

NO. 35331-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB MELVIN KORUM,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

ON APPEAL FROM THE PIERCE COUNTY SUPERIOR COURT

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether entry of a firearm enhancement based on a deadly weapon finding can be considered harmless under Washington law.
2. Whether the failure to obtain an express firearm weapon finding in this case was harmless error.

II. STATEMENT OF THE CASE

During the summer months of 1997, Jacob Korum, along with three of his childhood friends and one recent acquaintance, planned and executed a series of home invasion robberies. 1RP 795-803, 806.¹ Korum, whose position in the group was second only to that of Ethan Durden and Michael Bybee, supported the selection of drug dealers as victims since they were not likely to report the crimes to the police. 1RP 855, 1110.

The first home invasion robbery occurred at the home of John McDonnell. 1RP 805. Durden, Brian Mellick, and Korum entered the McDonnell home through a bedroom window sometime after midnight equipped with firearms, duct tape and masks. 1RP 807-08, 810, 1181. The three men encountered Mr. McDonnell's roommate, Gregory Smith, whom they forcibly removed from the sofa, threatened, questioned, duct taped, and dragged into a hallway. 1RP 1202, 1212-15. They then searched the residence for drugs and found two to three ounces of methamphetamine. 1RP 816, 1178, 1214, 1216. As the men prepared to leave, they deposited their bound victim in the rear bedroom. 1RP 1217. This crime was not reported

¹The transcripts from Korum's first appeal have been included in the record of this appeal by order of Commissioner Schmidt. The transcripts from State v. Korum, COA No. 27482-5-II, are cited as "1RP". The transcripts from the post-appeal resentencing hearing is cited as "2RP".

to the police by Mr. McDonnell or by Mr. Smith. 1RP 1180, 1219. After the police contacted them Mr. Smith, who had met Korum prior to the night of the crime, identified Korum as one of his assailants based upon his voice and his distinctive workboots. 1RP 1197-98, 1205-07. Korum, meanwhile, admitted to a friend that he participated in the robbery of Mr. McDonnell's home. 1RP 1028.²

The next home invasion robbery occurred at the residence of Aldrich Fox, Angie Campbell, and Ms. Campbell's 2½ year-old daughter Brandi. 1RP 824, 1357-58. In the early morning hours, 4 to 5 men entered the house carrying a variety of firearms. 1RP 821, 1358. Fixing the laser scopes on the adults, the armed men, who were dressed in dark clothing and ski masks and who identified themselves as police, ordered Mr. Fox and Ms. Campbell to the floor. 1RP 821, 1358. The men duct taped Mr. Fox in the front room and forcibly questioned him regarding the location of any drugs or money. 1RP 826, 1360. When Mr. Fox was not forthcoming, he was struck in the back of the head with a rifle butt. 1RP 1362. Eventually, the men removed money from Mr. Fox's pockets, and ephedrine from the oven. 1RP 826, 1365. While some of the men occupied themselves with Mr. Fox, others took Ms. Campbell and her daughter into another room. 1RP 1362. The invaders eventually left in Ms. Campbell's car. 1RP 827-28, 1365-66. This crime was not reported to the police. 1RP 1366.

The next two home invasion robbery attempts were both unsuccessful. 1RP 834,844-48. Tami Tegge and Marcos Apodaca resided together and sold

²These facts gave rise to counts 24 (first degree burglary), 25 (kidnapping), 26 (second degree assault), and 27 (attempted first degree robbery). CP 69-85.

drugs in the summer of 1997. 1RP 1284, 1321-22. One night, Mr. Apodaca was awakened by noises and when he looked out the window, he observed somebody crawling in the yard dressed in army fatigues. 1RP 1324. This individual never obtained entry into the home. 1RP 834. The next day, a man came to the door and rang the bell. 1RP 1288. When Marcos opened the door, the stranger reached under his shirt, presumably for a weapon. 1RP 1292. Marcos observed another man arriving from the side of the house dressed in camouflage who pulled out a firearm, pointed it at Marcos, and said “government agent, get on the ground”. 1RP 1329-31. Marcos elected not to comply with this request and slammed the door shut before the men could make entry. 1RP 845, 1292. Neither of these two attempted home invasion robberies was reported to the police. 1RP 1293.³

The final two home invasions occurred in two separate residences located upon the same piece of property. On this occasion, Korum stayed in the car and monitored events by walkie-talkie after dropping off his four accomplices. 1RP 851, 843. One man kept an eye on the back trailer while the other three knocked on the door of the garage apartment and claimed to be police officers with a warrant. 1RP 541, 608, 863-64. Judy Beaty and her friend, Jennifer McDonald, opened the door, only to be shoved aside and ordered to the floor by the three armed men. 1RP 542. These men duct taped and zip tied the women, then directed the laser scopes on their weapons at the women’s heads while they questioned them regarding the location of any

³These incidents gave rise to counts 28 (attempted first degree burglary), 29 (attempted first degree robbery of Tami Tegge), and 30 (attempted second degree assault of Marcos Apodaca and/or Tami Tegge), 31 (attempted first degree burglary), 32 (attempted first degree robbery of Tami Tegge). CP 69-85.

drugs or money. 1RP 545-56, 610. When the firearms did not seem persuasive enough, the men demonstrated the harm muriatic acid could do to carpet. 1RP 548, 550, 567, 617.

The men then proceeded to the back trailer, eventually transporting a taped and blindfolded Jennifer McDonald from the garage apartment to the trailer. 1RP 614, 618-19, 702, 867, 869. In the trailer, the men had the two adult women, Sherrita Vernon-Thompson, and 14 year old Robert positioned on their knees, "execution style", with their hands and legs bound and duct taped. 1RP 619, 672. Sherrita's head was taped so extensively that she could barely breathe and was blue when the tape was finally removed. 1RP 619, 623, 651.

Prior to Jennifer's arrival in the trailer, the men, who had gained entry by claiming to be police, attempted to persuade the women to tell them where to find money and drugs by directing the laser scope on their firearms at the heads of 8 year old Brandon and 4 year old Miguel. 1RP 649-50, 662, 670. After Jennifer arrived, she was placed in a back bedroom with Miguel and Brandon. 1RP 620, 672. When Miguel tried to leave the bedroom to join his mother in the living room, the men blocked his path. 1RP 673.

At regular intervals, the men radioed information to another person, who responded audibly. 1RP 547, 612-13. After both residences had been searched and some necklaces taken from the back trailer, Zach Phillips was left in the back trailer and Durden, Mellick, and Bybee returned to the garage apartment. 1RP 871, 677. Almost immediately upon their return, the real police arrived and arrested Durden, Mellick and Bybee. 1RP 729, 741, 873. Phillips fled on foot and later met up with Korum, who had driven away

when the police arrived. 1RP 707, 794, 874, 1025, 1031, 1044, 1060, 1087.⁴

Mellick, concerned that he was facing a life sentence, offered to cooperate with the police in exchange for leniency. 1RP 876-894. After an agreement was reached, Mellick disclosed that Korum and Phillips had participated in the home invasion robberies on August 30th and in three other attempted or completed robberies. Id.

Korum was ultimately charged with 32 counts arising from the previously described events. CP 69-85. The charging language for 30 of the counts ended with the following phrase:

and in the commission thereof the defendant and/or an accomplice was armed with a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310, and adding additional time to the presumptive sentence as provided in RCW 9.94A.370, and against the peace and dignity of the State of Washington.

All of the charges were tried to a jury in March of 2001. At that time, the case law provided that the jury was only required to determine whether the defendant was armed with a deadly weapon, and the court determined whether the weapon was a firearm.⁵ Thus, the agreed upon special verdict forms in this case merely indicated that the jury unanimously found that

⁴These facts supported counts 1 (burglary of garage apartment), 2 (kidnapping of Judy Beaty), 3 (kidnapping of Jennifer McDonald), 4 (Assault of Judy Beaty), 5 (assault of Jennifer McDonald), 6 (robbery of Judy Beaty), 7 (burglary of back trailer), 8 (kidnapping of Sherrita Vernon-Thompson), 9 (kidnapping of Tonya Molina), 10 (kidnapping of Robert Lee Warner), 11 (kidnapping of Brandon Vernon-Thompson), 12 (kidnapping of Miguel Lopez), 13 (assault of Sherrita Vernon-Thompson), 14 (assault of Tonya Molina), 15 (assault of Robert Warner), and 16 (robbery of Jennifer McDonald and/or Tonya Molina). CP 69-85.

⁵See State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998), review denied, 136 Wn.2d 1028 (1998), overruled by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

Korum was armed with a deadly weapon. The only legal definition of deadly weapon, however, that the jury received was the following:

The term “deadly weapon” includes any firearm, whether loaded or not.

Jury Instruction 57, CP 144. During closing argument, neither Korum or the State argued that Korum or his accomplices utilized any deadly weapon other than a firearm. See 1RP 2070 to 2110, and 1RP 2126 to 2221.

A jury convicted Korum of 30 counts, with special verdict forms unanimously finding that Korum or an accomplice was armed with a deadly weapon. CP 160-203, 205-221. In addition, the jury unanimously found that Korum unlawfully possess a firearm during the period of time in which this crime spree occurred. CP 204.

Prior to the June 8, 2001, sentencing hearing, Korum filed a memorandum in which he indicated to the court that the verdict supported imposition of a 60 month firearm enhancement. See CP 241, at 3. Korum reaffirmed that position during his sentencing hearing presentation. 1RP 2300, 2303-04, 2307, 2340.

Each of the ten persons who were restrained⁶ during Korum’s robberies were separately recognized with a kidnapping charge. The sentence for each of these kidnapping counts was required to run consecutively due to the operation of former RCW 9.94A.400(1)(b). This calculation resulted in a low end sentence of 608 months. All other sentences were required by

⁶The jury returned verdicts finding Korum guilty of the kidnapping of (1) Judy Beaty; (2) Jennifer McDonald; (3) Sherrita Vernon-Thompson; (4) Tonya Molina; (5) 14 year-old Robert Lee Warner; (6) 8-year-old Brandon Vernon-Thompson; (7) 5-year-old Miguel Lopez; (8) Aldrich (Rick) Fox; (9) Angela Campbell; and (10) Gregory Smith. See CP 160-221.

operation of former RCW 9.94A.400(1)(a) to run concurrently to each other and to the kidnapping sentences.

Korum asked for an exceptional sentence below the low end for the kidnapping counts, but the trial court rejected that request. 1RP 2352-57. After setting the term of imprisonment for the kidnapping counts, the court, almost as an afterthought, directed that bottom of the range sentences be imposed on all other counts. 1RP 2358.⁷

Korum filed a timely notice of appeal. On March 15, 2004, this Court issued an opinion (1) dismissing all of the kidnapping charges on the ground that the restraint was incidental to the robberies, (2) dismissing all of the charges that were added after Korum rescinded the plea agreement, and (3) directing the trial court on remand to determine whether any of the original 16 counts should also be dismissed pursuant to CrR 8.3(b) "in order to provide a deterrent to prosecutorial vindictiveness". State v. Korum, 120 Wn. App. 686, 86 P.3d 166, 182 (2004), rev'd in part, 157 Wn.2d 614, 141 P.3d 13 (2006).

On August 17, 2006, the Washington Supreme Court declined to

⁷The trial judge confirmed, at the resentencing hearing, that the sentence imposed upon the non-kidnapping counts was not based upon the exercise of considered discretion at the original sentencing hearing:

The context in which this Court found itself in sentencing Mr. Korum the first time was that his minimum of the standard sentencing range was 608 to 810 months, the high end of the standard sentencing range. At that point, the Court determined that it made no difference whatsoever as a practical matter whether on the robbery court Mr. Korum was sentenced to 129 months or 171 months or anywhere in between that.

review the Court of Appeals' ruling with respect to the kidnap charges,⁸ but did affirm the remaining 20 convictions. State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006). The Court then remanded the matter to the trial court for "resentencing consistent with this opinion." Id., at 653.

A resentencing hearing was held on September 8, 2006. In advance of this hearing, many supporters of Korum submitted letters seeking leniency. See CP 307-325, 334-342. Two of his supporters indicated that Korum would be able to reach out to others before they made the same "stupid mistakes" that Korum had made. CP 318 (Letter from Colleen Harnish stating that "[Korum] would be able to help troubled teens before they make stupid mistakes, like he did."), CP 321 (Letter from Sommer Carbone stating that "[Korum] is someone that might be able to reach out to someone else before they make the same stupid mistakes he did."). All of Korum's letter writers stated that they had seen marked changes in Korum since his conviction. Those sentiments were repeated in oral statements to the judge. 2RP 37-45.

In the years between Korum's trial and the resentencing hearing, the law regarding firearm enhancements had changed. Korum argued that based upon the change, he could only receive a deadly weapon enhancement. CP 297, at 5-7. The trial judge rejected this contention on the grounds that the record is clear that the jury's deadly weapon special verdicts could have only been based upon the firearms that were used in the crimes. 2RP 61-64.

⁸The Washington Supreme Court did, however, reaffirm its earlier rejection of the kidnap merger doctrine that was the basis for this Court's vacation of the kidnapping convictions in State v. Louis, 155 Wn.2d 563, 571, 120 P.3d 936 (2005) (kidnapping, even when incidental to the robbery, does not merge with robbery).

Finally, Korum contended that the trial judge must resentence him to the bottom of the standard range on all counts because of his good, post-conviction conduct. CP 297, at 2 and 4. Korum argued that anything more would violate double jeopardy and due process. CP 297, at 4.

The trial judge found that the kidnapping conduct did not simply disappear. 2RP 56. She held that the context in which Korum's sentences for the robberies and other charges was to be determined had changed in light of the Supreme Court's decision. 2RP 54-56. The sentence imposed upon these offenses no longer ran concurrent to the kidnapping offenses. In addition, the trauma experienced by five of the victims who were restrained during the robberies was no longer separately recognized, but had to be accounted for in setting the sentence for the relevant robberies:

Date of Robbery or Attempted Robbery	Victims Named in the Robbery Counts	Additional Persons Who Were Restrained During the Course of the Robbery or Attempted Robbery
Between 06/01/1997 and 08/30/1997	Angela Campbell	Aldrich Fox
8/30/1997	Tonya Molina and/or Jennifer McDonald	Sherrita Vernon-Thompson, 14 year-old Robert Lee Warner, 8-year-old Brandon Vernon-Thompson, and 5-year-old Miguel Lopez

Ultimately, the trial court judge imposed a sentence of 150 months on each robbery count. 2RP 66. This sentence was the middle of the standard range. 2RP 66. She also imposed the mandatory 60 month firearm enhancement. *Id.* Finally, she directed that the sentences on all other counts be set at the middle of the standard range. 2RP 66; see also CP 343-357..

Korum filed a timely notice of appeal. CP 360.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY CONSIDERING THE APPROPRIATE SENTENCE BASED UPON THE CONTEXT IN WHICH THE CHARGES WERE NOW PRESENTED.

Korum contends that this court must vacate his standard range sentence and must remand his case to a new judge with directions to impose a sentence at the bottom of the standard range. Opening Brief of Appellant, at 21. Korum claims that this result is required because the trial judge vindictively increased his sentence on remand. Korum argues that the court's vindictive attitude is apparent from her commenting on Korum's supporters' minimization of the crimes, her misapplication of State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003) (Tili II), her inaccurate comparison of his current sentence to that of his co-defendants, and her failure to comply with the mandate. None of Korum's arguments merit the relief he is requesting.

Initially, it should be noted that the mandate issued by the Washington Supreme Court merely directed the trial court to resentence Korum "consistent with this opinion." Korum, 157 Wn.2d at 653. To be consistent with the opinion, the trial court needed to dismiss the kidnapping charges and then resentence Korum based upon a corrected offender score. This is exactly what the trial court did.

When Korum appeared for resentencing, he stood before the court in a fundamentally different position than he did in 2001. Korum's offender score was different. Korum's conduct in restraining people in addition to the identified victim in each robbery offense was no longer separately addressed. Finally, Korum's sentences for robbery, assault, burglary, and the unlawful

possession of a firearm no longer ran concurrently with a 108 year sentence for kidnapping.

In North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), the Supreme Court stated that to “assure the absence of [vindictiveness]” that would deter defendants from challenging their convictions, the Due Process Clause requires that “whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.” Id. at 726. Korum, like many other litigants, argues that any higher sentence after remand creates a presumption of vindictiveness that the government must rebut.

Later decisions, however, have narrowed Pearce. In Texas v. McCullough, 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986), the jury had sentenced the defendant to 20 years’ imprisonment, but after a retrial the judge sentenced him to 50 years. See id. at 136. The judge explained that the higher sentence was based on new evidence at the second trial showing that the defendant had played a much larger role in the crime than was evident at the first trial. See id. The Supreme Court held that no presumption of vindictiveness arose because the judge who imposed the new sentence had also been the judge who had granted the defendant a new trial after the original sentence. See id. at 138-39. It further held that any presumption of vindictiveness was overcome by the judge's explanation for the increase in sentence. See id. at 141. McCullough recognized that the explanation did not come within the Court's prior language “permit[ting] ‘a sentencing authority to justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings.’”

Id. (brackets omitted) (quoting Wasman v. United States, 468 U.S. 559, 572, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984)). But, it explained, “[t]his language . . . was never intended to describe exhaustively all of the possible circumstances in which a sentence increase could be justified. Restricting justifications for a sentence increase to only ‘events that occurred subsequent to the original sentencing proceedings’ could in some circumstances lead to absurd results.” Id.

Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), then reduced the Pearce doctrine to its essential core. The Court held that the defendant has the burden “to prove [that] actual vindictiveness,” id. at 799-800, caused the higher sentence and that a presumption of vindictiveness arises only in circumstances “in which there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority,” id. at 799 (citation and internal quotation marks omitted).

Thus, it is now clear that the Pearce doctrine’s goal is to prevent the “‘evil’” of “‘vindictiveness of a sentencing judge,’” and not simply “‘enlarged sentences after a new trial.’” Alabama v. Smith, 490 U.S. at 799 (quoting McCullough, 475 U.S. at 138); see also Wasman, 468 U.S. at 569-70 (finding that harsher sentences following reconviction are prohibited only if actually motivated by vindictiveness against defendant for challenging his conviction). Accordingly, there is no presumption of vindictiveness if the greater sentence (1) is based on new evidence at retrial;⁹ (2) is determined by

⁹Texas v. McCullough, supra.

a different jury;¹⁰ (3) follows a trial de novo;¹¹ (4) follows a trial when the first sentence was imposed after a guilty plea;¹² (5) is imposed by a different sentencing judge;¹³ or (6) follows a change in the law governing sentencing.¹⁴ In these cases, the burden lies with the defendant to demonstrate that the resentence was the result of vindictiveness. Alabama, 490 U.S. at 799-800.

Case law also places the burden upon the defendant of demonstrating actual vindictiveness when a resentencing follows the reversal of some counts that were inextricably entwined with the remaining convictions. See, e.g., United States v. Atehortva, 69 F.3d 679 (2d Cir. 1995), cert. denied, 517 U.S. 1249 (1996); United States v. Forester, 874 F.2d 983 (5th Cir. 1989); White v. State, 576 A.2d 1322 (Del. 1990). In Atehortva, the trial court increased the penalty on one count after the appellate court reversed the other two counts. The increased penalty was based upon factors that could have been articulated by the sentencing judge prior to the appellate court decision. In refusing to find that the defendant had met his burden of demonstrating actual vindictiveness, the appellate court commented that the original sentence for the remaining count had been purely academic at the first sentencing hearing as the sentence, by operation of law, was required to be served concurrently

¹⁰Chaffin v. Stynchcombe, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

¹¹Colten v. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972).

¹²Alabama, 490 U.S. at 803.

¹³United States v. Perez, 904 F.2d 142 (2d Cir.), cert. denied, 498 U.S. 905 (1990).

¹⁴United States v. Singletary, 458 F.3d 72, 77 (2nd Cir. 2006).

to the now reversed counts which carried substantially longer sentences. As the court noted:

When a defendant challenges convictions on particular counts that are inextricably tied to other counts in determining the sentencing range under the guidelines, the defendant assumes the risk of undoing the intricate knot of calculations should he succeed. Cf. Duso, 42 F.3d at 368 (noting that "there is a calculated risk taken by a defendant in appealing his sentence computation"). Once this knot is undone, the district court must sentence the defendant de novo and, if a more severe sentence results, vindictiveness will not be presumed.

Atehortva, 69 F.3d at 685-86.

Our Supreme Court's case of State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003) (Tili II), reaches the same conclusion as that reached by the Second Circuit in Atehortva. Tili had been convicted of multiple sex offenses. At his first sentencing hearing, the trial judge determined that each of the sex offenses constituted separate criminal conduct. The trial judge further determined that the standard range that resulted from the first determination established an appropriate sentence. Tili successfully appealed the trial judge's refusal to find that the sex offenses constituted the "same criminal conduct." State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999) (Tili I).

When Tili returned to the Pierce County Superior Court for resentencing, the trial judge, based upon the new offender score and standard range, determined that an exceptional sentence was merited. Tili appealed this decision, claiming that the trial court was collaterally estopped by the fifth amendment to the United States Constitution from imposing an exceptional sentence on remand. See Tili II, 148 Wn.2d at 360-61. The

Supreme Court rejected Tili's argument because the trial court was faced with a different sentencing context:

The procedural history of this case presents us with two sentencing contexts to consider. The first is the presumptive sentence resulting from a determination that the conduct was separate and distinct. The second context is the presumptive sentence arising from a determination that a defendant's conduct constitutes same criminal conduct. In Tili's case, the presumptive sentence vastly differs depending on which context the court was considering at the time of sentencing. ⁿ² At the original sentencing, the trial court decided Tili's three counts of first degree rape would be counted as separate and distinct for sentencing purposes pursuant to former RCW 9.94A.400(1)(b) (1996). Sentencing seriously violent offenses, of which first degree rape is one, as separate and distinct conduct results in consecutive sentences for those offenses. Sentencing the same offenses as same criminal conduct results in concurrent sentences. Thus, sentencing Tili's rape counts under a separate and distinct format results in a longer overall sentence than if he were sentenced as though the rape counts were the same criminal conduct, simply because the former results in consecutive terms and the latter results in concurrent terms.

The trial court, having decided that it would sentence Tili as though the rape counts were separate and distinct, considered and rejected imposing an exceptional sentence on top of the presumptive sentence, which the judge considered to be fair by reason of the consecutive sentencing that occurs in the separate and distinct context. When we determined that Tili's rape counts were to be sentenced as same criminal conduct in Tili I, and we remanded for resentencing in accordance with that determination, the trial court was faced with a different sentencing context. At that point, the sentences for each rape count were to be served concurrently. This results in a sentence for the rape counts that is significantly reduced compared to that which resulted at the first sentencing and one that the trial judge perceived to be too lenient. ⁿ³ Thus, the issue at the resentencing was fundamentally different. At the first sentencing, the trial court considered and declined to impose an exceptional sentence on top of the presumptive sentence resulting from separate and distinct conduct and consecutive sentences. Upon resentencing, the trial court was deciding whether to impose an exceptional sentence on top of the presumptive sentence resulting from same criminal conduct. For this reason, we answer the first question of the collateral estoppel analysis in the negative. There being no identity of the issues, the trial

court was not collaterally estopped from imposing an exceptional sentence at the resentencing.

----- Footnotes -----

n2 As same criminal conduct, the presumptive range of 111-147 months for the three first degree rape counts is served concurrently. Thus, Tili serves only 111-147 months for all three counts of rape. As separate and distinct conduct, Tili serves three consecutive 111-147 sentences for the rapes. Thus, he would serve from 333-441 months for the three rape counts rather than just 111-147 months, a significant difference.

----- End Footnotes-----

Tili II, 148 Wn.2d at 362-63.

The trial court at Korum's resentencing was faced with a different sentencing context than it faced before. In 2001, the kidnapping counts existed separately and apart from the other offenses, yielding a standard range of 608 to 812 months. On remand, however, those offenses merged with the robbery charges and the sentence to be imposed on the robbery convictions was no longer a merely academic question. Thus, the trial court judge was free, as a matter of law, to impose any sentence within the standard range that justice demanded.

In deciding what sentence to impose within the standard range, the trial court judge properly considered that Korum's restraint of the robbery victims was greater than the incidental restraint associated with that crime. Korum and his accomplices duct taped his victims, leaving them in a vulnerable position upon leaving.¹⁵ This conduct now had to be considered

¹⁵Even jurisdictions that have adopted the kidnapping merger rule recognize that tying up a victim constitutes a greater restraint than that associated with robbery alone. See, e.g., Berry v. State, 652 So.2d 836 (Fla. App. 4 Dist. 1994), affirmed 668 So.2d 967 (1996) (court advises robbers that under the state's kidnap merger rule "if you tie 'em up you've kidnapped 'em" and can be convicted of both

as part of the robbery, rather than as the separately punishable crime of kidnapping.

At resentencing, moreover, the court had to consider that multiple individuals were restrained during all but one robbery. A jury found beyond a reasonable doubt that the individuals identified below were subject to restraint in addition to the named robbery victims: Sherrita Vernon-Thompson, Robert Lee Warner (14 years-old), Brandon Vernon-Thompson (8 years-old), Miguel Lopez (5-years-old), and Aldrich (Rick) Fox. The jury's verdict, which was reflected in their kidnapping offenses, was now subsumed in Korum's robbery offenses. This means that the sentence for each robbery now needed to take into consideration the trauma added to these now nameless victims. These legal and factual distinctions provided an appropriate basis for the trial judge's middle of the standard range sentence, and shift the burden of demonstrating actual judicial vindictiveness squarely to Korum's shoulders.

Korum attempts to satisfy this burden by ascribing a sinister motive to every statement uttered by the trial judge. Korum's attack is replete with factual errors. Korum claims that the judge's animus is demonstrated by her concern that some of Korum's supporters characterized his actions as "stupid

robbery and kidnapping); Carter v. State, 468 So.2d 370 (Fla. App. 1 Dist.), petition for review denied, 478 So.2d 53 (1985) (defendant properly convicted of both robbery and kidnapping where the defendant tied up the victim with a cord before he left in a manner that would allow the victim to free herself by use of determined effort); State v. Beatty, 347 N.C. 555, 495 S. E. 2d 367 (1998) (despite the state's kidnapping merger rule the defendant could be convicted of both robbery and kidnapping where the defendant put duct tape around the victim's wrists and forced the victim to lie on the floor); Anderson v. State, 582 S.E.2d 575, 577-79 (Ga. Ct. App. 2003), cert denied, (Oct. 6, 2003) (evidence sufficient to sustain both robbery and kidnapping convictions where robbers bound the victim's arms with duct tape and forced her to lie on floor).

mistakes” when none of the letters used that phrase. Opening Brief of Appellant, at 13-14. Korum, however, is in error on this point as two of the letters used that exact phrase. See CP 318 (Letter from Colleen Harnish stating that “[Korum] would be able to help troubled teens before they make stupid mistakes, like he did.”), CP 321 (Letter from Sommier Carbone stating that “[Korum] is someone that might be able to reach out to someone else before they make the same stupid mistakes he did.”).

Korum contends that this animus is demonstrated by the judge’s failure to consider the differences between Mr. Korum and his co-participants. Opening Brief of Appellant, at 15. Actually, Korum’s complaint is that the judge focused on the fact that all four of Korum’s co-participants were convicted of far fewer offenses than was Korum and upon the fact that two of Korum’s co-participants received longer sentences than were possible for Korum,¹⁶ rather than upon the fact that two of Korum’s co-participants received shorter sentences. Mere disagreement over what weight to give to certain facts, however, cannot establish actual judicial vindictiveness, particularly where the sentencing judge does not impose the maximum lawful sentence. Korum’s request, therefore, for a remand to a different judge with directions to impose a bottom of the standard range sentence must be denied.¹⁷

¹⁶Information regarding Korum’s co-participant’s sentences was not presented at Korum’s resentencing hearing. Relevant information, however, appeared in Korum’s original sentencing hearing memorandum and in this court’s original appellate decision. See CP 241, at 2; Korum, 120 Wn App. at 716 n. 37.

¹⁷In any event, if this court should determine that Korum has met his burden of demonstrating actual judicial vindictiveness, the remedy would be resentencing before a different judge. The new judge would have the discretion to sentence Korum at any point within the standard range.

B. THE ERROR REGARDING THE WORDING OF THE SPECIAL VERDICT FORM WAS HARMLESS

Korum contends that no statutory procedure exists for submitting the question of a firearm enhancement to the jury. He also argues, that even if the jury could be asked to pass upon this question, the inartfully worded special verdict forms prevent the imposition of a firearm enhancement. In making his second argument, Korum does not contend that the error in this case *would* not be harmless, he merely argues that the error *could* not be harmless under the Washington Constitution. In this, he errs.

1. A Statutory Procedure Exists for Finding Firearm Enhancements

Korum's position that the State is prohibited from submitting a firearm enhancement to a jury is not supported by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), rev'd, 548 U.S. ___, 126 S. Ct. 2072, 23 L. Ed. 2d 362 (2006), State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), or any subsequent Washington case. To the contrary, recent appellate court decisions clearly indicate that a trial court has the authority to submit the firearm enhancement to the jury. See State v. Fleming, COA No. 33405-4-II, ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 80 (Jan. 17, 2007); State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006).

2. The Harmless Error Doctrine Serves Several Important Purposes

The practice of reviewing error in order to determine whether it was harmless has roots in English jurisprudence of the 19th century. R. Traynor, The Riddle of Harmless Error 4-13 (1970) (hereinafter "Harmless Error"); 5 W. LaFave et al., Criminal Procedure § 27.6(a), at 933 (2nd ed. 1999).

American courts were somewhat slow to adopt the concept and ultimately came under heavy and protracted criticism for reversing convictions based upon seemingly insignificant errors. Traynor, Harmless Error, *supra*, at 13-14; 5 LaFave et al. *supra*, § 27.6(a), at 933-34. Eventually, “out of widespread and deep conviction over the general course of appellate review in American criminal causes[,]” the federal government and each state had adopted some form of statutory or common law harmless-error rule. Traynor, Harmless Error, *supra*, at 13-14; Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Kotteakos v. United States, 328 U.S. 750, 759, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

This trend recognized that the harmless error doctrine promotes fundamental fairness in criminal proceedings by ensuring that criminal cases are decided on the merits, and not on the basis of defects that have no bearing on guilt or innocence. State v. Allen, 359 N.C. 425, 464-55, 615 S.E.2d 256 (2005) (Martin, J., dissenting). The doctrine preserves public confidence in the criminal justice system by reducing the risk that guilty defendants may go free. Johnson v. United States, 520 U.S. 461, 470, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (quoting Traynor, Harmless Error, *supra*, at 50: “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.”). The harmless error doctrine conserves judicial resources by preventing costly, time-consuming and unnecessary remands. Allen, 359 N.C. at 454 (Martin, J. dissenting) (citing Chapman, 386 U.S. at 22); Traynor, Harmless Error, *supra*, at 14, 51. And, finally, the doctrine promotes stability and predictability in the law because appellate judges will be less likely to bend,

stretch, or adapt the law in order to avoid a clearly unwarranted reversal. Id. at 455.

3. The State Constitution Does Not Prevent Harmless Error Analysis Where a Special Verdict Form is Insufficiently Precise

There is no state constitutional provision that requires automatic reversal for constitutional error, even where such error concerns omitted or misdescribed elements. In analyzing such error, the Washington Supreme Court has consistently adhered to federal due process analysis. There is no principled reason to interpret the state due process clause differently than the federal clause or to interpret the right to a jury trial as forbidding harmless error analysis.

a. Due Process

Because there is no constitutional provision regarding harmless error review, it has always been analyzed as a component of due process. Thus, an error that relieves the State of proving elements of a crime beyond a reasonable doubt violates due process. Because the Due Process Clause of the United States Constitution and the Due Process Clause of the state constitution are virtually identical, and because analysis of State v. Gunwall, 106 Wn.2d 54, 59-63, 720 P.2d 808 (1986) demonstrates that there is no reasoned basis to interpret the due process clause of the state constitution more broadly in regard to the question presented here, this court should hold that harmless error analysis is appropriate under the state guarantees of due process.

The six neutral criteria set forth in Gunwall must be addressed before an independent interpretation under the state constitution is appropriate.

State v. Ortiz, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992). Only when these criteria weigh in favor of independent interpretation does the Washington Supreme Court have a principled basis for departing from federal constitutional precedent. When previously faced with the question of whether the state guarantee of due process should be interpreted differently than the federal guarantee of due process, the Washington Supreme Court has rejected independent interpretation of the state provision. In re Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001); In re Matteson, 142 Wn.2d 298, 310, 12 P.3d 585 (2000); State v. Manussier, 129 Wn.2d 652, 679-80, 921 P.2d 473 (1996); Ortiz, 119 Wn.2d at 302-04.

The first Gunwall criterion is an examination of the textual language of the state constitution. Gunwall, 106 Wn.2d at 61. The due process guarantee of the state constitution is contained in Const. Art. I, § 3, and states, “[n]o person shall be deprived of life, liberty, or property, without due process of law.” The second Gunwall criterion is a comparison between the text of the state constitutional provision and the text of the federal constitution provision. The Fifth Amendment of the United States Constitution uses the identical language as the state constitution, “no person . . . shall be deprived of life, liberty or property, without due process of law.” The Fourteenth Amendment uses the same language as well, stating, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” Because there is no textual difference between the due process clauses of the state and federal constitution, these criteria do not favor an independent interpretation of the state provision. Matteson, 142 Wn.2d at 310.

The third criterion is whether legislative history of the state provision reveals an intention that the provision be broader than its federal counterpart. Gunwall, 106 Wn.2d at 61. In the past, the Washington Supreme Court has noted that no legislative history regarding the state guarantee of due process contained in art. I, § 3 indicates that the framers intended the provision to be broader than the federal provision. Ortiz, 119 Wn.2d at 303. Indeed, art. I, § 3 was adopted as proposed, without any apparent controversy, in language identical to the Fifth and Fourteenth Amendments. Journal of the Washington State Constitutional Convention 1889, 154, 496 (B. Rosenow, ed. 1999). It is interesting to note as well that the state guarantee of due process is immediately preceded by Art. 1, § 2, which states “[t]he Constitution of the United States is the supreme law of the land.” The wholesale adoption of the language of the federal Due Process clauses, immediately following a declaration of the supremacy of the federal constitution, strongly indicates that the framers intended the state provision to be interpreted identically with the federal provision. Cf. Gunwall, 106 Wn.2d at 65 (finding that a material difference in the language between the state and federal provisions indicated an intention that the state provision be more expansive). This third criterion does not support an independent interpretation of the state provision.

The fourth criterion is preexisting state law. Gunwall, 106 Wn.2d at 61. The Gunwall court explained that this criterion involves examining state law that existed before the state constitutional provision was adopted, stating “[p]reexisting law can thus help to define the scope of a constitutional right later established.” Gunwall, 106 Wn.2d at 62; State v. Smith, 150 Wn.2d

135, 75 P.3d 934 (2003) (the law at the time of founding governs interpretation of the state constitution). Statutes and cases surrounding the founding are most persuasive in this regard, and if prior state cases do not provide independent reasons under state law for their holdings, they do not support an independent interpretation of the state provision. Ortiz, 119 Wn.2d at 304.

Preexisting state law does not support an independent interpretation of the state due process clause in regard to the question presented here. Appellate procedure in the Washington Territory was governed by Code of 1881, § 1147:

On hearing all writs of error, the supreme court shall examine all errors assigned, and on the hearing of appeals shall examine all errors and mistakes excepted to at the time, whether waived by the strict rules of law or not; but the court shall consider all amendments which could have been made, as made, and shall give judgment without regard to technical errors or defects, or exceptions which do not affect the substantial rights of the defendant.

Thus, in Washington Territory, errors committed at a criminal trial did not result in automatic reversal. The appellate court was required to determine whether the error was “technical” and whether it affected “the substantial rights of the defendant.”

Not surprisingly, beginning in the earliest days of statehood, the Washington Supreme Court applied harmless error analysis to missing or misdefined elements. In the year following ratification of the constitution, the Washington Supreme Court decided a murder by arson capital case in which murder was erroneously defined. McClaine v. Territory, 1 Wash. 345, 25 P. 453 (1890). First, the Court identified and discussed the instructional error that had occurred, concluding that “[i]t is too obvious to admit of

discussion that all the elements of the crime necessary to be proven were not presented to the jury in this instruction.” McClaine, 1 Wash. at 352-53. Second, the Court went on to assess whether the error was so harmful as to require reversal of the conviction: “...the question now to be considered is whether this particular instruction was so segregated from the rest of the charge, and made so distinct and impressive, that it would be likely to mislead the jury as to what were essential elements of the crime.” Id. at 353. The Court ultimately concluded that the instruction misled the jury, and reversed the conviction.

Four years later, the Washington Supreme Court found harmless error where an erroneous jury instruction placed the burden on the defendant to prove he acted in self-defense. State v. Conahan, 10 Wash. 268, 38 P. 996 (1894). The very next year, in State v. Courtemarch, 11 Wash. 446, 39 P. 955 (1895), the Court held that a failure to instruct on a lesser offense, and the submission of an improper presumption instruction were harmless errors. Thus, the earliest cases show that the Washington Supreme Court did not automatically reverse convictions for constitutional error.

The practice of applying constitutional harmless error analysis continued into the early part of the twentieth century, State v. Hazzard, 75 Wash. 5, 134 P. 514 (1913), and beyond. For instance, in State v. Hartley, 25 Wn.2d 211, 170 P.2d 333 (1946), the Washington Supreme Court held that the omission of the words “unless it is excusable or justifiable” from the “to convict” instruction in a murder case was harmless error because there was no evidence to support a defense of excusable or justifiable homicide. In State v. Thompson, 38 Wn.2d 774, 779, 232 P.2d 87 (1951), the Washington

Supreme Court applied harmless error analysis to an error in the jury instructions that omitted the element of force from the definition of burglary, and noted that “[i]f all the evidence had been consistent with the theory of a use of force or a breaking, instruction No. 5 might not have constituted prejudicial error.”

In State v. Martin, 73 Wn.2d 616, 623-27, 440 P.2d 429 (1968), the Washington Supreme Court held that an error in the jury instructions that relieved the State of proving knowledge was harmless. Significantly, the Washington Supreme Court stated, “[t]he rule is now definitely established in this state that the verdict of the jury in a criminal case will be set aside and a new trial granted to the defendant, only when such error may be designated as prejudicial.” Martin, 73 Wn.2d at 627 (listing numerous cases).

In State v. Bailey, 114 Wn.2d 340, 349, 787 P.2d 1378 (1990), the Washington Supreme Court noted that even if constitutional error had occurred in setting forth the elements of the crime, the error was harmless beyond a reasonable doubt. In State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996), the Washington Supreme Court held that an instruction that constituted a mandatory presumption, which operated to relieve the State of its burden of proving all of the elements of the crime, was harmless. And, most recently, the Washington Supreme Court rejected arguments for a rule of automatic reversal as to missing or misstated elements. State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). In Brown, the Washington Supreme Court held that error in defining the knowledge element of accomplice liability could be harmless.

Similarly, Washington courts have repeatedly engaged in harmless error analysis with respect to sentencing enhancements decided by the jury. See State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961) (failure to submit special interrogatory concerning age of victim was harmless given the undisputed testimony at trial); In re Taylor, 95 Wn.2d 940, 944, 632 P.2d 56 (1981) (failure to instruct jury that it needed to find firearm enhancement beyond a reasonable doubt was harmless error); State v. Hall, 95 Wn.2d 536, 541, 627 P.2d 101 (1981) (same; citing Chapman v. California, 386 U.S. at 24); State v. Belmarez, 101 Wn.2d 212, 216, 676 P.2d 492 (1984) (erroneous conclusive presumption in deadly weapon instruction was subject to harmless error analysis but error was prejudicial); State v. Fowler, 114 Wn.2d 59, 785 P.2d 808 (1990) (harmless error in failing to provide a reasonable doubt instruction specific to the weapon enhancement); State v. Cook, 31 Wn. App. 165, 175-76, 639 P.2d 863 (1982) (same); State v. Braithwaite, 34 Wn. App. 715, 725-26, 667 P.2d 82 (1983) (harmless error that jury not instructed that it needed to find firearm enhancement beyond a reasonable doubt given uncontroverted evidence that firearm was used).

These cases represent a long history in this state of applying harmless error analysis to instructional errors -- including sentence enhancements -- even when the error relieves the State of the burden of proving every element of the crime or sentencing enhancement to a jury.¹⁸ In sum, the fourth

¹⁸The Washington Supreme Court has also applied the Chapman standard in reviewing many other constitutional violations. See e.g., State v. Nist, 77 Wn.2d 227, 233-34, 461 P.2d 322 (1969) (erroneous admission of custodial statements); State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985) (confrontation clause violation). Nothing in the state constitution provides a principled basis for adopting different harmless error standards for different violations.

Gunwall criterion does not favor independent interpretation of the state guarantee of due process in regard to the question presented here.

The fifth Gunwall criterion is the difference in structure between the federal and state constitutions. Gunwall, 106 Wn.2d at 62. According to the Gunwall court, the federal constitution is a grant of enumerated powers to the federal government, and the state constitution is a limit on the sovereign power of the state. Gunwall, 106 Wn.2d 62. Nonetheless, the Washington Supreme Court has previously concluded that this criterion sheds little if any light on the question of whether a particular state constitutional provision should be interpreted more broadly than its federal counterpart. Matteson, 42 Wn.2d at 310. This criterion favors independent interpretation in only the most general sense.

Finally, the sixth Gunwall criterion is whether the question presented involves matters of particular state or local concern. Gunwall, 106 Wn.2d at 67. At its most basic level, due process of law simply means fundamental fairness. See State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). Due process of law has been defined as “the law of the land . . . exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” In re Payne v. Smith, 30 Wn.2d 646, 649, 192 P.2d 964 (1948) (quoting Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 2d 232 (1884)). Surely, principles of fundamental fairness do not differ from state to state and between localities. More particularly, the due process concept that the State is required to prove each element of the crime to the jury beyond a reasonable doubt is a nationwide axiom, not a matter of particular state or local concern. The sixth

Gunwall criterion does not favor an interpretation of the state guarantee of due process that is different from the federal guarantee of due process.

In sum, the above analysis of the Gunwall criteria demonstrates that there is no principled basis for interpreting the state guarantee of due process more broadly than the federal guarantee of due process in regard to the question presented here. This court should hold that under both the federal and state guarantees of due process, an instructional error that relieves the State of the burden of proving each element of the crime is subject to constitutional harmless error analysis.

b. Right to Trial by Jury

Korum has argued that the jury trial guarantee of the Washington State Constitution requires reversal of a judgment whenever the right to jury is affected, and that harmless error analysis affects that right. This argument should be rejected, as a detailed consideration of the Gunwall criteria suggests that the state jury trial guarantee does not forbid harmless error analysis.

Two provisions of the Washington Constitution deal with the right to trial by jury. Const. art. 1, § 22 provides:

In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged. . .

Const. art. 1, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than 12 in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving the jury in civil cases where the consent of the parties interested is given thereto.

There are a number of significant differences in the texts of these provisions as compared to the federal constitution. Article 1, § 22 is the only provision that deals exclusively with criminal cases. The relevant language is substantially identical to language in the Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

This similarity in language suggests that the two provisions are co-extensive. Article 1, § 21, on the other hand, corresponds most closely to the Seventh Amendment, which provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

There are significant differences between these two provisions, which can lead to different results. One difference is that Article 1, § 21 specifically refers to juries in courts not of record. The Washington Supreme Court has relied on this language in extending the right to jury trial to misdemeanors, which are often tried in courts not of record. Pasco v. Mace, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). This distinction, however, relates to the scope of the right, and not to what should occur when the right is violated.

A second difference between the Seventh Amendment and Article 1, § 21 is that the Federal provision covers only civil cases, while the state provision contains no such limitation. This difference does not support the creation of special rules for juries in criminal cases. Logically, such special rules would be placed in Article 1, § 22, which deals specifically with

criminal cases, rather than § 21, which does not. As already pointed out, the jury trial provisions of § 22 are substantially identical with those of the Sixth Amendment. This supports the conclusion that the Constitution was not intended to create jury trial rights that specifically apply in criminal cases, beyond those created by the Federal constitution.

As argued previously, state constitutional and common law history does not support an independent state interpretation. Article 1, § 21 has been construed as preserving the right to trial by jury as it existed at common law in Washington Territory at the time the Constitution was adopted. State v. Smith, 150 Wn.2d at 153. But there is no indication that the jury trial clause operates to prevent harmless error analysis, since harmless error analysis was routinely applied to errors that arguably touched on a defendant's right to trial by jury.

Finally, as to the sixth Gunwall criterion, although it can be said that the scope of the state right to trial by jury can be of local concern, the more general principles underlying harmless error analysis are broader. This state certainly has a strong local concern in the efficient use of judicial resources. It is not efficient to retry cases based on errors that could not reasonably have made any difference.

4. The Record in the Instant Case Establishes that the Error in the Wording of the Special Verdict Form Was Harmless.

In the instant case, neither the State nor Korum ever asserted to the jury that any deadly weapon other than a firearm was utilized throughout Korum's violent crime spree. The jury instruction defined the term "deadly weapon" solely as including a firearm. CP 57. Finally, the jury found Korum guilty of unlawfully possessing a firearm during in the time period in which

all twenty offenses were committed. CP 204. Under these facts, the error in the special verdict forms was harmless beyond a reasonable doubt. The trial court, therefore, did not err by imposing a 60 month enhancement.

IV. CONCLUSION

The sentence imposed upon Korum was reasonable and lawful. Korum's failure to establish actual judicial vindictiveness mandates the affirmance of the sentence.

DATED this 15th day of February, 2007.

Respectfully submitted,



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DIVISION II

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PROOF OF SERVICE

I, Amber Castillo, declare that I have personal knowledge of the ~~STATE OF WASHINGTON~~
BY ~~DEPUTY~~
matters set forth below and that I am competent to testify to the matters stated
herein.

On the 15th day of February, 2007, I deposited in the mails of the
United States of America, postage prepaid, a copy of the document to which
this proof of service is attached in an envelope addressed to:

Mr. Wayne Fricke
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I declare under the penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.

Signed this 15th day of February, 2007, at Olympia,
Washington.


Amber Castillo