

FILED: February 06, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

IVAN CAM,
Defendant-Appellant.

Marion County Circuit Court
08C49052

A142984

Susan M. Tripp, Judge.

Argued and submitted on March 01, 2012.

Ryan Scott argued the cause and filed the brief for appellant. Ivan Cam filed the supplemental brief *pro se*.

Jamie K. Contreras, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

WOLLHEIM, J.

Remanded for resentencing and for entry of judgment merging Counts 18 and 19 into a single conviction of theft; merging Counts 20 and 21 into a single conviction of theft; merging Counts 33 and 34 into a single conviction of theft; merging Counts 38 and 39 into a single conviction of theft; otherwise affirmed.

1 WOLLHEIM, J.

2 After a jury trial, defendant was convicted of 53 offenses, including forty-
3 one counts of theft in the first degree, ORS 164.055; one count of theft in the second
4 degree, ORS 164.045; seven counts of possession of a stolen vehicle, ORS 819.300; two
5 counts of delivery of methamphetamine (a Schedule I controlled substance); ORS
6 475.840 (2009);¹ possession of methamphetamine (charged as a commercial drug
7 offense), ORS 475.894; ORS 475.900(1)(b); possession of marijuana (charged as a
8 commercial drug offense), ORS 475.864; ORS 475.900(1)(b); possession of MDMA²
9 (charged as a commercial drug offense), ORS 475.874; ORS 475.900(1)(b); and unlawful
10 possession of a short-barreled shotgun, ORS 166.272. He appeals, raising 15
11 assignments of error. His first two assignments relate to the trial court's denial of
12 motions to suppress evidence seized from defendant's residence. The remaining 13
13 assignments relate to the commercial drug offense (CDO) classifications, merger of
14 guilty verdicts, and sentencing. With the exception of one contention relating to merger
15 of some of the theft guilty verdicts, we reject his remaining assignments.

16 We first set forth the facts relating to defendant's motions to suppress. In
17 December 2007, a homeowner reported a burglary and the theft of his car.³ After the
18 homeowner's report of the theft, the car was involved in a hit-and-run accident on

¹ ORS 475.840 is now numbered ORS 475.752. Or Laws 2009, ch 898, § 1.

² MDMA is 3, 4--methylene dioxymethamphetamine, also colloquially known as "ecstasy."

³ The car was a 2006 Nissan 350Z, which is a distinctive sports car.

1 December 14, 2007. On December 24, a Hubbard police officer found the car and
2 arrested its driver, Martel, who said that she lived with defendant and that the title and
3 registration application for the car were at defendant's home. Martel told officers that she
4 had accompanied defendant to the Woodburn branch of the Driver and Motor Vehicle
5 Services Division (DMV) to register the car, but that for some reason DMV had rejected
6 the title.

7 On the morning of December 26, 2007, detectives Abel, Elmore, and
8 Johnson of the Salem Police Department drove an unmarked police vehicle to defendant's
9 house. The house was in a rural area and located at the end of a gravel driveway. The
10 detectives turned onto the driveway through an open metal gate that was located a short
11 distance from the road. See photograph attached as Appendix 1. Further down the gravel
12 driveway there were three signs. On a tree next to the driveway, there was a sign that
13 read "PRIVATE PROPERTY," and above it, a sign that read "10 M.P.H." Near the tree,
14 on a metal pipe, was a sign that read "PRIVATE PROPERTY." See photograph attached
15 as Appendix 2. The detectives did not recall initially seeing the signs, but Johnson
16 remembered seeing the signs during the course of subsequent investigation. The
17 detectives followed the driveway to the residence and parked near a shop on defendant's
18 property. There were several people in the area. The detectives, who were in
19 plainclothes, asked for defendant; the detectives were told that defendant was at the
20 house. The detectives walked to the residence and recognized defendant. Abel asked to
21 speak to him privately. Defendant directed the detectives to a sauna at the east of the

1 house. Abel and Elmore went into the sauna with defendant, and Johnson remained
2 outside the sauna. Abel described to defendant the circumstances of the stolen car, and
3 asked defendant if he had any documents relating to his purchase of the car. Defendant
4 said that he had the documents in the house. The detectives asked if defendant was
5 willing to show them the documents. Defendant then invited the detectives to follow him
6 to the house, which they entered through the garage. Defendant showed the detectives
7 his documents. Abel asked for and received permission to walk through the residence to
8 look for other stolen property.

9 As he was walking through the house, Abel saw items that he suspected
10 were stolen and asked for and received defendant's permission to call in the serial
11 numbers. None of those items had been reported stolen. Defendant and the detectives
12 then agreed that the detectives would accompany defendant to his bank to see if his check
13 for the car had cleared. As they were leaving the house through the garage, Abel noticed
14 a four-wheeler, which defendant said belonged to his nephew. On the way to the bank,
15 detectives called in the serial number for the four-wheeler and learned that it had been
16 reported stolen.

17 When they arrived at the bank, detectives arrested defendant. Police
18 subsequently sought and obtained two warrants to search defendant's property.
19 Execution of the search warrants resulted in the seizure of narcotics.

20 Defendant moved to suppress evidence seized subsequent to the warrantless
21 entry of his property, contending that the "private property" sign and gate on the

1 driveway manifested a clear intent to exclude visitors, including the police. *See State v.*
2 *Dixson/Digby*, 307 Or 195, 211, 766 P2d 1015 (1988) ("A person who wishes to preserve
3 a constitutionally protected privacy interest in land outside the curtilage must manifest an
4 intention to exclude the public by erecting barriers to entry, such as fences or by posting
5 signs."); *State v. Gabbard*, 129 Or App 122, 126-27, 877 P2d 1217, *rev den*, 320 Or 131
6 (1994). In an April 2009 written ruling, the trial court denied the motion because
7 defendant had consented to a search of the house. In a May 2009 ruling from the bench,
8 the trial court found that defendant had allowed the entry onto his property and held that
9 defendant had not manifested a clear intent to exclude visitors. The trial court also
10 denied defendant's motion to suppress evidence seized after the execution of two search
11 warrants that were based on the evidence found during the warrantless search.
12 Defendant's first two assignments of error relate to those rulings. We review the trial
13 court's rulings for errors of law, deferring to the trial court's findings of fact that are
14 supported by constitutionally sufficient evidence in the record. *State v. Ehly*, 317 Or 66,
15 75, 854 P2d 421 (1993).

16 Article I, section 9, of the Oregon Constitution provides:

17 "No law shall violate the right of the people to be secure in their
18 persons, houses, papers, and effects, against unreasonable search, or
19 seizure; and no warrant shall issue but upon probable cause, supported by
20 oath, or affirmation, and particularly describing the place to be search, and
21 the person or thing to be seized."

22 The Oregon Constitution protects a person's privacy interest in the curtilage
23 of his or her residence; however, a person impliedly consents to visitors approaching the

1 front door unless the person has "manifested an intent to forbid the intrusion of casual
2 visitors onto the property." *Gabbard*, 129 Or App at 126-27. We consider all the
3 surrounding circumstances to determine the resident's intent. *State v McIntrye/Pereira*,
4 123 Or App 436, 440, 860 P2d 299 (1993), *rev den*, 318 Or 351 (1994).

5 Defendant asserts that the combination of the gated driveway and the
6 "PRIVATE PROPERTY" signs manifested his intent to exclude uninvited visitors. The
7 state responds that, although the gate, which was open, and the private property sign may
8 have been sufficient to signal to approaching visitors that they were no longer on a public
9 road, they were not sufficient to warn visitors that they were not authorized to proceed.
10 The state contends that a sign that identifies property as private does not, as a matter of
11 law, manifest a clear intent to exclude casual visitors.

12 We agree with the state that, under the circumstances, defendant's intent to
13 exclude visitors from his property was not manifest. The state correctly notes that the
14 posting of a sign indicating that property is private does not in and of itself suggest that
15 visitors to the property are excluded. As we said in *Gabbard*, in order to exclude the
16 casual visitor from approaching a residence, "a person must make a greater showing than
17 that which would be required to exclude individuals who would use the property for their
18 own purpose, such as hiking." 129 Or App at 127. As we recently stated in *State v.*
19 *Roper*, 254 Or App 197, 200, ___ P3d ___ (2012), each case depends on its factual
20 circumstances. In *Roper*, we affirmed the trial court's grant of a motion to suppress
21 evidence where the circumstances included two no trespassing signs and another sign that

1 read "Posted, No Trespassing and Keep Out." Considering all of the circumstances in
2 this case, including the open gate and the absence of a no-trespassing sign, we conclude
3 that the trial court correctly held that the gate and the private property signs did not
4 manifest defendant's clear intent to exclude visitors.

5 The warrantless entry to defendant's property was permissible. Thereafter,
6 the officers entered the house with defendant's consent.⁴ The trial court therefore did not
7 err in denying defendant's motion to suppress.

8 Defendant was charged with possession of eight grams or more of
9 methamphetamine (Count 54). Defendant's third and fourth assignments of error relate to
10 the charging of two additional possession offenses, possession of marijuana (Count 55)
11 and possession of MDMA (Count 56), as commercial drug offenses (CDOs), based on
12 defendant's possession of "[eight] grams or more of methamphetamine." ORS
13 475.900(1)(b)(K)(iii). Defendant contends that "the legislature never intended substantial
14 quantities of one drug (methamphetamine) to enhance the sentence on possession of
15 another substance (marijuana and MDMA)." According to defendant, a particular
16 enhancement factor is only available for possession of the same controlled substance, but
17 in a larger amount cannot be used to enhance other drug possession offenses. Defendant
18 therefore argues that the trial court erred in denying his motion to strike the commercial
19 drug offense factor of possession of eight grams or more of methamphetamine. We

⁴ We reject defendant's contention, made in his *pro se* supplemental brief, that defendant's consent to the detectives' entry of the house was involuntary.

1 conclude that the trial court did not err.

2 As relevant, ORS 475.900(1)(b) provides that

3 "a possession, delivery or manufacture [offense] is a commercial drug
4 offense * * * if it is accompanied by at least three of the following factors:

5 * * * * *

6 "(D) The offender was in possession of materials being used for the
7 packaging of controlled substances such as scales, wrapping or foil, other
8 than the material being used to contain the substance that is the subject of
9 the offense;

10 * * * * *

11 "(F) The offender was in possession of stolen property;

12 * * * * *

13 "(K) The offender was in possession of controlled substances in an
14 amount greater than:

15 * * * * *

16 "(i) Eight grams or more of a mixture or substance containing a
17 detectable amount of heroin;

18 "(ii) Eight grams or more of a mixture or substance containing a
19 detectable amount of cocaine;

20 "(iii) Eight grams or more of a mixture or substance containing a
21 detectable amount of methamphetamine;

22 "(iv) Eight grams or more of a mixture or substance containing a
23 detectable amount of hashish;

24 "(v) One hundred ten grams or more of a mixture or substance
25 containing a detectable amount of marijuana[.]"

26 In Counts 55 and 56, the state charged defendant with possession of marijuana and

27 possession of MDMA, respectively. Both counts were charged as CDOs, based on ORS

1 475.900(1)(b)(D), (F), and (K)(iii). Defendant challenges only the state's reliance on the
2 factor set forth in subsection (1)(b)(K)(iii)--possession of eight grams or more of a
3 mixture or substance containing a detectable amount of methamphetamine--to enhance
4 the offenses of possession of marijuana and possession of MDMA.⁵ In defendant's view,
5 the structure of ORS 475.900 shows that the enhancement "subfactors" set out in
6 subparagraphs (b)(K)(i) to (viii) serve to enhance only the possession, delivery or
7 manufacture charges for the particular named substances. So, for example, in defendant's
8 view, his possession of eight or more grams of methamphetamine could serve only to
9 enhance a possession, delivery or manufacture of methamphetamine charge, and cannot
10 enhance offenses involving marijuana or MDMA. Defendant contends that his
11 possession of eight grams or more of methamphetamine (Count 54) cannot be used to
12 elevate his possession of marijuana and MDMA to commercial drug offenses and that the
13 trial court therefore erred in denying his motion to strike those two CDO enhancement
14 factors.

15 The state responds that the statute plainly allows possession of any of the
16 listed controlled substances in sufficient quantities to serve as enhancements for a
17 possession offense. We agree. The trial court's ruling is supported by a literal reading of
18 the statute, which provides that the offense is enhanced if "[t]he offender was in
19 possession of controlled substances in an amount greater than" the amount specified for

⁵ Defendant does not contend that the other factors charged by the state--possession of drug packaging materials and stolen property--did not apply.

1 each controlled substance. The controlled substance charged as a CDO need not be the
2 same substance possessed in the enhancement amount. As we held in *State v. Moore*,
3 172 Or App 371, 382, 19 P3d 911, *rev den*, 332 Or 250 (2001), the factors listed in ORS
4 475.900 need not relate to the specific underlying drug offense.⁶ The state need only
5 prove that the three factors occurred in conjunction with and thus accompanied the drug
6 offenses for which the defendant was convicted. There is no requirement of a nexus
7 between the underlying drug offense and the listed factors. Thus, the trial court did not
8 err in denying defendant's motion to strike the elevation of the charges of possession of
9 marijuana and MDMA to commercial drug offenses.

10 Defendant's remaining assignments relate to merger of guilty verdicts and
11 sentencing. In his fifth assignment of error, defendant contends that the trial court
12 committed plain error by not merging the guilty verdict on Count 54 (possession of
13 methamphetamine as a CDO), with the guilty verdict on Count 55 (possession of
14 marijuana as a CDO), because both counts alleged the same facts--(1) methamphetamine
15 possession in an amount greater than eight grams, (2) possession of stolen property, and
16 (3) possession of materials used for packaging controlled substances. The only
17 difference, defendant argues, is that Count 55 has the additional allegation of possession
18 of marijuana. Although he did not make the contention below, defendant now asserts
19 that, as pleaded, the offense of possession of methamphetamine charged as a CDO is

⁶ In *Moore*, we addressed the issue in the context of a statutory predecessor to ORS 475.900.

1 actually a lesser included of the offense of possession of marijuana charged as a CDO,
2 and that the two guilty verdicts should merge. Defendant asks that we consider and
3 correct the error as plain error.

4 Error is plain if it is (1) an error of law; (2) that appears on the face of the
5 record; and (3) that is obvious and not reasonably in dispute. *State v. Gornick*, 340 Or
6 160, 166, 130 P3d 780 (2006). In defendant's view, it is obvious and not reasonably in
7 dispute that as charged, possession of methamphetamine is a lesser-included offense of
8 possession of marijuana and that the guilty verdicts should therefore merge.

9 In determining whether convictions merge under ORS 161.067(1),⁷ the
10 court considers the statutory elements of each offense, not the underlying factual
11 circumstances recited in the indictment. *State v. Gray*, 240 Or App 599, 604-07, 249 P3d
12 544, *rev den*, 350 Or 574, (2011); *State v. Wright*, 150 Or App 159, 162, 945 P2d 1083
13 (1997). Offense subcategories, including the CDO categories, are not statutory elements
14 of the offense. *See State v. Merrill*, 135 Or App 408, 412, 899 P2d 712 (1995), *rev*
15 *dismissed*, 323 Or 73 (1996). Counts 54 and 55 allege distinct offenses, with distinct
16 elements--one charged possession of methamphetamine, ORS 475.894, and the other
17 charged possession of marijuana, ORS 475.864. Although the alleged CDO enhancement

⁷ ORS 161.067(1) provides:

"When the same conduct or criminal episode violates two or more statutory provisions and each provision requires proof of an element that the others do no, there are as many separately punishable offenses as there are statutory violations."

1 factors for each were the same, it is not obvious to us or reasonably beyond dispute that
2 the pleading of the enhancement factors made the methamphetamine charge a lesser
3 included of the marijuana charge and that the two guilty verdicts should therefore merge.
4 We accordingly reject defendant's invitation to consider the issue as plain error.

5 We have previously rejected the argument that defendant makes in his sixth
6 assignment of error, that the trial court erred in rejecting his motion to withdraw from the
7 jury's consideration at sentencing the "harm greater than typical" enhancement factor,
8 because it was not alleged in the indictment. As we held in *State v. Sanchez*, 238 Or App
9 259, 267, 242 P3d 692 (2010), *rev den*, 349 Or App 654 (2011), sentencing enhancement
10 factors do not need to be set forth in the indictment.

11 In his seventh assignment, defendant asks that we review as plain error his
12 unpreserved contention that the trial court erred in instructing the jury with regard to
13 offender-specific enhancement facts at sentencing. Defendant's unpreserved contention is
14 not subject to plain error review. *See State v. Guardipee*, 239 Or App 44, 46-47, 243 P3d
15 149 (2010) (construing ORCP 59 H(1) to bar plain error review of a claim that the trial
16 court erred in giving or refusing to give an instruction unless the party identified the
17 asserted error to the trial court and made a notation of exception immediately after the
18 court instructed the jury).

19 OAR 213-008-0002(1)(b)(D) provides that a defendant is subject to a
20 departure sentence if the evidence establishes the defendant's "persistent involvement" in
21 similar offenses. That factor may be cited when consecutive sentences are imposed "only

1 if the persistent involvement in similar offenses * * * is unrelated to the current offense."
2 In his eighth assignment of error, defendant asks that we review as plain error the trial
3 court's failure to instruct the jury that, in considering the sentence enhancement factor of
4 "persistent involvement," the jury should limit itself to consideration of defendant's prior
5 convictions for misdemeanor theft and misdemeanor criminal mischief for which he had
6 been sentenced before the trial in this proceeding had begun, and could not consider
7 uncharged misconduct and offenses of which the jury had just found him guilty.
8 Defendant did not ask for the instruction that he now proposes, and we therefore consider
9 whether it is subject to plain error review. *See State v. Toth*, 213 Or App 505, 162 P3d
10 317 (2007), (explaining limited exceptions to rule precluding plain error review).

11 It is not obvious or reasonably beyond dispute that defendant's proposed
12 instruction would have been a correct statement of the law. In determining persistent
13 involvement, a jury may consider a defendant's prior criminal conduct, even if that
14 conduct did not result in a criminal conviction. *State v. Barrett*, 134 Or App 162, 165,
15 894 P2d 1183, *rev den*, 321 Or 340 (1995) (defendant's admitted history of sexually
16 abusing young women could be considered "persistent involvement" even in the absence
17 of criminal convictions). Additionally, the jury could find "persistent involvement"
18 based entirely on crimes that the jury itself had found defendant guilty of committing, as
19 long as the offenses were unrelated to each other. *State v. Nelson*, 119 Or App 84, 87-88,
20 849 P2d 1147 (1993); *see also State v. Ceballos*, 162 Or App 477, 481, 986 P2d 680
21 (1999), *rev den*, 330 Or 252 (2000) (in determining whether the persistent involvement

1 factor applies, "the sentence court may consider similar offenses committed after the
2 current offense for which sentence is being imposed"). The state charged "persistent
3 involvement" for only eight of the 42 counts of theft with which defendant was charged.
4 The jury found that defendant had committed all 42 theft counts, which involved 37
5 different victims. The jury could properly consider all of the offenses of which defendant
6 had been found guilty as evidence of persistent involvement, not only those offenses for
7 which he had been previously convicted, and could infer that defendant's thefts were
8 unrelated and therefore that he was persistently involved in property crime. It was not
9 plain error for the court to fail to instruct the jury as defendant now proposes.

10 In his ninth assignment, defendant contends that the trial court committed
11 plain error in not declaring a mistrial *sua sponte* when the prosecutor argued to the jury
12 that it could find "persistent involvement" based on evidence that was not in the record.⁸

⁸ In his argument on rebuttal regarding persistent involvement, the prosecutor argued:

"Now, you all saw the pictures and you heard all the testimony, and I--you can tell from the testimony and the pictures that there were other items of stolen property and other victims that weren't mentioned in the trial, that we didn't bring to court.

"Furthermore, you heard from Sergeant Albert about some numbers that the Salem PAID had compiled about how many items they had recovered and how many they had returned; and you may not remember the number, but after you add them up, Salem PAID returned approximately 677 items. And you might remember from Ms. Suver's exhibit in closing, they returned about 302 items so that's roughly half * * * the items they returned you heard about. So there was nearly twice that many in the total. And I would submit to you that those other items are clear indicators that the defendant was persistently involved in other similar activity--not related to the charges that you've already heard about."

1 As we have said, it was not plain error for the jury to consider as evidence of persistent
2 involvement the offenses with which defendant was charged in this proceeding. Further,
3 as we have said, the jury could also consider evidence of previous conduct with which
4 defendant was not charged and for which he was not convicted. The record was replete
5 with evidence from which the jury could properly find that defendant was persistently
6 involved in theft crimes and, because it was in the record, it was proper for the prosecutor
7 to refer to that evidence in his argument to the jury at sentencing. It was not, however,
8 proper for the prosecutor to argue that the jury could consider conduct that was not
9 supported by evidence in the record, and, to the extent that the prosecutor's comment
10 suggested that, the comment was not permissible. The question is whether it was plain
11 error for the trial court not to grant a mistrial *sua sponte*.

12 It is a rare circumstance where the trial court must grant a mistrial in the
13 absence of an objection by the defendant during the prosecutor's rebuttal argument to the
14 jury. A trial court's denial of a motion for mistrial based on a prosecutor's improper
15 argument to the jury is reviewed for an abuse of discretion, and a trial court abuses its
16 discretion in denying a motion for mistrial when the prosecutor's comments are so
17 prejudicial as to deny the defendant a fair trial. *State v. Cheney*, 171 Or App 401, 410, 16
18 P3d 1164, *rev den*, 330 Or 252 (2000). We decline to conclude, on this record, that the
19 prosecutor's remark, although improper, was so prejudicial that the only legally

(Emphasis added.)

1 acceptable alternative was to grant a mistrial *sua sponte*, and that trial court therefore
2 committed plain error in not granting a mistrial *sua sponte*.

3 We reject without further discussion defendant's tenth and eleventh
4 assignments, in which he contends that the evidence was insufficient to support a finding
5 of "persistent involvement," and that an upward departure sentence was not supported by
6 substantial and compelling reasons.

7 Eight of defendant's convictions involved two thefts against each of four
8 victims. In his twelfth through fifteenth assignments of error, defendant contends that the
9 trial court erred in failing to merge the eight guilty verdicts into four convictions. The
10 state concedes that defendant is entitled to a merger of guilty verdicts for thefts
11 committed against the same person and that the trial court should have entered single
12 convictions for counts of theft from the same victim, reducing by four defendant's total
13 convictions. We accept the state's concession.

14 Remanded for resentencing and for entry of judgment merging Counts 18
15 and 19 into a single conviction of theft; merging Counts 20 and 21 into a single
16 conviction of theft; merging Counts 33 and 34 into a single conviction of theft; merging
17 Counts 38 and 39 into a single conviction of theft; otherwise affirmed.

18

APPENDIX 1



1

APPENDIX 2

