

No. 63498-4-I

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

STATE OF WASHINGTON, Respondent,

v.

FREDDIE L. HARRIS, Appellant.

On Appeal from THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR KING COUNTY

The Honorable Michael J. Fox, Judge

FILED
STATE OF WASHINGTON
2009 DEC 23 AM 10:53

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS

Freddie Harris, #300190 E-326-1
Mcneil Island Corrections Center
P.O. Box 881000
Steilacoom, WA 98388-1000

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A. Status of Appellant

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A. STATUS OF APPELLANT

Freddie Levi Harris, the Appellant in this case, is filing this STATEMENT OF ADDITIONAL GROUNDS pursuant to RAP 10.10.

B. ISSUES PRESENTED

1. IS THIS MATTER AND THE ISSUES PRESENTED PROPERLY BEFORE THE COURT FOR THE FIRST TIME ON APPEAL?
2. WAS THE STATE'S FILING OF AN AMENDED INFORMATION TO ADD NEW CHARGES BARRED BY THE STATUTE OF LIMITATIONS PERIOD AS SET FORTH IN RCW 9A.04.080?
3. WAS THE AMENDMENT OF THE INFORMATION UNTIMELY?
4. WAS THE STATE RELIEVED OF ITS BURDEN TO PROVE EACH OF THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 3 AND 22 OF THE STATE CONSTITUTION?
5. DID THE TRIAL COURT ERR IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES TO THE CHARGED CRIMES IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 3 OF THE STATE CONSTITUTION?
6. WAS THE KIDNAPPING CHARGE IN COUNT IV INCIDENTAL TO THE ROBBERY CHARGE IN COUNT I, AND IF SO, SHOULD IT HAVE MERGED UNDER STATE v. KORUM?

7. DID THE TRIAL COURT ERR BY APPLYING STATE v. LOUIS TO THE PRESENT CASE?
8. SHOULD THE DOCTRINE OF STARE DECISIS APPLY TO THE KORUM DECISION?

C. STATEMENT OF THE CASE

a. Relevant Facts

On February 6, 1997, the State filed an Information and charged Freddie Levi Harris, together with others, for crimes allegedly committed on February 7, 1994. CP-1. The State charged Mr. Harris with Second Degree Robbery (Count I), and Second degree kidnapping (Count II).

On February 28, 2005, after trial had begun, the State amended the Information to change and include new charges. CP-89. Midtrial, the State again filed a Second Amended Information. CP-94A. The State did not allege any new facts not known in 1997, when it filed the Amended Information. CP-1-4; CP-89; CP-94A.

i. Facts Known To The State At The Time The Original Information Was Filed: Freddie Harris and Gregory White were working as janitors, and Krista Schafer was the off

manager of the Red Robin Restaurant in Seattle, when it was robbed. CP-4. A short time later the police arrived and all three victims, Schafer, Harris, and White gave statements to the police. CP-4.

A man named Gary Shawn Brown was arrested and charged with the crimes. CP-4. Brown confessed that he committed the crimes. CP-4. Brown's girlfriend, Sharon Couldry, assisted Brown with these crimes, however, she was not investigated as a suspect. Couldry admitted that she would do anything to protect her boyfriend, Brown, and would even lie. RP, March 26~~95~~2005, para 62. . Id. Couldry has previously been convicted of making false statements to police and perjury. Id. Couldry was not an eyewitness to any of these crimes, but provided specific details of the crimes to the police. Couldry knew information that only the robber could have known, but she was not investigated as a suspect.

Couldry's testimony is entirely hearsay, and the State relied heavily on Couldry's hearsay testimony to convict Mr. Harris, despite the State's knowledge that Couldry had been previously convicted of perjury and making false statements to the police. This information was withheld from the jury.

Brown confessed to these crimes, yet he was only charged, convicted and sentenced for one count of Second Degree Robbery. Brown himself alleged that he had a gun, but the victims of the crimes, Schafer, Harris, and White stated that they did not see any weapons.

The State's Amendment of the Information to add the weapon enhancement is based entirely on Brown's statements that he had a gun, but as the principal in these alleged crimes, Brown was not charged with any of these enhancements. It is not clear how the State proceeded its case against Mr. Harris, as an accomplice, for crimes he did not commit.

// Mr. Harris has advised appellate counsel of the
// issues he intends to raise in this appeal. See
// Appendix A.

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D. ARGUMENT

1. THIS MATTER AND THE ISSUES PRESENTED ARE PROPERLY BEFORE THE COURT FOR THE FIRST TIME ON APPEAL.

"... this court has the authority to determine whether a matter is properly before the court, to perform those acts which are proper to secure fair and orderly review, and to waive the rules of appellate procedure when necessary to 'serve the ends of justice.'"

State v. Aho, 137 Wn.2d 736, 740-41, 975 P.2d 512 (1999)(quoting RAP 1.2(c)). Issues of constitutional magnitude may be raised for the first time on appeal.

State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988).

Mr. Harris asks this Court to exercise its discretion to consider the following issues in the interest of public policy and fundamental justice pursuant to RAP 2.5(a).

2. THE STATE'S FILING OF AN AMENDED INFORMATION TO ADD NEW CHARGES WAS BARRED BY THE STATUTE OF LIMITATIONS PERIOD SET FORTH IN RCW 9A.04.080.

RCW 9A.04.080, states in relevant part:

- (1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.
 - (h) No other felony may be prosecuted more than three years after its commission;

RCW 9A.04.080(1)(h).

In this case, Mr Harris was charged by information with Robbery in the Second Degree (Count I) and Kidnaping in the Second Degree (Count II), for crimes alleged to have been committed on February 7th, 1994. The Information was written/charged as follows: (On Feb. 6, 1997)

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse Freddie Levi Harris and Kendall Tyson Harris, and each of them, of the crime of Robbery in the Second Degree, committed as follows:

That the defendants Freddie Levi Harris and Kendall Tyson Harris, and each of them, together with another, in King County, Washington, on or about February 7th, 1994, did unlawfully and with intent to commit theft take personal property of another, to wit: U.S. Currency, from the person and in the presence of Krista Fabrizio of Red Robin Restaurant against her will, by the use or threat-

ened use of immediate force, violence, and fear of injury to such person or her property and the person or property of another;

Contrary to RCW 9A.56.210 and 9A.56.190, and against the peace and dignity of the State of Washington.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse Freddie Levi Harris and Kendall Tyson Harris, and each of them, of the crime of Kidnapping in the Second Degree, a crime of the same or similar character and based on a series of acts connected together with another crime charged herein, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendants Freddie Levi Harris and Kendall Tyson Harris, and each of them, together with another, in King County, Washington, on or about February 7th, 1994, did intentionally, abduct Krista Fabrizio, a human being;

Contrary to RCW 9A.40.030(1) and against the peace and dignity of the State of Washington.

CP-1. On February 28th, 2005, without any new facts, the State amended the Information to add new charges, as follows:

COUNT I

I, Norm Malenq, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse Freddie L. Harris of the crime of Robbery in the First Degree, committed as follows:

That the defendant, freddie L. Harris, together with others, in King County, Washington, on or about February 7, 1994, did unlawfully and with intent to commit theft take personal property of another, to-wit: U.S. currency, from the person and in the presence of Krista Schafer, against her will, by the use or threatened use of immediate force, violence, and fear of injury to such person, and in the commission of and in immediate flight therefrom, the defendant or an accomplice displayed what appeared to be a firearm, to-wit: a pistol;

Contrary to RCW 9A.56.200(1)(a) and RCW 9A.56.190, and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant Freddie L. Harris or an accomplice at said time of being armed with a pistol, a deadly weapon as defined in RCW 9.94A.310(3).

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse Freddie L. Harris of the crime of Unlawful Imprisonment, based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant, Freddie L. Harris, together with others, in King County, Washington, on or about February 7, 1994, did knowingly restrain Krista Schafer, a human being;

Contrary to RCW 9A.40.040, and against the peace and dignity of the State of Washington.

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COUNT III

And I, Norm Malenq, Prosecuting Attorney aforesaid further do accuse Freddie L. Harris of the crime of Bail Jumping, based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant Freddie L. Harris in King County, Washington during a period of time intervening between May 14, 2003 through May 19, 2003, being charged with Robbery Second Degree and Kidnapping Second Degree, a Class B felony, and having been released by court order, and with knowledge of the requirement of a subsequent personal appearance before the court, did fail to appear;

Contrary to RCW 9A.76.170, and against the peace and dignity of the State of Washington.

COUNT IV

And I, Norm Malenq, Prosecuting Attorney aforesaid further do accuse Freddie L. Harris of the crime of Kidnapping in the First Degree, based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant Freddie L. Harris, together with others, in King County, Washington on or about February 7, 1994, did intentionally abduct Krista Schafer, a human being, with intent to facilitate commission of the felony of Robbery in the First Degree and flight thereafter;

Contrary to RCW 9A.40.020(1)(b), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington do further accuse the defendant Freddie L. Harris or an accomplice at said time of being armed with a pistol, a deadly weapon, as defined in RCW 9.94A.310(3).

CP-94-A

a. The Robbery In The First Degree Charged In Count I Is Barred By The Statute Of Limitations. On March 2, 2005, the State amended the charge in Count I from Second Degree Robbery to First Degree Robbery. CP 94A. Second Degree Robbery and First degree Robbery are different crimes.

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The State cannot amend an Information to add new charges that are barred by the Statute of Limitations. However, amendments are permitted to charge a lesser included offense of the one charged in the information (RCW 10.61.006), or to an offense which is a crime of an inferior degree to the one charged (RCW 10.61.003). The First Degree Robbery should be vacated for at least two reasons: (1) It was charged outside the Statute of Limitations period set forth in RCW 9A.040.080, and (2) the amendment did not charge a lesser included offense or inferior degree offense to the charge of Second Degree Robbery. See CP 94A.

i. The Deadly Weapon Enhancement In Count I Is Barred By The Statute Of Limitations. The State amended the charge in Count I to add a deadly weapon enhancement. CP-89. The enhancement was charged outside the Statute of Limitations period set forth in RCW 9A.04.080 and should be vacated.

b. The Unlawful Imprisonment Charged In Count II Is Barred By The Statute Of Limitations. In Count II, the State originally charged Mr. Harris with Kidnapping

in the Second Degree. CP-1. On February 28, 2005 the State amended the Information to charge a different crime, Unlawful Imprisonment. CP-89. The Unlawful Imprisonment pertained to conduct alleged in 1994, but was charged in 2005, well outside the Statute of Limitations period set forth in RCW 9A.04.080. Although the trial court merged the Unlawful Imprisonment with the Kidnapping, it was unlawfully charged and tainted the jury by placing facts that should not have been in evidence. A new trial should be granted.

c. The Kidnapping In The First Degree Charged In Count IV Is Barred By The Statute Of Limitations. On February 28, 2005, the State amended the Information to add a new charge of Kidnapping in the First Degree in Count IV. CP-89; CP-94A.

The State cannot amend an Information to add new charges that are barred by the Statute of Limitations period. Although the State may amend an Information to charge a lesser included offense of the one charged in the original Information under RCW 10.61.006, or to an offense which is an inferior

degree to the one charged under RCW 10.61.003, the State amended the Information here to add new crimes. CP-94A. Because the charge of Kidnapping In The First Degree was not filed within the time period set forth within the Statute of Limitations as required under RCW 9A.04.080, it should be vacated.

i. The Deadly Weapon Enhancement In Count IV Is Barred By The Statute Of Limitations. In 2005, the State filed an Amended Information charging Mr. Harris with Kidnapping In The First Degree with a Deadly Weapon Enhancement. CP-89; The Enhancement was charged outside the Statute of Limitations set forth in RCW 9A.04.080, and should be vacated.

The law is clear that an Information which indicates that the offense is barred by the Statute of Limitations fails to state a public offense. It is not subject to Amendment and must be dismissed. State v. Glover, 25 WA. App. 58, 604 P.2d 1015 (1979).

3. THE AMENDMENT OF THE INFORMATION WAS UNTIMELY.

The midtrial amendment of the Information violated Mr. Harris's Constitutional Right under Art. 1, §22

(Amend. 10) to demand the nature and cause of the accusation against him, and must be vacated. See State v. Pelkey, 109 Wn. 2d 484, 745 P.2d 854 (1987).

In Pelkey, the Supreme Court held that when a mid-trial Amendment occurs, as in the present case, that is not to a lesser included offense, prejudice per se occurs. Pelkey, 109 Wn. 2d at 491-492 (Durham, J., concurring) ("[T]he Court concludes that any such Amendment is a per se violation of Const. Art. 1, §22 (Amend. 10)...").

In State v. Markel, 118 Wn. 2d 424, 433, 823 P.2d 1101 (1992), the State asked the Supreme Court to overrule Pelkey, which the Court declined.

"The State acknowledges that in Pelkey this Court held it is automatic reversible error for a trial court to allow the midtrial amendment of an information to include a crime that is neither a lesser included offense nor an offense of a lesser degree. The State asks this Court to overrule Pelkey to the extent of such holding. ... We decline to overrule Pelkey..."

State v. Vangerpen, 77 Wn App. 94, 102, 856 P.2d 1106 (1993) (Quoting Markle, 118 Wn. 2d at 433).

In this case the State filed an Information on February 6, 1997, for crimes allegedly committed on February 7, 1994. The Information charged Robbery in the Second Degree (Count I), and Kidnapping in the Second Degree (Count IV). CP-1. On February 28, 2006, after trial had begun, the State filed an Amended Information which changed the charges and added new charges. CP-89. On March 2, 2005, the State again amended the Information midtrial. CP-94A. The Amended Charges were untimely and must be vacated.

4. THE STATE WAS RELIEVED OF ITS BURDEN TO PROVE EACH OF THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 3 AND @@ OF THE STATE CONSTITUTION.

"A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (Quoting State v. Traweck, 43 Wn. App. 99, 107, 715 P.2d 1148, Review Denied, 106 Wn. 2d 1007 (1986), disapproved on other

grounds by State v. blair, 117 Wn. 2d 479, 491, 816 P.2d 718 (1991) (Citing In Re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

a. Count I.

In the present case, the State charged that Mr. harris "together with others," took personal property "from the presence of Krista Schafer", and that Mr.Harris "or an accomplice" at said time was armed with a pistol. CP-89; CP-94A.

However, the to-convict jury instruction omitted the quoted language above. Jury Instruction #12 states:

"To convict the defendant of the crime of robbery in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 7, 1994, the defendant unlawfully took personal property from the person or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate forc, violence or fear of injury to that person;

(4) That force or fear was used by the defendant to obtain or retain possession of the property.

(5) That in the commission of these acts the defendant displayed what appeared to be a firearm; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I." CP-104

The jury was not instructed to find that Mr. Harris "together with others" took personal property "from the person and in the presence of Krista Schafer" and that Mr. Harris "or an accomplice" at said time was armed. CP-104.

i. A Proper Jury Instruction Was Required To Reflect The Charges Filed In The Information. The proper to-convict jury instruction should have been provided as follows to reflect the facts as charged in the Information:

"To convict the defendant of the crime of Robbery in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 7th day of February, 1994, the defendant and/or an accomplice unlawfully took personal property, not belonging to the defendant, from the person or in the presence of Krista Schafer;

(2) That the defendant and/or an accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's and/or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of another;

(4) That the force or fear was used by the defendant and/or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking;

(5) That in the commission of these acts or in immediate flight therefrom, the defendant and/or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm; and

(6) That the acts occurred in the State of Washington.

the failure to instruct the jury on the facts as reflected in the charging information violated Mr. Harris' right to a jury trial on every element of the crime with which he is charged, a right that our constitution has specifically declared to be "inviolable." See Wash. Const. Art. 1, §22.

Mr Harris's conviction on count I should be reversed because the jury instruction did not contain the essential elements of the charged crime, which is an error of Constitutional magnitude warranting reversal regardless of the defendant's failure to object at trial. See State v. Savaria, 83 WA App. 823, 919 P.2d 1263 (1996).

b. Count IV.

Also alleged in Count IV that Mr Harris "together with others" did "intentionally abduct Krista Schafer" and that Mr. Harris "or an accomplice" was armed at said time. CP-89; CP-94A.

However, the to-convict jury instruction omitted the quoted language above. As a matter of fact the jury

instruction did not identify or even mention "Krista Schafer" as the person allegedly kidnapped. Jury Instruction #21 states:

"To convict the defendant of the crime of kidnapping in the first degree, as charged in count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 7, 1994, the defendant intentionally abducted another person;

(2) That the defendant abducted that person with intent to facilitate the commission of Robbery in the First degree or flight thereafter; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count IV.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count IV.
CP-104[Instruction #21]

STATEMENT OF ADDITIONAL GROUNDS -21

The United States Supreme Court declared that "[T]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged," In Re Winship, 397 U.S. 358, 364, and the **name of the person kidnapped** is an element of kidnapping in the first degree. See WPIC 39.02:

WPIC 39.02 specifically states:

KIDNAPPING - FIRST DEGREE - ELEMENTS

"To convict the defendant of the crime of kidnapping in the first degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about (date), the defendant intentionally abducted (name of person),..."

See WPIC 39.02, Washington practice Vol. 11, 2005, at page 713-14.

In addition, the jury was not instructed to find Mr. Harris, "together with others" or Mr. Harris "or an accomplice" abducted "Krista Schafer" CP-104 (Instruction #21). These are the specific facts the State

alleged in the Information (CP-89 & CP-94A) and was then required to prove beyond a reasonable doubt to satisfy Winship and its progeny.

The Court has said that "[i]t is appropriate to reverse on this issue despite the defendant's failure to object at trial because removing an element of the crime from the jury is an error of constitutional magnitude which may be raised for the first time on appeal." Savaria, 83 WA. App. at 837 (quoting State v. Smith, 56 Wn. App. 909, 913, 786 P.2d 320 (1990)). Mr. Harris' conviction should be reversed.

5. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES TO THE CHARGED CRIMES IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 3 AND 22 OF THE STATE CONSTITUTION.

Where there is even slightest degree of evidence that defendant may have committed degree of offense inferior to and included in one charged, law of such inferior degree ought to be given, and refusal to give appropriate instruction on lesser crime or degree is reversible error. State v. Young, (1900) 22 Wash. 273, 60 P. 650.

In the instant case, the State originally charged Mr. Harris with Second Degree Robbery and Second Degree Kidnapping. Thus, the jury should have been instructed on lesser included offenses and degrees of the crime.

6. THE KIDNAPPING CHARGE IN COUNT IV INCIDENTAL TO THE ROBBERY CHARGE IN COUNT I SHOULD HAVE MERGED UNDER STATE v. KORUM.

Mr Harris respectfully submits that the Kidnapping charge is in fact incidental to the Robbery charge. Washington State law is well settled. In the recent case of State v. Korum, 120 Wn. App. 686 (2004), Division Two of the Court of Appeals addressed this issue, and held "as a matter of law that the kidnappings herein were incidental to the robberies..." Id. at 707

7. THE TRIAL COURT ERRED BY APPLYING STATE v. LOUIS TO THE PRESENT CASE.

State v. Louis is inapplicable to the present case.

The State improperly relied on State v. Louis: "However, based on the case law I provided to the Court, primarily State v. Louis, it's a Wa. State Supreme Court case, 155 Wn. 2d 563, (2005)... indicates that Robbery in the First degree and Kidnapping in the First Degree do not merge. RP, Nov. 3rd, 2006, @ page 3.

case. Louis's crimes were "seperate and distinct", and as a result, did not merge. In the present case, the trial court determined that the crimes constituted the same criminal conduct, and thus the Korum decision is controlling.

8. THE DOCTRINE OF STARE DECISIS APPLIES TO THE KORUM DECISION.

Under the doctrine of stare decisis, the court's decision in State v. Korum, Supra, is binding until it is expressly overruled by the Supreme Court. Counsel made that argument to the trial court in light of the Korum decision. RP Nov. 3rd, 2006, @ page 5-8. The State also conceded that point.

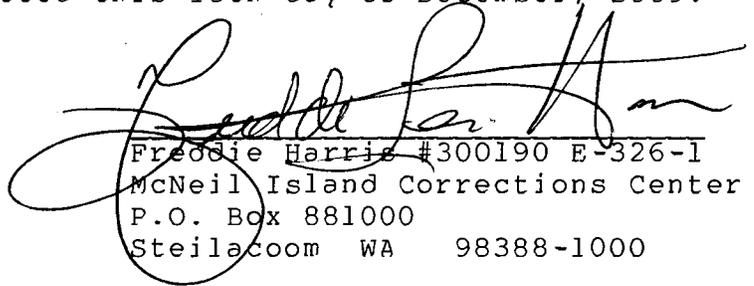
Mr. Mohandeson, Prosecutor: "I know defense counsel disagrees and believes counts I and IV should merge, although the State, I should also note, does concede that Robbery in the First Degree and Kidnapping in the First degree would be the same criminal conduct."

The State, by it's own admission, concedes that the Robbery is incidental to the Kidnapping under the same criminal conduct analysis, as it happened at the same time and place and involved the same victims.

E. CONCLUSION

Appellant respectfully submits that his judgement and sentence should be reversed and his case remanded to the trial court for further proceedings.

Respectfully submitted this 18th day of December, 2009.



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APPENDIX

A

Freddie Harris, #300190
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December 9, 2009

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RE: State v. Harris,
COA #63498-4-I

Dear Mr. Gibson:

I received the State's Brief in Response to your Opening Brief. I believe a Reply is necessary to reiterate the fact that I was held in Canada because of the actions initiated by the Seattle Police Department and King County Prosecutor's Office. I have enclosed documents relevant to this issue.

The State had possession and control over these documents as the documents are from their own agencies. This could be a Brady violation for failure to disclose, or may raise a viable claim of ineffective assistance of counsel for failure to seek discovery or familiarize himself with material relevant to my defense.

I am asking that you file a Reply and include the relevant documents enclosed. These documents have not been previously presented, and under RAP 9.11, the Court should review this evidence because it will probably change their decision. There is case authority to support that position.

Rules of Appellate Procedure allow an appellate court to take additional evidence if, among other requisite factors, additional proof of facts would fairly resolve the issues on review, and if additional evidence would probably change the decision. See *Sackett v. Santilli*, 101 Wn.App. 128, 5 P.3d 11, **affirmed**, 146 Wn.2d 498, 47 P.3d 948 (2000). This Rule applies to me, or in the alternative, the Court has the authority under RAP 1.2 and RAP 18.8, which provides for waiver or alteration of any Rule of Appellate Procedure to preserve the ends of justice.

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CLERK OF SUPERIOR COURT
STATE OF WASHINGTON

Also, I would like to apprise you and discuss with you the issues I intend to raise in my SAG. While this appeal may be limited only to the issues that you raised, the court may exercise its discretion to consider my issues in the interest of public policy and fundamental justice under RAP 2.5(a). I intend to address the following:

1. The Unlawful Imprisonment in Count II was charged as an alternative to the Kidnapping in Count IV. However, this is not an alternative means case, and the jury was not instructed on alternative means nor lesser included offenses.

"THE COURT: All right. Then there is a reference to unlawful imprisonment. Is that factually distinct from the alleged kidnapping, or is that just a lesser predicate offense?"

MR. MOHANDESON (Prosecutor): It's more in the nature of a lesser predicate offense, Your honor. The jury may decide to go in that direction. I don't know if it technically qualifies as a lesser lesser, but it might. But the State has elected to charge that in the alternative."

RP, Feb, 28, 05, @ page 7. This was clearly an issue of double jeopardy and not merger. It is settled law that prosecutors should not pyramid charges, which is exactly what happened here. The Unlawful Imprisonment charge in Count II violated the principles of double jeopardy.

2. The Unlawful Imprisonment in Count II was barred by the statute of limitations. These crimes were alleged to have been committed in 1994. In 1997, the State charged only Robbery in the Second Degree (Count I), and Kidnapping in the Second Degree (Count II). The crime of Unlawful Imprisonment is a different charge in an Amended Information. The State filed that charge outside the seven year statute of limitations period. See RCW 9A.04.080.

3. The Amended Information which charged different charges of First Degree Robbery and First Degree Kidnapping, from Second Degree, and to add firearm enhancements, was also barred by the statute of limitations. Originally, Count II was charged as Second Degree Kidnapping, but the Amended Information charged a different crime in Count II, Unlawful Imprisonment. An additional crime was charged in Count IV, First Degree Kidnapping. These additional charges

here were filed outside the statute of limitations.

4. The Amended Information was unlawful, in that, it was an Improper amendment. The different charges include Kidnapping in the First Degree with firearm enhancement, Robbery in the First Degree with firearm enhancement, and Unlawful Imprisonment. Not only did the Amended Information contain different charges, the Amendment was done after the State had presented it's case, and based on the same information it had always had. In other words, the State did not allege any new information. Most importantly, the State did not amend the Information to a lesser included or lesser degree offense.

Amending a criminal charge after the State has presented its case in chief violates the defendant's right under Const. art. 1, sec. 22 (amend 10) to be informed of the charge against him unless the new charge is a lesser included offense or a lesser degree offense to the original charge. See **State v. Pelkey**, 109 Wn.2d 484, 745 P.2d 854 (1987).

Here, the Amended Information is unlawful for at least two reasons: (1) The Amendment added new charges outside the statute of limitations period; and (2) the Amendment was not to a lesser included offense or a lesser degree offense of the original charge. The new charges should be vacated.

5. The To-Convict Jury Instructions did not contain all the elements of the charged crimes relieving the State of it's burden to prove each of the elements of the crimes beyond a reasonable doubt.

WPIC 39.02 contains the elements of first degree kidnapping in a jury instruction. Under WPIC 39.02, the "name of the person" kidnapped, must be mentioned:

Element (1): That on or about (date), the defendant intentionally abducted (name of person),

In my case, Jury instruction No. 21 stated:

Element (1): That on or about February 7, 1994, the defendant intentionally abducted another person; .

However, the Charging Information specifically alleged:

"That the defendant FREDDIE L. HARRIS, together with others, in King County, Washington on or about February 7, 1994,

did intentionally abduct Krista Schafer,"

Jury Instructed No. 21 did not identify "Krista Shafer" as the "name of person" kidnapped. This Instruction also did not contain the language "the defendant or an accomplice" or "the defendant, together with others" committed the alleged crimes. The question then turns on whether, because I was charged as an accomplice, the jury should have been instructed that "the defendant or an accomplice" committed the crimes as charged in the Information, or should the jury instructions (to-convict) contain the language "or an accomplice" or "together with others" to satisfy accomplice liability?

This same problem occurred in the Robbery Charge. At no time was "Krista Shafer" mentioned in the jury instructions. The United States Supreme Court declared that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged," and the **name of the person** kidnapped is an element of Kidnapping in the First Degree. See WPIC 39.02.

6. The State did not prove "knowledge" to support its position on accomplice liability. Our Supreme Court has previously held that our state's complicity statute, RCW 9A.08.020, requires that a defendant charged as an accomplice must have general knowledge of the charged crime in order to be convicted of that crime. See *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000).

The State charged that I was an accomplice, but it is unclear just how the State proved the "knowledge" element in the jury instructions, when no such instruction was given and the "to-convict" instructions did not contain the language "or and accomplice."

7. The kidnapping is incidental to the robbery. First, the State conceded that the robbery and kidnapping constitute the same criminal conduct. RP, Nov. 3, 06, @ page 3:

"MR. MOHANDERSON [Prosecutor]: I know defense counsel disagrees and believes that Counts I and IV should merge, although the State, I should also note, does concede that robbery in the first degree and kidnapping in the first degree would be the same criminal conduct."

The State, by its own admission, concedes that the robbery is incidental to the kidnapping because, under the same criminal

conduct analysis, it happened at the same time and place and involved the same victim. See **State v. Porter**, 133 Wn.2d 177, 942 P.2d 974 (1997).

8. **State v. Louis**, 155 Wn.2d 563, 120 P.2d 936 (2005), is inapplicable to my case. The State improperly relied on the Louis case:

"However, the State, based on the case law that I provided to the court, primarily **State v. Louis**, it's a Washington State Supreme Court case, 155 Wn.2d 563, 2005 -- indicates that robbery in the first degree and kidnapping in the first degree do not merge."

RP, Nov. 3, 06, @ page 3. But Louis is distinguishable from my case. Louis was charged with crimes against separate victims. In my case, all the charges were alleged against one victim.

The robbery and kidnapping involved the same victim, as charged by the State, (Krista Shaffer), and because the robbery is incidental to the kidnapping, as conceded by the State, the proper case applicable to mine is **State v. Korum**, 120 Wn.App. 686, 86 P.3d 166 (2004), affirmed, 157 Wn.2d 614, 141 P.3d 13 (2006). This argument was presented to the trial court:

"MS. KEMP (Defense Counsel): Thank you, Your Honor. I would submit, Your Honor, that Mr. Harris's range is 41 to 54 months because the kidnapping merges into the robbery. Korum has not been overturned, at least to that extent."

RP, Nov. 3, 06, @ page 4.

"MR. MOHANDESON [Prosecutor]: And the Korum decision defense counsel referred to is the Court of Appeals decision. As the Court knows, the Supreme Court has now issued an opinion in that case, and although the Supreme Court didn't overrule the Court of Appeals' decision with respect to the kidnapping charges being incidental to the robbery charges, that was based I believe on a technical issue where apparently the State in its petition to the Supreme Court didn't make that argument in its concise statement of issues presented for review. Therefore, the Court elected to not even address it. They didn't overrule it because it wasn't properly before them. I want to make that clear."

RP, Nov. 3, 06, @ page 6.

"MS. KEMP: Thank you. With regard to the Korum case, Your Honor, it was not considered by the Washington Supreme Court; therefore, Korum rules, and at this time, kidnapping would merge into robbery. And whether or not one has the lesser sentence range or the lesser standard doesn't matter because it hasn't been litigated, or it hasn't been considered by the Washington State Supreme Court. So I iterate again that Korum rules at this point."

RP, Nov. 3, 06, @ page 8.

It is clear that the proper case applicable to my case is State v. Korum, supra, rather than State v. Louis, supra.

9. The trial court erred by applying State v. Louis to my case.

"THE COURT: And just for the record, I've reviewed Korum and Louis, and I'm convinced that Louis is the controlling authority with regard to the legal question involved in the sentencing."

RP, Nov. 3, 06, @ page 11.

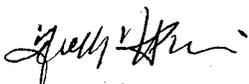
10. The Doctrine of Stare Decisis should apply to the Korum decision. Stare Decisis is the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.

11. In the alternative, State v. Louis should not be applied retroactively to my case. The Supreme Court of the United States has announced that new rules amounting to a "clear break" with past precedents would not be applied retroactively. **United States v. Johnson**, 457 U.S. 537, 549, 73 L.Ed.2d 202, 102 S.Ct. 2579 (1982).

It is well settled law, Mr. Gibson, that "a defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." **State v. Fleming**, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996). Please review these claims and set up a phone call so we can discuss those issues, inter alia.

I look forward to your response and thanks for your time in this matter.

Sincerely,



Freddie Harris
Appellant

No. 63498-4-I
St. v. HARRIS

General Rule ~~3~~ 3.1.

DECLARATION OF SERVICE

I, Freddie Levi Harris, certify that I deposited today in the internal mail system of McNeil Island Corrections Center a properly stamped and addressed envelope directed to:

The Court Of Appeals of the State of Washington - Division I
One Union Square, 600 University Street
Seattle, WA 98101-4170

The King County Prosecuting Attorney's Office
Attn: SDP Dennis J. McCurdy
W554 King County Courthouse, 516 3rd Avenue
Seattle, WA 98104

Nielsen Broman Koch PLLC. - Attorney At Law
1908 E. Madison Street, Seattle, WA 98122

Containing the following document(s):

- #1: Declaration Of Service
- #2: (Defendant's) STATEMENT OF ADDITIONAL GROUNDS
- #3. APPENDIX A

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

Submitted this 18th day of December, 2009, at McNeil Island Corrections Center, Steilacoom, Washington.

By: 
(Signature)

Freddie L. Harris #300190 E-326-1
(Name, DOC # and Cell)
McNeil Island Corrections Center
P.O. BOX 88-1000
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2009 DEC 23 AM 10:53
STATE OF WASHINGTON
CLERK OF SUPERIOR COURT