IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 62928-0-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
JAMES ALLAN HORTON,	)	
	)	
Appellant.	)	FILED: November 8, 2010

Grosse, J. — When the State requests an exceptional sentence based on prior criminal history, an aggravating factor that need not be submitted to the jury, the State is not required to give notice by alleging the aggravating circumstances upon which the requested exceptional sentence is based. Thus, the trial court did not err by imposing an exceptional sentence based on the free crimes aggravating factor when the State did not include this aggravating factor in the information. Accordingly, we affirm.

FACTS

The State charged James Horton with possession of a stolen vehicle and attempting to elude a pursuing police vehicle. A trial, the State presented evidence that a green Mustang was stolen from the owner's home and that Horton did not have permission to drive the car. A police officer testified that a week or so later, Horton was driving the Mustang and sped away when he saw a police officer approach in a marked police car. The officer turned on his car lights and siren and followed Horton as he drove at speeds in excess of 90 miles per hour, ran stop

signs, and drove into oncoming lanes. Horton eventually hit a guardrail and the car spun to a stop. The officer arrested Horton and observed that the ignition assembly of the car had been removed and a large hole in the dashboard. The ignition assembly was found in the back seat and the car's license plates were found inside the trunk.

The State also presented the testimony of an officer who arrested Horton on a prior similar charge that involved the same make and model of car involved in the current charge. The trial court ruled in limine that the State could present evidence that the prior incident involved a punched ignition to show Horton had knowledge that the car in the current charge was stolen. But the court also ruled that the State could not present evidence about the make and model of the car involved in the prior incident because it was too prejudicial.

At trial, the State asked the officer to identify a photograph of the car involved in the prior incident and he testified that it was "a photograph of the ignition of the red Mustang." Horton objected, the court sustained the objection, and an instruction was given to the jury to disregard the officer's testimony in its entirety. A jury found Horton guilty as charged.

The State requested an exceptional sentence based on Horton's high offender score and multiple current offenses, the free crimes statutory aggravating factor under RCW 9.94A.535(2)(c). The court found that his offender score was 39 on the possession of a stolen vehicle conviction and 22 on the attempting to elude conviction. The court imposed an exceptional sentence of 80 months on the

possession of a stolen vehicle conviction and 60 months on the attempting to elude conviction, to run concurrently. Horton appeals.

ANALYSIS

Horton challenges the exceptional sentence as unlawful because the State did not allege the facts in support of the exceptional sentence and therefore failed to comply with the notice requirement of RCW 9.94A.537. That statute provides:

> At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudices, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.[1]

Horton contends that the statute requires that the State include in the information the facts upon which it intends to rely for its request for the exceptional sentence, even where, as here, the basis for the requested exceptional sentence is not an aggravating factor that must be submitted to the jury. We have recently rejected this argument in State v. Edvalds,[2] and Horton provides no persuasive reason to depart from that opinion.

In Edvalds, we addressed an identical challenge to an exceptional sentence based on RCW 9.94A.535(2), the free crimes provision. Noting that "RCW 9.94A.535 specifically excludes prior convictions from the procedural requirements of RCW 9.94A.537," we concluded that "[c]onsidering the statutory scheme as a whole, notice is not required by the statutory provisions when the State alleges aggravating factors based on prior criminal history."[3] Likewise here, because the

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[1] RCW 9.94A.537(1).
[2] No. 64953-1-I (Wash. Ct. App. August 16, 2010).
[3] Edvalds, No. 64953-1, slip op. at 14.

request for the exceptional sentence was based on the free crimes provision, no notice was required.

Edvalds further argued, as does Horton, that the recent decision in State v. Powell[4] requires a different result. We disagreed, noting that the exceptional sentence at issue in Powell "was comprised exclusively of factors that must be found by a jury," and concluded that "Powell did not address whether notice is required for an aggravating factor based on criminal history under RCW 9.94A.535(2)."[5] Finally, we rejected Edvalds' due process arguments based on the Sixth Amendment and article I, section 22 of the Washington Constitution and similarly reject those made by Horton.[6]

Statement of Additional Grounds

Horton asserts additional arguments in a Statement of Additional Grounds, contending that the trial court erred by failing to enter written findings and conclusions in support of the exceptional sentence, the prosecutor improperly discussed evidence during voir dire, a State's witness testified in violation of an order in limine, the State engaged in burden shifting during closing argument, and that the trial court erred by allowing the jury to view the photograph of the car involved in the prior incident despite the instruction to disregard the officer's testimony about the photograph.

While Horton is correct that no findings appear in the record,[7] the trial court's

[4] 167 Wn.2d 672, 676, 223 P.2d 493 (2009).
[5] Edvalds, slip op. at 17.
[6] See Edvalds, slip op. at 17-18.
[7] There is, however, a notation on the judgment and sentence stating,"record will be supplemented with additional findings and conclusions."

failure to enter written findings was harmless due to the sufficiency of its oral findings.[8] The remaining issues were also raised in a motion for a new trial, which was denied by the trial court. We agree with the trial court's ruling and find no merit in these contentions warranting reversal.

First, Horton fails to show any resulting prejudice from the prosecutor's question about punched ignitions during voir dire. During a discussion about the reasons someone would not want to stop when signaled by an officer, the prosecutor asked, "What if you were driving a car with [a] punched ignition?" While this was a fact to be presented at trial, Horton immediately called a sidebar and objected and the court sustained the objection. Thus, there was no further discussion beyond the question itself. Additionally, members of the venire had already talked about punched ignitions when discussing their previous experience with stolen cars.

Nor has Horton demonstrated that the prosecutor's closing argument amounted to burden shifting. As the trial court noted, the prosecutor's comments about the fact that there was no evidence of another person in the vehicle was in direct response to Horton's argument that there could have been another person in the vehicle and therefore proper argument.

Horton also fails to show prejudice resulting from the officer's violation of the order in limine. Horton immediately objected, the court sustained the objection and the court instructed the jury to disregard that witness's testimony in its entirety to avoid emphasizing the prejudicial evidence. The jury is presumed to have followed

[8] See State v. Riley, 69 Wn. App. 349, 848 P.2d 1288 (1993).

the court's instruction.[9]

Finally, Horton fails to show that the trial court erred by admitting the photograph of the car involved in the prior incident. He contends that because it was as prejudicial as the officer's testimony, the jury should have not have been permitted to review the photograph. But because the exhibit has not been designated as part of the appellate record, we cannot evaluate the claim that it had a prejudicial effect.[10] Additionally, Horton's failure to object at trial to admission of that evidence waives any challenge to its admission on appeal.[11]

We affirm the judgment and sentence.

Grosse, J

WE CONCUR:

Dwyer, C. J.

Appelwick, J

[9] See State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998).
[10] In any event, presuming the jury followed the court's instruction to disregard the officer's testimony about what the photograph depicts, the photograph has no relevance and therefore no prejudicial effect if it does not otherwise connect Horton to the incident.
[11] ER 103(a)(1); State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).