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Consolidated Nos. 23834-2-III; 24313-3-III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY DAVIS, APPELLANT

---

CONSOLIDATED WITH:

IN RE PERSONAL RESTRAINT OF

ANTHONY DAVIS

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JEROME J. LEVEQUE

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BRIEF OF RESPONDENT

AND

RESPONSE TO PERSONAL RESTRAINT PETITION

---

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

(1) The prosecutor committed misconduct that violated appellant's right to a fair trial when she shifted the burden of proof and repeatedly asked appellant if other witnesses were liars.

(2) The evidence at trial was insufficient to prove unlawful imprisonment of T.B. beyond a reasonable doubt.

(3) The trial court acted contrary to its prescribed sentencing authority when it imposed an exceptional sentence in a manner contrary to that prescribed by the S.R.A.

II.

ISSUES PRESENTED

(1) Was any error in the deputy prosecutor's cross examination of the defendant so egregious that the failure to object was unnecessary?

(2) Did the evidence support the unlawful imprisonment verdict?

(3) In light of RCW 2.28.150, did the trial court have authority to submit a special interrogatory to the jury?

(4) Has petitioner established any prejudicial error occurred at his trial?

### III.

#### STATEMENT OF THE CASE

Respondent accepts appellant's statement of the case, but will note additional facts as necessary during the arguments.

### IV.

#### ARGUMENT

##### A. THERE WAS NO EGREGIOUS ERROR COMMITTED DURING THE CROSS EXAMINATION OF THE DEFENDANT.

The first issue presented by the appeal is a contention that the prosecutor erred during her cross examination of the defendant. Defense counsel never objected to the now-challenged line of questioning. Any error was not so egregious that it was beyond cure from a timely objection. Accordingly, this claim of error is not preserved.

The standards of review are well understood. The general rule in this area was well stated in State v. Swan, 114 Wn.2d 613, 664, 790 P.2d 610 (1990):

We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction. Thus, in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. Moreover, "counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or on appeal."

114 Wn.2d at 661 (footnotes omitted; emphasis supplied).

Appellant's brief claims two types of error occurred during the cross examination – alleged burden shifting concerning missing evidence and alleged misconduct by inquiring if other witnesses were lying. There was no error in the first category and any impropriety in the second was not so egregious as to be beyond cure from a timely objection. The two arguments will be addressed in turn.

*Missing Evidence.* Defendant testified at trial and provided an alibi for himself, claiming that he was at a restaurant/lounge during the time period of the crime. RP 439-443. The prosecutor in her cross examination asked about which friends and employees he saw there and why they weren't present to support his alibi. RP 465-466. Defendant also

testified that he spent the night at a hotel. RP 447-448. The prosecutor likewise queried why defendant had no documentation from the hotel or testimony from staff to support that portion of the testimony. RP 476. Defense counsel did not object to any of these questions. Defendant now claims that these questions amounted to improper shifting of the burden of proof. They did not. Once defendant decided to put on evidence, the prosecutor was free to point out what he failed to do.

The cases cited by defendant are easily distinguishable. Each involved the situation where the defendant did not testify or present a case and the prosecutor in closing argument pointed out that the defendant did not call witnesses or present evidence. Since the defendant has no obligation to do either thing, it was improper argument because it tended to shift the burden of proof. *See* State v. Traweek, 43 Wn. App. 99, 106, 715 P.2d 1148 (1986), *overruled by* State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991); State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000), *review denied sub nom. State v. Barraza*, 142 Wn.2d 1022 (2001); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, *review denied* 115 Wn.2d 1029 (1990), *cert. denied* 499 U.S. 948 (2001).

Once the defense puts on evidence, however, it is fair game to examine and argue what the defense failed to do. It is even proper to obtain a missing witness instruction against the defense when it fails to

produce witnesses, peculiarly available to them, who have information on a material topic. State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). Older cases similarly recognized that presenting a partial case opens up the defense for inquiry and argument about missing witnesses. *E.g.*, State v. Cozza, 19 Wn. App. 623, 627-628, 576 P.2d 1336 (1978) [failure to call witness to corroborate defendant's trial testimony]; State v. Contreras, 57 Wn. App. 471, 473-475, 788 P.2d 114, *review denied* 115 Wn.2d 1014 (1990) [proper to cross examine defendant about absence of alibi witness he supposedly was with at the time of the crime]; State v. Barrow, 60 Wn. App. 869, 871-873, 809 P.2d 209, *review denied* 118 Wn.2d 1007 (1991) [proper to argue "where is his brother" in case where defendant testified drug pipe belonged to his brother]. This rule is similar to that involving the Fifth Amendment. When a defendant waives his right to remain silent by giving a statement to police, the prosecution can properly comment on the statements given, including what the statement did not address. *E.g.*, State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988); State v. Scott, 58 Wn. App. 50, 54-55, 791 P.2d 559 (1990).

This case falls squarely within the Contreras fact pattern. Defendant testified to an alibi, explaining where he went and who he saw.

The prosecutor could properly question him about where those people were now.<sup>1</sup> There simply was no error here at all.

*“Lying” Questions.* The other claim of prosecutorial error involves asking the defendant about whether or not other witnesses were lying. In two of the three examples cited by the appellant, *he* was the one to raise the topic during cross examination. His counsel also engaged in similar cross examination of the chief victim. If there was any error here, it was error that was subject to cure by a timely objection.

The brief of appellant (at pp. 13-15) fully and fairly sets forth the examinations in question. With respect to witness Dean Smith, the prosecutor reiterated defendant’s direct testimony and asked “so Dean Smith didn’t see you.” Defendant answered: “That’s correct. Dean was creative.” RP 483 (emphasis supplied). The prosecutor then asked two other questions to confirm defendant’s testimony that Smith could not have seen what he testified to seeing, before asking if Smith “also lied under oath on the stand.” Defendant answered: “That’s correct.” RP 483. When the prosecutor attempted to question the defendant about whether in his experience the child T.B. had made up lies, defendant responded that she “was not truthful at times about a lot of things.” He also said that she had made up lies about

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<sup>1</sup> The prosecution was likely entitled to a missing witness instruction if one had been requested. State v. Blair, supra.

him. When asked if the child had “made up fantastic traumatic stories to get you in trouble,” the defendant *denied* that she had so acted. Rather, what the child was doing was repeating her mother’s story, and “that story is a lie.” RP 484.

As to these two instances, the defendant volunteered during the examination that the two witnesses were telling lies or being “creative.” The prosecutor then confirmed the fact that defendant was actually saying that the witnesses had lied under oath. RP 483, 484. These questions were not the prosecutor soliciting the defendant’s view that the witness had lied. Rather, she was simply confirming the defendant’s volunteered statements that the witnesses were doing so. These two fact patterns simply do not support the allegation that the prosecutor was forcing the defendant to call the other witnesses liars. He was doing that on his own.

The one problematic area involves the questioning about the testimony of officer Taylor. Here, the prosecutor flat out asked the defendant if the officer lied under oath. Defendant did not answer that question, testifying that he was “telling the jury what I knew” and that “my story is true.” RP 478-479. Since the defendant never testified that the officer lied, the error in asking the question was insignificant. Most certainly a timely objection and/or motion to strike would easily have taken care of the problem.

It also is easy to see why there were no objections to these types of questions. The two competing theories of the case were so opposite that someone was in fact lying. The defendant could not both be the perpetrator and also not be present. Either defendant was lying about being at the restaurant or three State's witnesses were lying about him being present in the apartment. In the real world in which the attorneys were operating, the jury already knew at this point that someone was lying. Of course, the defense also engaged in similar questioning, repeatedly asking Bobbi Dewey to speculate on why her daughter's testimony was not the same as hers. RP 210.

This was one of those comparatively rare cases where the parties decided to address the big elephant standing in the courtroom. Everyone present knew that lies were being told from the witness stand. Each side decided to address the matter directly. While that may be error in the usual case, it was not necessarily inappropriate here.

There was no error committed that could not have been dealt with by a timely objection. State v. Swan, supra. This claim of error was not preserved.

B. THE EVIDENCE SUPPORTED THE UNLAWFUL IMPRISONMENT VERDICT.

Defendant next contends that the evidence did not support the unlawful imprisonment verdict involving T.B. Defendant did restrain the child and the evidence permitted the jury to reach that conclusion.

The standard for adjudging the sufficiency of the evidence to support a verdict is well established. The test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). In reviewing the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. State v. Lopez, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). Application of that standard requires affirmance of this conviction.

The gist of appellant's argument is that the State did not show the victim had been "restrained." RCW 9A.40.010(1) provides the applicable definition:

'Restrain' means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is "without consent" if it is accomplished by (a) physical

force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old, or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

Appellant's argument focuses on the "substantiality" of the restraint.

The Washington statute does not require that a person be moved in order to be restrained. State v. Vladovic, 99 Wn.2d 413, 418 n.1, 662 P.2d 853 (1983). The restraint may be for a brief period of time. State v. Robinson, 92 Wn.2d 357, 360, 597 P.2d 892 (1979) [grabbing girl by arm and attempting to drag her towards car constituted restraint even though victim escaped and entire incident lasted less than a minute].

Here, there was quite adequate evidence of restraint. The victim, who was in her mother's bedroom, was directed by her mother to leave the apartment to summon aid. At that point the defendant grabbed her arm and pulled her down. He then ordered her to sit on a chair in the living room; later he commanded her to go to her room and stay there. RP 147-148, 150, 180-182. This evidence more than amply permitted the jury to conclude that defendant had restrained the child by limiting her mobility.

Defendant's reliance on State v. Kinchen, 92 Wn. App. 442, 963 P.2d 928 (1998), is misplaced. Kinchen involved a parent

charged with unlawful imprisonment for locking his two sons in their apartment when he left for work each day. The Court of Appeals was faced with a parental necessity argument given the children's unruly behavior. Along the way, the court rejected an argument that merely locking the children in the apartment constituted unlawful imprisonment. The court found such evidence insufficient, as long as the children had alternative means of safely escaping the apartment. *Id.* at 452, n.16.

Here, of course, the victim was restrained without the ability to escape. She was pulled to the floor in order to prevent her from summoning aid. She was then restrained in a chair, and later in her room. All of these actions were substantial limitations on her liberty. She was not able to follow through on her mother's directions.

Defendant argues that the jury must have necessarily rejected these arguments because of its verdicts on the felony assault counts. His argument misses the mark for a couple of reasons. First, a sufficiency of the evidence challenge looks at what a jury *could* do with the evidence rather than speculating about what it must have done. The issue is whether there was evidence to support the verdict rather than whether the jury accepted the State's theory of the case. The noted evidence adequately permitted them to find the crime was committed. Secondly, the verdicts on the assault count did not preclude the verdict on

the unlawful imprisonment as a matter of logic. As charged here, in order to prove second degree assault, the prosecutor had to show that the assaults were done with the intent to commit unlawful imprisonment. CP 2-3, 4-41; RP 508-501 (instructions 12, 14). Under the evidence, the jury could have easily concluded that the assaults preceded the unlawful imprisonment and that the latter crime was committed for an independent purpose such as to prevent notification of the police. In other words, the jury could easily have accepted the evidence but disagreed that the “motive” for the assaults was to commit the unlawful imprisonment. There is no logical problem with the verdicts.

Properly viewed, the evidence was sufficient for the jury to find each element of the crime of unlawful imprisonment. There was no error.

C. THE TRIAL COURT WAS NOT FORECLOSED  
FROM SUBMITTING AN INTERROGATORY TO THE  
JURY.

The final argument in the appeal is a contention that the trial court lacked authority to submit the interrogatory to the jury concerning the aggravating factor found on the unlawful imprisonment count. Defendant’s argument stems from an expansive view of

State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), which that court itself did not hold. Again, there was no error.

In Hughes, the court addressed the impact of Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), on exceptional sentences under Washington's Sentence Reform Act (SRA). The court determined that exceptional sentences were still possible under the act. Id. at 132-134. The court reversed the exceptional sentences in the cases before it on the basis that no jury had found the aggravating factors relied upon by the sentencing judges. Id. at 137-142. The court also ruled that Blakely error could never be harmless. Id. at 142-148. The court then turned to the remedy. Given the absence of any legislatively created mechanism for juries to find aggravating factors, the court stated: "we refuse to imply such a procedure on remand." Id. at 150. In reaching that decision, however, the court carefully circumscribed its ruling:

We are presented only with the question of the appropriate remedy on *remand* – we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial.

Id. at 149.

This case falls squarely into the Hughes exclusion. That court expressly declined to answer the question presented by this case –

whether a trial court could in fact give the jury interrogatories concerning aggravating factors. There is, in fact, statutory and case law authority for such an approach.

RCW 2.28.150 provides that “if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.” Relying on this statutory authority, the Court of Appeals once ruled that a trial court had the authority and duty to hold a show cause procedure before it could order prejudgment attachment. Rogoski v. Hammond, 9 Wn. App. 500, 513 P.2d 285 (1973). *Accord*, Abad v. Cozza, 128 Wn.2d 575, 588, 911 P.2d 376 (1996).

Washington trial courts have a long history of impaneling juries to consider sentence enhancements regardless of whether the right to jury has been incorporated into a statute. For example, although Washington’s habitual offender statute, RCW 9.92.030, was amended in 1909 to delete the requirement that a jury decide the defendant’s habitual offender status, trial courts regularly impaneled juries to make such determinations for over seventy years.<sup>2</sup> *See* State v. Smith,

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<sup>2</sup> When the habitual offender statute was first enacted in 1903, it specifically provided that the court should impanel a jury to decide whether the defendant was a habitual offender. Laws of 1903, ch. 86, §§ 1 and 2. Six years later, the Legislature amended the statute and deleted all references to a right to jury. Laws of 1909, ch. 249, §§ 34.

150 Wn.2d 135, 144, 75 P.3d 934 (2003); State v. Courser, 199 Wash. 559, 560, 92 P.2d 264 (1939); State v. Fowler, 187 Wash. 450, 60 P.2d 83 (1936). The statute was still not amended after the Supreme Court held in 1940 that there was a constitutional right to a jury in habitual offender proceedings. State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940). Yet Washington courts continued to recognize that they had the power to impanel juries for habitual offender proceedings.<sup>3</sup> See State v. Johnson, 104 Wn.2d 338, 705 P.2d 773 (1985); State v. Frederick, 100 Wn.2d 550, 553, 674 P.2d 136 (1983); In re Lee, 95 Wn.2d 357, 359-60, 623 P.2d 687 (1980).

Similarly, the school zone and bus stop sentencing enhancements set forth in RCW 69.50.435 make no specific provision for impaneling a jury to decide whether the facts support the enhancement. Yet there has been no doubt that Washington courts have the authority to instruct the jury and provide special verdict forms concerning the enhancement. State v. Becker, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997). Certainly, the trial court has the power to submit instructions concerning exceptional sentence aggravating factors to the jury.

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<sup>3</sup> Similarly, King County courts initially impaneled juries to decide whether a defendant was a persistent offender, though the statute made no reference to the need for a jury decision. See State v. Rivers, 129 Wn.2d 697, 703, 921 P.2d 495 (1996).

Court rules are to the same effect. The criminal rules provide the trial court with authority to request special findings from the jury. CrR 6.16(b) provides:

Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

Indeed, previous appellate court decisions have required the trial court to submit special findings to the jury in a variety of contexts though no specific statutory authority requires them to do so.<sup>4</sup> Blakely now requires the court to do so before an exceptional sentence may be imposed under certain circumstances. The trial court did not err in submitting the interrogatories to the jury.

Finally, it should be noted that the trial court's decision here is consistent with the policy of this state set forth by the Legislature in its Blakely-fix, Laws of 2005, c.68. There the Legislature stated that juries were to make findings concerning a large number of potential aggravating factors. The Hughes court did not have the benefit of the new

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<sup>4</sup> See State v. Roberts, 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000) (in death penalty case involving accomplice liability issues, jury should be presented with special interrogatories concerning the defendant's level of involvement); State v. Manuel, 94 Wn.2d 695, 700, 619 P.2d 977 (1980) (when defendant seeks reimbursement for self-defense, special interrogatories should be submitted to jury).

legislation when it made its remand decision. The public policy of this state is to honor a defendant's Sixth Amendment right and have a jury answer questions concerning potential aggravating factors. The trial court's action here was consistent with this public policy and was not the least bit inconsistent with the Hughes decision.

The trial court did not err in submitting the interrogatory concerning the aggravating factor. The sentence should be affirmed.

D. THE PERSONAL RESTRAINT PETITION FAILS  
TO ESTABLISH ANY PREJUDICIAL ERROR.

Defendant also filed an habeas corpus action that was later transferred to this court, converted to a personal restraint petition (PRP), and consolidated with the direct appeal. Respondent was directed to file its response in conjunction with the brief filed in the appeal. This brief response addresses the arguments of the PRP to the extent they can be discerned.

Initially, the standards for review of this action should be noted since they differ significantly from those governing appeals. Several rules govern consideration of a PRP to ensure that it is not a substitute for appeal. Unlike an appeal, in a PRP a petitioner alleging constitutional error must demonstrate "actual and substantial prejudice" in order to obtain relief. In re Haverty, 101 Wn.2d 498, 504, 681 P.2d 835

(1984); In re Hews, 99 Wn.2d 80, 86, 660 P.2d 263 (1983); In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982); In re Rice, 118 Wn.2d 876, 884, 828 P.2d 1086, *cert. denied*, 113 S. Ct. 421 (1992). Put another way, the petitioner must establish error which resulted in a “substantial disadvantage” at trial. Hagler, *supra* at 825. Mere allegations unsupported by persuasive reasoning are not sufficient to meet the threshold burden of proof that is necessary to attack a judgment or sentence. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), *review denied* 110 Wn.2d 1002 (1988). The current PRP fails to meet these standards. Indeed, the entire petition could be summarily dismissed for lack of any significant effort at explaining why it believes errors were committed. State v. Brune, *supra*. String cites to cases and passing reference to the law simply do not satisfy the petitioner’s obligations in this action.

*Sentencing.* The petition (ground 1) seems to claim that the trial court erred by imposing an exceptional sentence, supposedly violating both Blakely and Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). This unexplained claim is exceptionally curious since the trial court did exactly what those cases required it to do – submit factual questions to the jury for a determination of what happened. How this act of complying with the dictates of the Sixth Amendment also

violated that amendment is unclear at best. The petition goes absolutely nowhere in explaining this alleged error.

A second sentencing-related claim (ground 6) involves the misdemeanor probation period. Jail sentences on the four gross misdemeanor counts were suspended for a two year period and ordered to be served consecutively to the felony sentence. CP 56-74. This, as the petition notes, effectively gave the defendant three years of probation upon his release from confinement. Why the petition thinks this is improper is absolutely unclear. The court was totally within its powers in sentencing on the misdemeanor offenses both to suspend the sentences and to run them consecutively to the felony crimes. RCW 9.92.060; RCW 9.92.080; RCW 9.95.210. The Department of Corrections is permitted to supervise misdemeanor sentences. RCW 9.95.204. The petition shows no error in this regard.

*CrR 3.5 Hearing.* Petitioner seems to complain (ground 2) that officer Taylor changed his “testimony” at the CrR 3.5 hearing. The petition does not explain what the testimony was changed “from” or when there was even some previous hearing at which testimony was taken. It does not explain what the missing “favorable” testimony was or why it was not possible to bring that evidence out at trial. The petition likewise makes no attempt to explain how this mystery error changed the verdict.

This issue simply can not be addressed further for lack of factual foundation or relevant and cogent legal reasoning. State v. Brune, supra.

*Charging Decision.* The petition (ground 3) next contends that it was not fair for the prosecutor to add additional charges before trial. There is again next to no reasoning on this claim. If the complaint is that the charges should have been increased sooner, then the petition fails to explain how there was any prejudice in the timing of the amendment or how that delay specifically impacted the ability to defend at trial. If the complaint is that the charges were not supported by evidence, then the fact that the court found sufficient evidence to permit them to go to the jury should be dispositive. Indeed, the defense never even challenged the factual bases for the charges at trial. This complaint, too, fails for lack of significant reasoning. State v. Brune, supra.

*Alcohol Evaluation.* The next complaint (ground 4) appears to be directed towards the requirement that defendant undergo an alcohol evaluation as a condition of his probation. This certainly seems a reasonable sentence requirement given that the victim believed he was drunk when he committed the crimes. RP 175-176. The fact that defendant does not believe he has a problem does not divest the trial court to order an evaluation. Its powers to set probation conditions are quite

broad – particularly in the misdemeanor sentencing arena. RCW 9.95.210(1). The petition has shown no error in this regard.

*Driver's License.* Petitioner (ground 5) seems to be under the misapprehension that the judgment and sentence revoked his driver's license. It did not. The paragraph of the judgment form dealing with license suspensions, ¶ 5.8, is *not* checked. CP 68. There is absolutely no reason to believe that the defendant's license was suspended.

*Bond Revocation.* Finally, the petition seems to challenge the court's decision to revoke his release on bond. He makes no showing that the trial court abused its discretion in some manner here. Additionally, nothing in the action of setting or revoking bond pending appeal affects the validity of the judgment and sentence. The petition simply does not explain what relief is appropriate or even available in this proceeding. As with the other claims, the petition simply proves nothing.

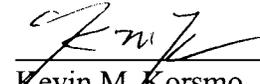
There is no merit to any portion of the PRP. It should be dismissed.

V.

CONCLUSION

For the reasons stated, the convictions and sentence should be affirmed.

Respectfully submitted this 6<sup>th</sup> day of September, 2005.

  
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Attorney for Respondent