

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KYLE E. WAGAR,

Appellant.

No. 41830-4-II

UNPUBLISHED OPINION

Armstrong, P.J. — Kyle Wagar appeals his conviction and sentence for unlawful first degree firearm possession. Wagar argues that the State improperly elicited evidence of his prior conviction for second degree assault during cross examination, resulting in a trial irregularity. Wagar also argues in his statement of additional grounds (SAG) that the trial court erred by including a juvenile offense in calculating his offender score and that his counsel ineffectively represented him by failing to hire an investigator, failing to communicate with him, and failing to move to suppress evidence. Because Wagar is unable to demonstrate (1) that the jury was so prejudiced by the trial irregularity that he was denied his right to a fair trial; (2) that he was prejudiced by his counsel’s representation; or (3) that the trial court erred by counting a juvenile offense toward his offender score, we affirm his conviction. We remand for the trial court to correct the clerical errors in the judgment and sentence to reflect the correct offender score and that Wagar was on community custody at the time of the current offense.

FACTS

On September 10, 2010, at the Lucky Eagle Casino, an off-duty Centralia police officer

told two on-duty Chehalis tribal police officers that Wagar was in the casino and might pose a public safety threat. One of the tribal officers noticed that Wagar had his right hand in his right pants pocket most of the time he was in the casino. Wagar left the casino and began walking down a main street. As the tribal officers ran toward him, Wagar looked over his shoulder in their direction before bending down, removing an object from his pants pocket, and placing it in a nearby bush. He immediately turned toward the officers with his hands in the air.

Neither officer could identify what Wagar placed in the bush. When the officers asked Wagar what it was, he said it was a cigarette. One of the officers looked in the bush and found a small, loaded .22 caliber revolver. He did not find a cigarette. Casino surveillance cameras recorded Wagar dropping an unidentified object in the bush. The revolver had its serial number destroyed and the police found no fingerprints on the weapon.

The State charged Wagar with first degree unlawful firearm possession. One element of this crime is a prior conviction for a serious offense. RCW 9.41.040(1)(a).¹ Wagar does not dispute that he had two convictions which qualify: first degree robbery and second degree assault. Before trial, the parties stipulated:

The parties, the State of Washington, Plaintiff, and Kyle Edward Wagar, Defendant, agree and stipulate that on September 14, 2010 the defendant had previously been convicted of a serious offense.

Clerk's Papers (CP) at 31. Defense counsel clarified the exact nature of the stipulation during pretrial motions:

[DEFENSE ATTY]: I would so move in limine that no reference to the nature of my client's serious offenses be made to the jury, that is, the jury has no reason to

¹ The legislature subsequently amended the statute. Because the amendments do not change our analysis, we cite to the most recent version of the statute.

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know that my client's been convicted of Assault 2 or Rob 1 now that we have entered into this stipulation.

[THE COURT]: That is correct.

Report of Proceedings (RP) at 22.

The trial court read the stipulation to the jury at the end of the State's case-in-chief.

Wagar then testified that he had placed a small glass pipe for ingesting drugs in the bush rather than a gun. On cross-examination, the prosecutor asked:

[PROSECUTOR]: In any event, on the 14th when you're in that casino, you knew that you were not supposed to be in possession of a firearm?

[WAGAR]: Like I said, since I was the age of 16 years old, sir, I've known that.

[PROSECUTOR]: By the way, what was the serious offense that you were convicted of?

[WAGAR]: It was robbery and assault.

[PROSECUTOR]: Robbery in the first degree; is that correct?

[WAGAR]: Yes, sir.

[PROSECUTOR]: And assault in the second degree?

[WAGAR]: Yes, sir.

RP at 143-44.

Defense counsel immediately moved for a mistrial outside the presence of the jury, arguing that the prosecutor had violated the stipulation not to reveal Wagar's second degree assault conviction. Defense counsel conceded that Wagar's first degree robbery conviction was admissible to impeach Wagar. The prosecutor argued that Wagar opened the door to the assault conviction by volunteering it in response to the prosecutor's question. The trial judge denied the motion for mistrial, and the jury convicted Wagar.

ANALYSIS

I. Admissibility of Second Degree Assault Conviction

A. Standard of Review

Wagar argues that the prosecutor erred when he elicited the assault conviction during cross-examination; Wagar characterizes this error as a trial irregularity. We agree with Wagar that we should review this as a trial irregularity and not an evidentiary error, as the State urges.

B. Trial Irregularity

When reviewing a trial irregularity we ask whether, when viewed against the backdrop of all the evidence, the irregularity so prejudiced the jury that the defendant did not receive a fair trial. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). If the irregularity does so prejudice the jury, the remark warrants a mistrial. *Escalona*, 49 Wn. App. at 254. Only errors which may have affected the outcome of the trial are prejudicial. *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (quoting *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)). To determine the impact of the irregularity, we consider “(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.” *Escalona*, 49 Wn. App. at 254 (citing *Weber*, 99 Wn.2d at 165-66). We then review the trial court’s decision whether to grant a mistrial under an abuse of discretion standard. *Escalona*, 49 Wn. App. at 254-55 (citing *Weber*, 99 Wn.2d at 166).

In *Escalona*, the victim testified to the defendant’s criminal record in violation of an order in limine. *Escalona*, 49 Wn. App. at 252-53. The trial court denied the defendant’s motion for a mistrial and Division I of our court reversed. *Escalona*, 49 Wn. App. at 253, 257. The court reasoned that the victim’s statement was “extremely serious” because: (1) generally a defendant’s prior crimes are excluded from evidence; (2) there was a lack of other credible evidence against

the defendant; and (3) the victim's key testimony contained several inconsistencies. *Escalona*, 49 Wn. App. at 255. The court viewed the statement as inherently prejudicial, not curable by an instruction to the jury, and "difficult, if not impossible, in this close case for the jury to ignore." *Escalona*, 49 Wn. App. at 255-56. The court reasoned that the jury would use the "seemingly relevant fact" to conclude that Escalona was acting in conformity with his previous offenses. *Escalona*, 49 Wn. App. at 256.

The trial irregularity here is less serious than that in *Escalona*. The State's case against Wagar—including eyewitness testimony from tribal officers, video surveillance footage of Wagar placing an object in a bush, and a firearm recovered from the bush moments later—is considerably more persuasive than the State's case in *Escalona*. Also, in *Escalona* the defendant's criminal history included convictions for the same crime as the current charge against the defendant. *Escalona*, 49 Wn. App. at 252. Here, the State did not charge Wagar with an assault but, instead, simple firearm possession. Thus, we do not have a direct correlation between the charged crime and the wrongly elicited criminal history.

Also, the evidence is essentially cumulative. Wagar stipulated to a prior serious felony. And he concedes that his first degree robbery conviction was admissible, although for the purposes of impeachment only.

Finally, Wagar's defense counsel did not request a curative instruction, a decision we generally treat as tactical to avoid highlighting the negative testimony. *State v. Barber*, 38 Wn. App. 758, 771 n.4, 689 P.2d 1099 (1984). Moreover, neither the giving nor withholding of a curative instruction is likely to have affected the jury's verdict. The issue at trial was whether

Wagar possessed a firearm, not whether he had a prior serious felony conviction. Because we believe the wrongfully elicited assault conviction is unlikely to have affected the trial outcome, we conclude that Wagar was not prejudiced.

We are satisfied that the jury was not so tainted by the wrongly elicited evidence that the only remedy was a new trial. Thus, the trial court did not abuse its discretion in denying the motion for a mistrial.

II. Ineffective Representation of Counsel

Wagar argues that his trial counsel ineffectively represented him on various issues. Wagar complains that counsel did not communicate with him; failed to hire an investigator as he requested; failed to provide him with the warrant for his arrest; and failed to prepare and argue motions to suppress evidence “for unlawful approach, arrest, etc.” SAG at 1-4. Wagar is unable to demonstrate, however, that his counsel’s representation prejudiced him and thus his claims fail.

To demonstrate ineffective representation by counsel, a defendant must show that

(1) defense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). The defendant has the burden of demonstrating counsel’s allegedly flawed representation based on the record before us. *McFarland*, 127 Wn.2d at 335.

We presume that counsel effectively represented the defendant. *McFarland*, 127 Wn.2d

at 335. In a direct appeal, we will not consider matters outside the trial record. *McFarland*, 127 Wn.2d at 335. A defendant who wants to raise issues on appeal that are not supported by the record must do so through a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

The record here does not support Wagar's claim that counsel ineffectively represented him. During a continuance hearing on November 29, 2010, counsel said he wanted to hire an investigator to follow up on a few issues Wagar had brought to his attention. Counsel cited several reasons for failing to hire an investigator earlier, and the trial was continued until December 6, but did not actually start until December 8.

Counsel "will be considered ineffective if his lack of preparation is so substantial that no reasonably competent attorney would have performed in such manner." *State v. Jury*, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978). A defendant can overcome the presumption that counsel was effective "by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial." *Jury*, 19 Wn. App. at 263. While the earliest that trial counsel could have hired an investigator was eight days before trial, the record contains no information as to what investigation counsel may have arranged during that time. Nor does the record show what information Wagar claims the investigation would have uncovered. Without such information we cannot find that Wagar was prejudiced by counsel's investigation or failure to investigate.

Wagar also faults trial counsel for not arguing motions to suppress evidence based on the State's failure to provide the Department of Corrections' warrant mentioned by the tribal officers

during his arrest. The record does not establish that the Department had issued an arrest warrant for Wagar and he seems to argue that none existed. And because of this, Wagar reasons, his counsel should have moved to suppress the evidence. The officers did not testify that they arrested Wagar based on a department warrant; rather, they testified that they arrested Wagar after finding the gun in the bush where Wagar dropped it. And Wagar does not argue that the officers lacked probable cause to approach him and to recover the gun from the bush. Thus, Wagar has not shown that he was prejudiced by counsel's failure to explore the Department's warrant issue.

Finally, Wagar faults trial counsel for not moving to suppress based on an unlawful arrest. An officer has probable cause to arrest where the officer has trustworthy information sufficient to reasonably believe that an offense has been or is being committed. *State v. Knighten*, 109 Wn.2d 896, 899, 748 P.2d 1118 (1988). The tribal officers arrested Wagar only after they had: (1) received a tip regarding Wagar as a possible threat; (2) observed Wagar with his hand in his pocket for a long period of time inside the casino; and (3) observed Wagar dropping an object in the bush from which the officers immediately recovered a .22 caliber revolver. Based on this information, a motion to suppress would have failed. Counsel was not ineffective for failing to move to suppress.

In conclusion, we hold that Wagar's right to effective representation was not violated.

III. Sentencing

Wagar also appears to challenge his offender score. We review an offender score calculation de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). If the score was

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incorrectly calculated, we remand for resentencing. *Mutch*, 171 Wn.2d at 653.

A. Juvenile Conviction

We first consider whether the trial court improperly included Wagar's juvenile conviction for second degree assault in his offender score. At the sentencing hearing, Wagar's trial counsel explained that Wagar believed his juvenile conviction should have "washed out" because he committed it before he turned 15 years of age. RP (Jan. 28, 2011) at 4. The trial court rejected his argument.

An offender must be sentenced under the law in effect when the current offense was committed. RCW 9.94A.345. Before 1997, the Sentencing Reform Act (SRA), chapter 9.94A RCW, did not include juvenile offenses in an offender score. See *In re Pers. Restraint of Jones*, 121 Wn. App. 859, 862-63, 88 P.3d 424 (2004) (a juvenile offense "washed out" under this scheme). In 2002, the legislature amended the SRA to include juvenile offenses in an offender score even if they had not been counted in a previous sentencing. *Jones*, 121 Wn. App. at 868 (citing Laws of 2002, ch. 107, § 1).

Wagar committed his current offense on September 10, 2010, the SRA then in effect does not allow juvenile offenses to automatically "wash out." Former RCW 9.94A.525(2)(f) (2010). Under former RCW 9.94A.525(7), if the current offense is nonviolent, the court adds one point to the offender score for violent juvenile felony convictions. Thus, the trial court did not err in counting Wagar's juvenile conviction for second degree assault as one point.

B. Clerical Mistake

We next consider whether Wagar's judgment and sentence accurately reflects his offender score. At the sentencing hearing, the State acknowledged that the correct offender score was

four and the trial court agreed with the State. The written judgment and sentence states, however, that the offender score is five.

After calculating the score based on former RCW 9.94A.525, we conclude that the trial court correctly calculated Wagar's offender score as four. Wagar's assault conviction from 2008 is one point. Former RCW 9.94A.525(7). His assault and robbery convictions from February 14, 1999, count as one point because the trial court determined that they were one offense for purposes of calculating Wagar's offender score. Former RCW 9.94A.525(5)(a)(i), (7). As stated above, Wagar's juvenile conviction from 1996 counts as one point. Former RCW 9.94A.525(7). And his theft conviction from 1996 counts as a ½ point. Former RCW 9.94A.525(7). Additionally, Wagar was apparently on community custody at the time of the current offense, which counts as one point.² Former RCW 9.94A.525(19). This adds up to 4½ points, which is rounded down to four points. Former RCW 9.94A.525. The trial court clearly stated at the sentencing hearing that Wagar's correct offender score was four. Based on that score, the trial court sentenced Wagar to 46 months, which his judgment and sentence reflects, despite its mistake regarding his offender score. RCW 9.94A.510.

A clerical error is one that, if amended, "correctly convey[s] the intention of the court based on other evidence." *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). CrR 7.8(a) states, in pertinent part, "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected

² At the sentencing hearing, the State said that Wagar was on community custody at the time of the current offense. The judgment and sentence, however, does not reflect this with a check mark in the appropriate box. Because Wagar did not contest his community custody status, we remand for the trial court to correct this clerical error.

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by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.” The judgment and sentence contains two clerical errors that the trial court should correct to reflect its intention to sentence Wagar based on an offender score of four.

Accordingly, we affirm the trial court’s determination that Wagar’s juvenile conviction does not “wash out” as he suggests. And, we remand for the trial court to correct the clerical errors in the judgment and sentence so that it reflects the correct offender score and the fact that Wagar was on community custody at the time of the current offense. We affirm all other issues, including his conviction.

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.

Armstrong, P.J.

We concur:

Hunt, J.

Penoyar, J.