In State v. Freeman, 153 Wn.2d 765, 103 P.3d 753 (2005), the Supreme Court held that assault convictions merge with robbery convictions where the assault had no purpose independent of the robbery, even where the robbery was not elevated to first degree by the assault or otherwise merged with the robbery.772-773.

