IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BENJAMIN DEAN HENNIGAN, Appellant.	No. 41815-1-II Consolidated with No. 42142-9-II UNPUBLISHED OPINION

Van Deren, J. — Benjamin Hennigan appeals his conviction and sentence for second degree identity theft and forgery. He argues that the trial court abused its discretion by admitting irrelevant and unfairly prejudicial evidence of other fraudulent uses of the victim's financial instruments because the State did not allege he was involved with those transactions. In both a pro se personal restraint petition (PRP) and on direct appeal, Hennigan also argues that the sentencing court erred by including washed out class C felony convictions in his offender score.[1] We affirm his conviction and sentence and deny his PRP.

FACTUAL AND PROCEDURAL BACKGROUND

While John Malich attended an early-morning meeting on April 6, 2009, his wallet, checkbook, and briefcase were stolen from inside his locked vehicle. Later that day, Malich

[1] We consolidated Hennigan's direct appeal and PRP.

closed his bank and credit card accounts and reported the theft to Tacoma police. Thereafter, someone used one of Malich's stolen checks at a Puyallup Les Schwab Tire Center. The check had Malich's name, address, and bank account number on it and was signed "John Malich." Report of Proceedings (RP) at 62. But Malich did not write the check or give permission to anyone else to write the check to Les Schwab.

While investigating the Les Schwab check, Tacoma Police Detective Randi Goetz discovered that the check was used to pay $1155 for new wheels and tires for a 1995 Honda Civic registered to Hennigan that he had not reported as stolen. Thereafter, Goetz prepared a photo montage of Hennigan and five other similar-looking men and showed it to Michael James, the Les Schwab employee who conducted the sale. James examined the photo montage for a few seconds, then stated, "'It's got to be that guy.'" RP at 110. James identified Hennigan as the person who passed Malich's check.

Comparing the Les Schwab check to known writing samples from Hennigan and Malich, the State's handwriting expert "could not identify or exclude Mr. Hennigan as the author of the John Malich signatures." RP at 231. But the State's handwriting expert found "indications [that Hennigan] wrote the payee information" on the Les Schwab check. RP at 232. Based on the check written to Les Schwab, the State charged Hennigan with second degree identity theft and forgery.

In addition to the Les Schwab check, however, there were several other fraudulent transactions on Malich's accounts. Before trial, Hennigan moved to exclude any reference to other fraudulent transactions on Malich's bank and credit card accounts within hours of his wallet being stolen. He argued that because the State neither charged Hennigan with any of those

transactions nor established any connection between those transactions and Hennigan, the evidence was irrelevant and unfairly prejudicial. He asserted that since nothing connected him to those transactions and the evidence only showed "other bad things [that] happened to this victim [it] would enflame the passions of the jury." RP at 18. Thus, Hennigan asked the trial court to limit the State to evidence only as it related to him.

But the trial court denied Hennigan's request, ruling that the State sought to introduce evidence of the other transactions "to provide the jury with a complete picture of how this case progressed and [how] the investigation proceeded . . . under [both] ER 402 [and ER 403]." RP at 23. The trial court found that evidence relating to how detectives conducted the investigation was relevant. Then, the trial court balanced that relevance against its danger of unfair prejudice and concluded that the proffered evidence "is pointing out a picture of what happened . . . [a]nd no one is going to be pointing a finger at [Hennigan for these transactions]." RP at 24. Accordingly, the trial court found that the danger of unfair prejudice from the other fraudulent transaction evidence on Malich's accounts did not outweigh its probative value and denied Hennigan's motion.

At trial, Malich testified that someone had already made several fraudulent charges on his debit and credit cards before he contacted the bank and his credit card companies to close his accounts. Those fraudulent transactions included charges at a car wash, an automobile parts store, a Safeway store, and a Bartell drugstore. Someone also fraudulently passed his stolen checks at several businesses, including Les Schwab, Best Buy, and a pizza restaurant.

Goetz testified that she investigated several merchants and ATMs where Malich's debit and credit cards were used, including a McDonald's, the Safeway store, and the Bartell drugstore.

Goetz was not able to identify a suspect in any of those transactions. Despite Hennigan's objections, the trial court allowed Goetz to say that it is not uncommon for investigators to be unable to identify suspects in financial crimes and that financial crimes are often committed by "rings of criminals that . . . . spread the cards, . . . and . . . financial instruments out as fast as they can because they know accounts are going to get closed down." RP at 114-15.

Based on Goetz's testimony, Hennigan requested a limiting instruction. Accordingly, the trial court instructed the jury that

> [c]ertain evidence has been admitted in this case for only a limited purpose. This evidence consists of several financial transactions involving the identification and financial information of John Malich, but it is not alleged that the defendant was involved in any of these transactions and may be considered by you only for the purpose of understanding the investigation in this case. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Clerk's Papers (CP) at 55. The jury found Hennigan guilty as charged.

Hennigan did not stipulate to his criminal history at sentencing. The State introduced certified copies of Hennigan's past felony judgments and sentences. The certified copies established that Hennigan was convicted of six prior felonies: (1) attempting to elude a pursuing police vehicle[2] and (2) bail jumping[3] on September 13, 2001, for crimes committed April 5, 2000, and November 3, 2000, respectively; (3) second degree possession of stolen property[4] on April 30, 2002, for crimes commited October 3, 2000; (4) first degree escape[5] and (5) third degree

[2] Former RCW 46.61.024 (1983).

[3] RCW 9A.76.170(1).

[4] Former RCW 9A.56.160(1)(a) (1995).

[5] RCW 9A.76.110(1).

assault[6] on September 13, 2001, for crimes committed May 22, 2001; and (6) unlawful possession of a controlled substance (methamphetamine)[7] on January 22, 2010, for a crime committed March 11, 2009.

Four of Hennigan's six prior felony convictions were class C felonies committed in 2000 and 2001. He was sentenced to consecutive sentences. The judgment and sentence for Hennigan's March 2009 conviction includes the notation, "[W]ork release 1/23/04," referring to his 2001 conviction. Ex. 1 at 4. But this notation does not state whether January 23, 2004, was the beginning or end of his work release.

Despite the January 23, 2004, work release notation, without objection from Hennigan and without analysis of whether any of Hennigan's convictions washed out, the sentencing court found that Hennigan had been convicted of six prior felonies and one concurrent offense. Based on Hennigan's criminal record, the sentencing court calculated an offender score of seven. The sentencing court then imposed concurrent sentences at the high-end of Hennigan's standard range of 29 months for the identity theft conviction and 18 months for the forgery conviction. Hennigan appeals his conviction and sentence.

ANALYSIS

I. Evidentiary Rulings

Hennigan first argues that the trial court abused its discretion when it admitted evidence of other uncharged fraudulent transactions on Malich's accounts because that evidence was (1) irrelevant and, (2) even assuming it was relevant, its undue prejudice outweighed its probative

[6] RCW 9A.36.031(1)(a), (g).

[7] RCW 69.50.4013.

value. We agree that evidence of these other transactions on Malich's accounts was irrelevant and that its prejudice outweighed its probative value, but hold that admission of this evidence was harmless.

A. Issues Preserved for Appeal

As a threshold matter, the State argues that Hennigan preserved only a narrow relevance issue for appeal and entirely failed to preserve his ER 403 issue. The State specifically argues that Hennigan only challenged the relevance of Goetz's testimony on two fraudulent transactions at a car wash, thus waiving any further challenge to the relevance or unfair prejudice of evidence of other fraudulent transactions on Malich's accounts.

But, claiming that they were both irrelevant and unfairly prejudicial, Hennigan moved in limine to exclude all references to the uncharged fraudulent transactions. Because the purpose of a motion in limine is to resolve legal issues outside the presence of the jury, a trial court's ruling denying a motion in limine is final and the moving party has a standing objection. *State v. McDaniel*, 155 Wn. App. 829, 853 n.18, 230 P.3d 245, *review denied*, 169 Wn.2d 1027 (2010). Because Hennigan has a standing objection, he may raise these evidentiary issues on appeal and the State's argument fails. Thus, we consider Hennigan's evidentiary challenges.

B. Standard of Review

"We review a trial court's evidentiary rulings for an abuse of discretion." *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). A trial court abuses its discretion if its evidentiary ruling is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Williams*, 137 Wn. App. at 743 (internal quotation marks omitted) (quoting *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)). The party challenging an

evidentiary ruling bears the burden of proving the trial court abused its discretion. *Williams*, 137 Wn. App. at 743.

C. Evidence of Other Fraudulent Transactions

Evidence is "'[r]elevant'" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The relevancy threshold is low and minimally relevant evidence is admissible. *State v. Cuthbert*, 154 Wn. App. 318, 336-37, 225 P.3d 407, review denied, 169 Wn.2d 1008 (2010). All relevant evidence is generally admissible but irrelevant evidence is inadmissible. ER 402.

Unless irrelevant, an officer may testify to establish the context and background information of a criminal investigation. *State v. O'Hara*, 141 Wn. App. 900, 910, 174 P.3d 114 (2005), *rev'd on other grounds*, 167 Wn.2d 91, 217 P.3d 756 (2009); *see also* ER 402. Evidence of how officers conducted the investigation is irrelevant if it is not an issue in controversy. *State v. Edwards*, 131 Wn. App. 611, 614-15, 128 P.3d 631 (2006).

Here, the investigation evidence was irrelevant. Still, Goetz testified about her investigation of a series of fraudulent transactions on Malich's accounts that occurred shortly after his wallet and checkbook were stolen from his vehicle. The State did not charge Hennigan with any of these other fraudulent transactions and they were not an issue in controversy. Since the other fraudulent transactions were not an issue in controversy, that evidence was not relevant and the trial court abused its discretion in admitting it.

D. Unfair Prejudice and Probative Value

Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Evidence is unfairly prejudicial if it is "'more likely to arouse an emotional response than a rational decision by the jury.'" *City of*

Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009) (internal quotation marks omitted) (quoting *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)).

Here, the trial court found the evidence of the other fraudulent transactions was relevant and weighed its danger of unfair prejudice against the probative value and admitted evidence of multiple fraudulent transactions on Malich's accounts. But these transactions were not connected to Goetz's testimony that financial crimes are often committed by "rings of criminals." RP at 14. Because the State could not connect Hennigan to any of these other fraudulent transactions or to any criminal ring perpetrating financial crimes, the admission of the prejudicial evidence outweighed its probative value. Thus, the trial court abused its discretion in admitting this evidence.

E. Harmless Error

Where the party challenging an evidentiary ruling shows that the trial court abused its discretion, we will not reverse a conviction unless the evidentiary ruling prejudiced the outcome. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A trial court's erroneous admission of evidence does not prejudice the outcome if that evidence is minor in comparison to the State's otherwise overwhelming evidence. *Thomas*, 150 Wn.2d at 871.

Here, the State's evidence was overwhelming. The Les Schwab employee identified Hennigan in the photo montage as the person who gave Les Schwab Malich's check. The wheels and tires purchased from Les Schwab were for Hennigan's car. The State's handwriting expert also suggested, but could not say conclusively, that Hennigan authored the payee line on the check to Les Schwab. And the trial court instructed the jury that it could only consider evidence

of the other fraudulent transactions Goetz investigated for the "limited purpose . . . of understanding the investigation in this case[ ]" because the State did "not allege[ ] that [Hennigan] was involved in any of these [other] transactions." CP at 55.

Accordingly, because the State's evidence that Hennigan fraudulently used Malich's check was overwhelming, we hold that the trial court's abuse of discretion in admitting evidence that was irrelevant and whose prejudice outweighed its probative value was harmless because it did not prejudice the outcome of Hennigan's trial. Thus, we affirm Hennigan's convictions.

II. Sentence

Hennigan argues in his consolidated pro se PRP and on direct appeal that the sentencing court erred by including washed out prior class C felony convictions in his offender score when sentencing him. We disagree.

A. Procedural History

Before Hennigan filed his brief in support of his direct appeal, he filed a PRP arguing that the sentencing court erred by including two prior class C felony convictions in his offender score. In his PRP, Hennigan argues that the 2000 and 2001 convictions should have washed out. Two months after Hennigan filed his PRP, his appellate counsel filed his appeal brief that challenged only the trial court's evidentiary rulings. The State responded to both Hennigan's PRP and direct appeal. Later, Hennigan's counsel filed a supplemental brief in his direct appeal, reiterating the sentencing issue Hennigan raised in his PRP. Thus, both on direct appeal and in his PRP, Hennigan argues that the sentencing court erred by counting his prior 2000 and 2001 class C felonies in his offender score because they had washed out.

B. Offender Score

When a person is under an unlawful restraint, he or she may request relief through a PRP. RAP 16.4(a)-(c). Parties bringing or responding to a PRP may introduce "competent, admissible evidence to establish the [necessary] facts." *In re Pers. Restraint of Reise*, 146 Wn. App. 772, 780, 192 P.3d 949 (2008); *see also* RAP 16.9. In responding to a PRP, the State must answer the petitioner's allegations, specify its authority for the restraint, and include copies of any writings supporting that authority. RAP 16.9. Thus, the State must respond to a PRP with its own competent evidence.[8] *Reise*, 146 Wn. App. at 780.

Here, the State responded to Hennigan's PRP and attached a certified copy of a judgment and sentence from Puyallup Municipal Court showing that Hennigan had a misdemeanor conviction in 2007. And because Hennigan had a misdemeanor conviction in 2007, he cannot overcome the strict limitations we place on PRPs. Before we reach the merits of a PRP, a petitioner must meet several requirements. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 809, 792 P.2d 506 (1990). For example, when a PRP alleges a constitutional error, the petitioner must first show that the error resulted in actual and substantial prejudice. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005); *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 87, 660 P.2d 263 (1983). But miscalculation of an offender score is a nonconstitutional error that requires the petitioner to show "a fundamental defect that inherently results in a miscarriage of justice." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002).

[8] We note that the legislature responded to *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 878, 123 P.3d 456 (2005), which had limited the evidence admissible on remand for resentencing, by amending RCW 9.94A.525 to allow the parties to present additional evidence on remand to correct sentencing errors. The legislature explained that it enacted the change to ensure that sentences are imposed based on the offender's correct and complete criminal history at resentencing. Laws of 2008, ch. 231, § 1.

Here, Hennigan challenges his offender score but he cannot show any miscarriage of justice because the sentencing court correctly counted his prior class C felony convictions. Hennigan committed four class C felonies in 2000 and 2001. The State's certified copies of Hennigan's judgments and sentences established that he served concurrent sentences for these four felonies and stated, "[W]ork release 1/23/04." Ex. 1 at 4.

After release from prison, prior class C felonies may wash out under RCW 9.94.A.525:

> [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.

RCW 9.94A.525(2)(c) (emphasis added). Thus, a sentencing court cannot include prior class C felony convictions in an offender score if the offender spent at least five consecutive crime-free years in the community after his or her last date of release from confinement. *See* RCW 9.94A.525(2)(c). Conviction for any crime, including a misdemeanor, interrupts the washout period and "effectively reset[s] the five-year clock." *State v. Ervin*, 169 Wn.2d 815, 821, 239 P.3d 354 (2010); RCW 9.94A.525(2)(c).

Even if Hennigan completed work release in January 2004, he reset his washout period when he committed the crime of misdemeanor driving with a suspended license in 2007. Because Hennigan's 2007 misdemeanor conviction effectively reset the washout period's five-year clock, Hennigan's argument that his prior class C felony convictions washed out under RCW 9.94A.525(2)(c) fails because Hennigan had not spent five crime-free years in the community before being sentenced for this April 2009 crime. Accordingly, the sentencing court did not err in

counting Hennigan's prior class C felony convictions in his offender score.

We affirm Hennigan's conviction and sentence and deny his PRP.

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 in accordance with RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Quinn-Brintnall, J.

Johanson, A.C.J.