

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LIZZIE ELLEN JABBOUR, a/k/a LIZZIE
ELLEN SPONSLER, a/k/a LIZZIE ELLEN
PARKER-CURIEL, a/k/a LIZZIE ELLEEN,

Appellant.

No. 40290-4-II

UNPUBLISHED OPINION

Armstrong, J. — Lizzie Jabbour appeals her convictions and sentences for possession of a controlled substance (methamphetamine), second degree identity theft, and bail jumping, arguing that (1) the trial court failed to commence her trial within the time required under CrR 3.3; (2) her identity theft conviction is not supported by sufficient evidence; and (3) six of her prior convictions washed out under RCW 9.94A.525(2)(c). Because the State failed to produce any evidence that Jabbour intended to commit a crime with the identification she possessed, her identity theft conviction is not supported by sufficient evidence. And because the State failed to show that Jabbour was confined pursuant to a felony conviction or committed a crime that resulted in a conviction between 1999 and 2005, her prior convictions for class C felonies prior to 1999 washed out of her offender score. Accordingly, we reverse Jabbour’s identity theft

conviction, affirm her remaining convictions, and remand to the sentencing court for the recalculation of her offender score and resentencing.

FACTS

I. Arrest

On December 24, 2007, Jabbour called the police from a gas station, complaining that the station had overcharged her and requesting that a police officer force the business to refund her money. Finding no record of Jabbour in Washington, the dispatcher asked what State she was from. Jabbour said she was from Alabama, but the dispatcher could find no record of her in Alabama either.

Sergeant Troy Price responded to the call and explained to Jabbour that he could not force the gas station to refund money to her. Because he found it suspicious that the dispatcher could find no record verifying Jabbour's identity, he asked for her personal information. She gave him her name, a birth date, and a social security number.

Back at the precinct, Sergeant Price learned that the social security number was associated with a different person. He met with Jabbour again and asked to see her identification. While Jabbour looked through her wallet, Sergeant Price saw her flip past a Washington State identification card and pull out a benefits card instead. A laminated social security card with the name Ana Tolentino fell out of her wallet. Jabbour appeared nervous when Sergeant Price asked where the card had come from and said she had found it on the ground.

Sergeant Price arrested Jabbour and searched her wallet and purse. In the wallet, he found a Washington State identification card with the name Lori Pegram, and also a Connecticut driver's license with Jabbour's name and a different birth date than the one she had previously given him. In her purse, he found a cylindrical metal container with a white substance inside, a spoon with the residue of a crystallized substance on it, and a small makeup bag full of syringes.

II. Information and Pretrial Continuances

The State initially charged Jabbour with possession of a controlled substance (methamphetamine) for the residue on the spoon found in her purse, and the unlawful use of drug paraphernalia for the metal cylindrical container found in her purse. The State amended the information several times over the next two years to include one count of identity theft for the Tolentino social security card, another count for the Pegram Washington State identification card, and two counts of of bail jumping for failure to appear in court on August 7, 2008 and May 14, 2009.

After Jabbour failed to appear in court on May 14, 2009, the trial court issued a bench warrant and revoked her supervised release. When Jabbour next appeared before the trial court on June 11, the court ordered her held without bail and appointed her a new attorney. On June 18, the court rescheduled Jabbour's trial for August 17.

On August 5, the State moved for a continuance, because one of its witnesses was unavailable until August 21, due to a vacation and training for work. The trial court granted the motion and continued the trial to August 24. On August 14, the State moved for a second

continuance because another witness was unavailable until August 26, due to a vacation. Defense counsel objected to the second continuance, arguing that the 60-day speedy trial time limit under CrR 3.3 had already elapsed. The trial court determined that a new speedy trial time limit had begun on June 18, when Jabbour's trial was rescheduled and that the 90-day time limit applied. The court granted the State's motion and rescheduled Jabbour's trial for September 14.

On September 10, the State moved to amend the information to add the second bail jumping charge, and defense counsel objected. The trial court allowed the State to amend the information but severed the second bail jumping charge and set a separate trial date for November 9, to give defense counsel additional time to prepare.

III. Trials

At the September 2009 trial, Sergeant Price and Officer Lear testified to Jabbour's arrest and the search of her purse. Bruce Siggins, a forensic analyst from the Washington State Patrol Crime Laboratory, testified that the residue on the spoon from Jabbour's purse contained trace amounts of methamphetamine. Maria Markley, a special agent with the Social Security Administration Office of the Inspector General, testified that the social security number Jabbour had initially given Sergeant Price was associated with an individual named Sabine Heinhorst, and that the number on the card that fell out of Jabbour's wallet was associated with an individual named Ana Tolentino. The State also attempted to introduce documentary evidence supporting the August 7, 2008 bail jumping charge, but the trial court excluded that evidence because the State had failed to produce the documents for defense counsel prior to trial.

The trial court dismissed for lack of evidence the identity theft charge based on Pegram's identification card, the August 7, 2008 bail jumping charge, and the drug paraphernalia charge. The jury found Jabbour guilty of the two remaining charges—possession of a controlled substance and identity theft based on Tolentino's social security card.

At the November 2009 trial on the second bail jumping charge, Jabbour waived her right to a jury trial. The trial court ruled that she had failed to prove her uncontrollable circumstances defense and found her guilty.

III. Sentencing

At sentencing, the parties contested whether the State had proved Jabbour's prior convictions and whether any of her prior convictions washed out under RCW 9.94A.525(2)(c). The sentencing court found that Jabbour's prior convictions included six class C felonies and that none had washed out. When combined with her current convictions, the court calculated Jabbour's offender score for possession of a controlled substance and identity theft as eight, and her offender score for the separate bail jumping conviction as nine. The court sentenced Jabbour to the low end of the standard sentencing range for each conviction: 366 days for possession of a controlled substance, 22 months for identity theft, and 51 months for bail jumping, to be served concurrently.

ANALYSIS

I. Speedy Trial Time Limit

Jabbour first contends that the trial court failed to bring her to trial within the time required under CrR 3.3. We review the application of court rules de novo. *State v. Carlyle*, 84

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Wn. App. 33, 35-36, 925 P.2d 635 (1996).

CrR 3.3 requires trial courts to ensure that criminal defendants are brought to trial within 60 days after arraignment, if the defendant is detained in jail, or 90 days after arraignment, if the defendant is not detained in jail. CrR 3.3(b)(1)(i), (b)(2)(i), (c)(1). If a defendant is not detained in jail when the trial date is set but is subsequently returned to custody, the 90-day time limit continues to apply. CrR 3.3(b)(4). But if the trial is reset following a new commencement date and the defendant is in custody at that time, then the 60-day time limit applies. CrR 3.3(b)(4). The commencement date is reset to zero if the defendant fails to appear for a required court proceeding. CrR 3.3(c)(2)(ii). The new commencement date “shall be the date of the defendant’s next appearance.” CrR 3.3(c)(2)(ii).

Jabbour argues that the trial court incorrectly concluded that, following her failure to appear in court on May 14, 2009, her new commencement date was June 18 and the 90-day time limit continued to apply. She argues that her new commencement date was June 11, because that was when she next appeared in court following her failure to appear, and that the 60-day time limit applied because she was in custody when her trial was rescheduled following the new commencement date. CrR 3.3(b)(4), (c)(2)(ii). Thus, she concludes, the 60-day time limit for her trial elapsed on August 10, 2009.

Assuming that Jabbour is correct, she failed to object when the trial court initially set her trial for August 17, outside the CrR 3.3 time limits. She has therefore lost her right to object to that trial date. CrR 3.3(d)(3)-(4). And a later trial date is still timely under CrR 3.3 if there is a subsequent excluded period, such as a continuance. CrR 3.3(d)(4), (e)(3).

Here, the trial court granted two motions to continue Jabbour's trial because two of the State's witnesses, Siggins and Officer Lear, were unavailable due to vacations and training for work. A trial court may grant a continuance when "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). The decision to grant a continuance is within the trial court's discretion. *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936 (1993). Jabbour acknowledges that it is well within the trial court's discretion to continue a trial to accommodate vacation schedules. *See State v. Grilley*, 67 Wn. App. 795, 798-800, 840 P.2d 903 (1992). And she does not allege that she suffered any prejudice as a result of continuing her trial from August 17 to September 14. CrR 3.3(f)(2).

Thus, even assuming the trial court incorrectly calculated Jabbour's speedy trial time limit, we hold that the commencement of her trial did not violate CrR 3.3 because she failed to object to the initial untimely trial date and her trial was subsequently rescheduled based on two valid continuances. CrR 3.3(d)(3)-(4), (e)(3).

II. Sufficiency of the Evidence

Jabbour next contends that insufficient evidence supports her conviction for second degree identity theft. A defendant who challenges the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

RCW 9.35.020(1) provides: "No person may knowingly obtain, possess, use, or transfer a

means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” Jabbour argues that the State produced no evidence from which the jury could find that she possessed Tolentino’s social security card with intent to commit a crime. We agree.

In a similar case, Division One of this court considered whether sufficient evidence supported an identity theft conviction where the defendant was stopped for speeding and gave the officer the name and personal information of her former neighbor, Shyla Dashiell. *State v. Presba*, 131 Wn. App. 47, 50-51, 126 P.3d 1280 (2005). The *Presba* court held that the evidence was sufficient, reasoning:

Presba was stopped for speeding while driving with a suspended license, offered Dashiell’s name, social security number, former address and date of birth all in a temporarily successful effort to thwart the officer’s attempt to ascertain her correct identity to enforce the traffic laws. The information Presba used constitutes a “means of identification” and the evidence supports an inference [that] she did so to facilitate both the offense of RCW 9A.76.020, obstructing a police officer, and RCW 46.61.020, giving false information while in charge of a vehicle. The evidence was sufficient.

Presba, 131 Wn. App. at 55-56.

Similar to *Presba*, the State argued to the jury that Jabbour possessed Tolentino’s social security card to facilitate the crime of making a false statement to a police officer. But unlike *Presba*, Jabbour did not use that particular card, name, or number when Sergeant Price requested identification. The card simply fell out of her wallet. Although Jabbour had previously given Sergeant Price the social security number associated with Heinhorst, the State did not charge her with identity theft based on that false statement. The information specifically charged:

That she, Lizzie Ellen Jabbour . . . did knowingly possess a Social Security Card . . . belonging to Ana Toletino with residence in Middletown, Connecticut, with the

intent to commit or to aid the commission of any crime; contrary to Revised Code of Washington 9.35.020(3).

CP at 70. Because there is no evidence that Jabbour actually committed a crime or intended to commit a crime using Tolentino's identification, we hold that insufficient evidence supports her conviction for second degree identity theft.

The State argues that the jury could infer criminal intent from the evidence showing that Jabbour (1) told the 911 dispatcher she was from Alabama, (2) initially gave Sergeant Price an incorrect social security number, (3) possessed multiple identification cards with different names and birth dates, (4) appeared nervous when Tolentino's social security card fell onto the ground and Sergeant Price questioned her about it, and (5) tried to deny that the purse was hers after Sergeant Price searched it and found the spoon and metal container. The State appears to be arguing that this evidence supports a reasonable inference that, even though Jabbour did not use or attempt to use the social security card to commit a crime on this particular occasion, she intended to use the social security card to commit some unspecified crime on some unspecified future date. Speculation that Jabbour might commit an unspecified crime with the identification at issue is insufficient to support a conviction for identity theft under RCW 9.35.020(1). Accordingly, we reverse Jabbour's conviction for second degree identity theft and vacate her sentence for that conviction.

III. Offender Score

Jabbour next argues that the trial court miscalculated her offender score because her prior class C felony convictions washed out under RCW 9.94A.525(c). We review an offender score calculation for sentencing purposes de novo. *State v. Bush*, 102 Wn. App. 372, 377, 9 P.3d 219

(2000) (citing *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995)).

RCW 9.94A.525(2)(c) provides, in relevant part:

[C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

Here, the sentencing court found that Jabbour was convicted of six prior class C felonies between 1990 and 1998. Following her 1998 forgery conviction, Jabbour was released from prison in 1999. From 2000 to 2002, there was an outstanding warrant for her arrest for failure to appear at a hearing regarding violations of the terms of her sentence for the 1998 forgery conviction. In 2005, Jabbour was convicted of two crimes in Connecticut.¹ Although Jabbour was not convicted of any new crimes between 1999 and 2005, the sentencing court found that the 2000 warrant interrupted the five-year washout period under RCW 9.94A.525(2)(c).

Jabbour argues that her prior class C felonies washed out of her offender score because from 1999 to 2005, she spent ““five consecutive years in the community without committing any crime that subsequently result[ed] in a conviction,”” and that the trial court erred by ruling that the outstanding warrant from 2000 prevented her prior convictions from washing out. Br. of Appellant at 25-27 (quoting RCW 9.94A.525(2)(c)). The State relies on *State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010), to argue that confinement due to a probation violation for a felony conviction constitutes “confinement . . . pursuant to a felony conviction” under RCW 9.9A.525(2)(c). Br. of Resp’t at 11-14. Because the 2000 warrant for Jabbour’s arrest was

¹ The sentencing court did not include the Connecticut convictions in Jabbour’s offender score because of comparability issues, but did consider the convictions for washout purposes.

based on violations of the terms of her sentence for a felony conviction, according to the State, the warrant interrupted the five-year washout period.

In *Ervin*, our Supreme Court considered whether the 17 days the defendant had spent in jail for violating a term of his probation for a misdemeanor conviction interrupted the five-year washout period under RCW 9.94A.525(2)(c). *Ervin*, 169 Wn.2d at 818. The *Ervin* court held that because the defendant was confined under a misdemeanor conviction, not a felony conviction, the confinement did not interrupt the washout period. *Ervin*, 169 Wn.2d at 825-27.

Had Jabbour served time in jail for violating the terms of her sentence for the 1998 felony conviction, then that term of confinement would have interrupted the five-year washout period. *See Ervin*, 169 Wn.2d at 825-27. But nothing in the record shows that Jabbour was ever sentenced to confinement. The State's evidence shows that in 2000, the State moved to modify the sentence for Jabbour's 1998 forgery conviction, alleging that she had violated the conditions of her sentence by failing to make required payments on her legal financial obligations and recommending that she serve 60 days in jail for the violation. Jabbour failed to appear at the scheduled hearing and the trial court issued a bench warrant to secure her presence for a hearing on the motion. Nothing in the record shows that Jabbour was ever arrested on the warrant or sentenced to confinement for the alleged violation.

Because the State has not shown that between 1999 and 2005, Jabbour was confined under a felony conviction or committed any crime that subsequently resulted in a conviction, Jabbour's class C felony convictions before 1999 washed out of her offender score under RCW 9.94A.525(2)(c). We reverse Jabbour's remaining sentences for possession of a controlled

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substance and bail jumping, and remand to the sentencing court for recalculation of her offender score and resentencing.

In sum, we reverse Jabbour's conviction for second degree identity theft, affirm her remaining convictions, and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Van Deren, J.

Johanson, J.