IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent and Cross Appellant, v. PABLO ANTONIO CARBO CISNEROS, Appellant and Cross Respondent.	)	No. 66667-3-I DIVISION ONE UNPUBLISHED OPINION FILED: September 12, 2011

Appelwick, J. — Cisneros appeals his convictions for one count of unlawful delivery of a controlled substance and one count of unlawful possession of a controlled substance. The trial court erred by refusing to give a jury instruction on unwitting possession for his unlawful possession charge, but that error was harmless for his unlawful possession charge. That error was harmless in light of the additional error in adding a "knowing" requirement in the instruction on possession. Officer Bowers's testimony was not hearsay and was thus properly admitted. The trial court failed to classify his out-of-state convictions before calculating his offender score, and the judgment and sentence contained clerical errors that must be corrected. We affirm the

conviction and remand for resentencing and correction of the scrivener's error.

FACTS

On September 5, 2008, officers of the Tacoma Police Department conducted a controlled buy of cocaine as part of a drug investigation. The investigation was directed by Officer Kenneth Bowers and involved the use of a confidential informant. The confidential informant told Officer Bowers that he had identified a target who would sell him cocaine—a male named Pablo. Under instruction from officers, he called Pablo to set up a drug buy. Officer Bowers testified that the confidential informant was supposed to use a specific phone number to reach Pablo. Officer Bowers was present when the confidential informant made the call and listened as the confidential informant brokered the transaction for crack cocaine. There was also an audio recording made of the call. Pablo instructed the confidential informant to meet him at 19th and Union for the transaction.

Officers provided the confidential informant with $100 of prerecorded money for the buy and drove him to the specified location. They also set the confidential informant up with an audio recording device. After dropping the confidential informant off, the officers remained nearby to keep visual surveillance of the intersection. The officers had been given a generic description of Pablo's vehicle, as a red, smaller, foreign car. They observed a red Toyota Camry at the intersection, driven by a man that matched Pablo's description. They observed the license plate number and after checking that number discovered that the vehicle was registered to the defendant, Pablo

Cisneros.

Cisneros was driving the vehicle and had a friend with him in the front passenger seat. The confidential informant got into the back seat on the driver's side. When Cisneros asked the confidential informant for the money, the confidential informant handed him the $100 buy money, and Cisneros gave the confidential informant six or seven rocks of crack cocaine. The officers maintained some distance from Cisneros's vehicle during the deal, but they could see the top of the vehicle. The officers also listened to the encounter on the portable audio device, and, though it was somewhat difficult to understand, they heard what they believed to be a crack cocaine deal

After the deal, the confidential informant got out of the car, and once Cisneros had driven away, officers picked up the confidential informant. The confidential informant handed Officer Bowers the crack cocaine he had just purchased.

Officers lost track of Cisneros for some time, eventually they heard from other informants that Cisneros was staying at a motel in Fife. On October 1, 2008, officers drove to the motel and identified the same Toyota Camry that they had observed during the controlled buy on September 5, 2008. The officers maintained surveillance for a short while and identified the person they observed walking to the car as Cisneros. When Cisneros got into his car and started to drive away, officers followed him, eventually stopping him on Interstate 5. A canine unit arrived at the scene, and officers located a small piece of crack cocaine on the driver's side floorboard. Officers also found $200 in cash on

Cisneros, as well as a cell phone. Officer Bowers took possession of Cisneros's phone, and while in his possession it rang several times. Officer Bowers was able to broker crack cocaine deals over the phone with callers who were attempting to reach Cisneros. Officer Bowers also checked the number of the phone, identifying its number in his report—the same number that, according to Officer Bowers's report, the confidential informant was supposed to have used to set up the earlier controlled buy.

The September 5, 2008 controlled buy occurred within 1000 feet of a school bus route stop.

Cisneros timely appealed, and the State cross appealed.

DISCUSSION

I. Jury Instruction on Affirmative Defense of Unwitting Possession

Cisneros requested an instruction on unwitting possession, an affirmative defense to the second count against him, possession of a controlled substance. The court declined to give such an instruction, and Cisneros argues that this refusal was an error.

As a general rule, a trial court must instruct on a party's theory of the case if the law and evidence support it; the failure to do so is reversible error. State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). A defendant raising an affirmative defense must offer sufficient admissible evidence to justify giving an instruction on the defense. Id. In evaluating whether the evidence is sufficient to support such an instruction, the trial court must interpret the evidence most strongly in favor of the defendant. Id.

"'Unwitting possession is a judicially created affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute.'" State v. Buford, 93 Wn. App 149, 151-52, 967 P.2d 548 (1998) (quoting State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931 (1998)). The affirmative defense of unwitting possession serves to ameliorate the harshness of the strict liability crime of possession of a controlled substance. State v. Bradshaw, 152 Wn.2d 528, 533, 98 P.3d 1190 (2004). A criminal defendant is not entitled to an unwitting possession instruction unless the evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband. Buford, 93 Wn. App. at 153.

When deciding whether to give an instruction, a trial court must consider all of the evidence presented, regardless of which party presented it. State v. Olinger, 130 Wn. App. 22, 26, 121 P.3d 724 (2005). While Cisneros did not testify or present any evidence in support of his request for the unwitting possession instruction, the facts and evidence presented by the State are sufficient to warrant such an instruction. Officer Bowers testified about what was found during the search of the vehicle: "A very small piece of crack cocaine was located on the driver's side floorboard. . . . It would, basically, be right where your feet would be placed on the floorboard in front of the seats, almost on the center portion of the carpet." He later testified that it was "[a]bout the size of a pencil lead." There was also testimony from the State's forensic scientist, who described the amount of crack cocaine as "residue" that she was able to test, but

did not weigh since it was less than .1 gram. This evidence must be interpreted most strongly in favor of Cisneros. Otis, 151 Wn. App. at 578. We hold that the evidence here was sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that Cisneros unwittingly possessed crack cocaine. The trial court erred in failing to give an unwitting possession jury instruction.

However, that that error was harmless. As the State points out in its cross appeal, the trial court also erred by adding a knowledge element to the jury instructions for the count of possession of a controlled substance. The trial court here instructed the jury: "It is a crime for any person to *knowingly* possess a controlled substance." (Emphasis added.) Jury Instruction 11 was similar:

> To convict the defendant of the crime of Unlawful Possession of a Controlled Substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 1st day of October, 2008, the defendant *knowingly* possessed a controlled substance, cocaine.

(Emphasis added.) It is clear and well established in Washington law that no such knowledge element is included in the crime of possession. Bradshaw, 152 Wn.2d at 539.

The State made this very argument before the trial court when the instructions were being discussed, with the prosecutor stating: "I would prefer that the unwitting possession instruction be allowed than to insert the word knowing into the instruction." The trial court's decision to add a knowledge element in the jury instructions was error. But, the jury convicted Cisneros of the

possession count despite this error. In essence, by virtue of the erroneous addition of the knowledge element, the jury already resolved the matter of knowledge, concluding that Cisneros was indeed aware of the drugs that were on his floorboard. In light of the jury's factual conclusion that the (erroneous) knowledge element of the possession crime was satisfied, it is clear that any error by the trial court in failing to give an unwitting possession instruction was harmless and would not have had any impact on the outcome of the conviction.

II. Hearsay

Cisneros next argues that his trial was prejudiced by the trial court's decision to admit testimony from Officer Bowers that should have been inadmissible as hearsay. He focuses on three separate aspects of Officer Bowers's testimony. First, he argues that Officer Bowers should not have been allowed to testify about Cisneros's phone number, which the informant had used to set up the initial controlled buy. Second, Cisneros focuses on the time immediately following his arrest when Officer Bowers had seized Cisneros's cell phone and went on to answer it several times when it rang during the arrest. Cisneros argues that Officer Bowers should not have been allowed to testify about the conversations he had with callers, in which Officer Bowers brokered crack cocaine deals. Third, Cisneros argues that Officer Bowers should not have been allowed to testify that he checked the number of Cisneros's cell phone at the time of arrest and that it was the same number that the confidential informant had used to set up the controlled buy.

This court reviews a trial court's decision to admit or exclude evidence at

trial under an abuse of discretion standard. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). Abuse of discretion will be found only on a clear showing that the trial court's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or made for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court's discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006).

Hearsay is generally inadmissible, unless there is an applicable exception. ER 802. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a). Hearsay is inadmissible because the witness repeating it has no personal knowledge of the truth of the matter asserted. See State v. Babich, 68 Wn. App. 438, 447, 842 P.2d 1053 (1993).

A. The Phone Number the Confidential Informant Used to Contact Cisneros

Cisneros's first objection arises from Officer Bowers's testimony during direct exam about the number the confidential informant was to use in contacting Cisneros:

> [Prosecution:] So was there a number that [the confidential

> informant] was supposed to call to contact Pablo?
>
> [Bowers:] Yes.
>
> [Defense Counsel:] Your Honor, I believe that was hearsay.
>
> THE COURT: I'll overrule it; not for hearsay purposes.
>
> [Bowers:] The telephone number he was supposed to contact Pablo was [the number identified in his report].

Officer Bowers's first answer—that there was a number for the confidential informant to call to contact Cisneros—was properly admitted. Officer Bowers was entitled to testify to the fact that the confidential informant knew a phone number to reach the defendant and to the fact that the controlled buy was set up in the first place by the confidential informant by making a call to that number, under Officer Bowers's supervision at the police station. Those were facts that Officer Bowers had personal knowledge of, having facilitated and observed the entirety of the phone call. And, the fact that the confidential informant had a phone number to reach Cisneros was self-evident, when the confidential informant used that number to arrange the controlled buy—there was no out-of-court statement involved. Accordingly, the trial court was correct in overruling Cisneros's objection at trial. When Officer Bowers went on to testify to the actual number used in contacting Cisneros, the defense counsel did not raise a new objection or renew the initial objection. A party's failure to object at trial generally precludes appellate review. State v. Warren, 55 Wn. App. 645, 649-50, 779 P.2d 1159 (1989). We decline to address Cisneros's argument about the admission of the actual phone number.

B. Officer Bowers's Conversations on Cisneros's Phone

Next, Cisneros argues that Officer Bowers was improperly allowed to testify to the fact that callers to Cisneros's phone attempted to purchase cocaine. During Officer Bowers's testimony, he stated that he took Cisneros's phone during the arrest, that it rang several times while he was investigating the scene, and that he answered it.

> Q. What happened when you answered the phone?
>
> [Bowers:] On two of the occasions, I was able to broker two crack cocaine deals.
>
> [Defense Counsel:] Objection, Your Honor. Any conversation -- anything that was said on that telephone is hearsay. It is an out-of-court statement; so anything that was said to the officer from anybody that was talking on the cell phone, at the other end of the cell phone, cannot come into evidence at this time.
>
> . . . .
>
> THE COURT: The Court will overrule the objection. The testimony is allowed, not for the truth of anything that was said on the phone, simply the fact that the phone rang, and people said something.
>
> . . . .
>
> A. I spoke to at least two people over the phone. I was able to broker, I believe, a hundred-twenty-dollar and a hundred-fifty-dollar crack cocaine deal.
>
> Q. And did the people who were calling ask for anyone in particular?
>
> A. They were --
>
> [Defense Counsel:] Objection. That is hearsay again.
>
> THE COURT: The Court will overrule. You may answer.

A. They were looking for a subject named Pablo.

Cisneros argues that this was inadmissible hearsay because it contains implicit out-of-court statements made by the callers to prove the truth of the matter asserted—presumably, to prove that Cisneros was a known drug dealer. Specifically, he argues that Officer Bowers should not have been allowed to testify that two of the callers asked for Cisneros. But, an "inquiry" is not assertive and is thus not a "statement" as defined by the hearsay rule. Robert H. Aronson, The Law of Evidence in Washington § 801.04, at 801-19 (4th ed. 2010); State v. Collins, 76 Wn. App. 496, 886 P.2d 243 (1995). In Collins, this court addressed nearly identical facts; an arresting officer answered several phone calls while in the defendant's apartment and later testified that the callers were seeking drugs, made references to cocaine transactions, and asked for the defendant, Larry Collins. 76 Wn. App. at 497-98. The court held that callers asking for the defendant by name made an inquiry, but no assertion. Id. at 498. It also held that statements by callers about wanting to buy drugs did not manifest an "intent to assert" that the defendant was a drug-dealer. Id. The Collins court concluded the detective's testimony about those inquiries was not hearsay. Id. The same reasoning applies here. The testimony that the callers to Cisneros's phone asked for Cisneros constitutes an inquiry, rather than a statement. Officer Bowers's testimony about the phone conversations was not hearsay, and the trial court did not err in admitting it.

C. The Phone Number of the Phone on Cisneros at his Arrest

Cisneros argues that the trial court should not have allowed Officer

Bowers to testify that he checked the number of Cisneros's cell phone and to identify what that number was. This argument is unsupported and unpersuasive. Officer Bowers had the phone in his possession. He checked the phone number of the phone. Accordingly, he had personal knowledge of what number was listed there, and he recorded that number at the time in his report. Furthermore, his testimony about that number was not about an out-of-court statement.

We reject Cisneros's hearsay arguments and hold that the trial court did not abuse its discretion in admitting Officer Bowers's testimony.

III. Classification of Out-of-State Offenses

Cisneros's offender score was calculated to be five. That score includes four points from his four prior convictions and one point from the two convictions at issue here. When a defendant is "sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score. . . ." RCW 9.94A.589. The State and the trial court made note of Cisneros's four prior convictions, both at sentencing and in the judgment and sentence. Those included: a 1999 conviction from Nevada, for possession for sale of a controlled substance, cocaine; a 2002 conviction from Nevada for unlawful possession of a controlled substance, cocaine; a 2005 conviction in Pierce County for unlawful delivery of a controlled substance; and a 2005 conviction in Pierce County for identity theft in the first degree.

It is the State's burden to show, by a preponderance of the evidence, that the record supports the existence and classification of out-of-state convictions.

State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). Cisneros points out that a trial court is required, under the Sentencing Reform Act of 1981 (SRA), chapter 9.94a RCW, to "classify" out-of-state offenses, before including them in the offender score. RCW 9.94A.525(3) provides, in relevant part: "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." In Ford, the Supreme Court read that language to mean that "classification is a mandatory step in the sentencing process under the SRA." 137 Wn.2d at 483. The Ford court also stated: "To properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Id. at 479.

Here, the State included Cisneros's two Nevada convictions on his judgment and sentence, as part of his criminal history and offender score. The best evidence of a prior conviction is a certified copy of the judgment. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). The State asserts that it provided copies of Cisneros's prior convictions at sentencing.[1] But, while this evidence meets the State's burden to show the existence of Cisneros's out-of-state crimes, it does not meet the State's burden of showing the classification of those crimes in accordance with Washington law. Ford, 137 Wn.2d at 480, 483. The trial court also failed to conduct such a classification on the record during

[1]The state asserts the judgment and sentence documents were at pages 120-180 of the designated clerk's papers. However, the designated clerk's papers received by this Court contain only pages 80-143. Pages 120-143 include copies of the two prior Washington convictions, but the prior convictions from Nevada are not present in the appellate record.

sentencing. Because there was no analysis of the comparability of Cisneros's out-of-state convictions we remand, with an opportunity for the State to prove the comparability of the Nevada offenses at resentencing. See, e.g., Mendoza, 165 Wn.2d at 930; Ford, 137 Wn.2d at 486.

IV. Clerical Errors in the Judgment and Sentence

Cisneros next argues that there are three errors in his judgment and sentence, requiring remand for correction. First, he argues that his judgment and sentence erroneously listed his maximum term for count I as 20 years, when the maximum term for the unlawful delivery of a controlled substance should be only 10 years. But, the trial court properly applied RCW 69.50.408 in doubling the maximum term: "Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized." Cisneros has a prior Pierce County conviction for delivery of a controlled substance. And, the Washington Supreme Court has expressly held that RCW 69.50.408 doubles the maximum penalty. In re Pers. Restraint of Cruz, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006). The trial court did not err by listing the maximum term for count I as 20 years.

Second, Cisneros argues that the sentence incorrectly listed the date of count II, unlawful possession of a controlled substance, as September 5, 2008, when it should have been October 1, 2008. The State concedes error, and correction of this clerical mistake is required.

Third, Cisneros argues that the trial court erred by listing one of his current offenses, unlawful possession of a controlled substance, in his criminal

history section. But, the trial court's placement of the offense is not an error, because it expressly indicates that the offense was a current offense, and Cisneros does not allege any resulting error in sentencing. Indeed, under RCW 9.94A.589(1)(a), where there are two current offenses as there are here, a second current offense should be used as if it were a prior conviction, for the purpose of the offender score. As the State points out, it is likely that the court included the current offense there amongst the prior offenses as a computational aid to ensure that it was properly reflected in the offender score.

V. Statement of Additional Grounds

Cisneros submitted a Statement of Additional Grounds (SAG), where he raises a number of new issues: he never waived his Miranda rights, so statements he made are not admissible; his right to a speedy trial was violated by the many continuances that were granted; the confidential informant's testimony was tainted by self-interest; and he received ineffective assistance of counsel. While a defendant is not required to cite to the record or authority for his SAG, "this court is not required to search the record to find support for the defendant's claims." State v. Meneses, 149 Wn. App. 707, 716, 205 P.3d 916 (2009), aff'd in part by 169 Wn.2d 586, 238 P.3d 495 (2010). Here, Cisneros does not explain his arguments or the underlying facts in a way that enables meaningful review on any of these complaints.

First, Cisneros does not point to any specific evidence or testimony that was erroneously admitted.

Second, Cisneros argues that the speedy trial rule was breached by the

failure to bring his case to trial within 60 days. Cisneros's trial was subject to a series of continuances, starting on October 29, 2008, 28 days after his arrest, which pushed the date of his trial beyond the 60 days provided for in CrR 3.3(b)(1). His trial, initially scheduled for November 24, 2008 was continued again in February, March, April, May, and June 2009, before finally going to trial in June and July 2009. But, a properly granted continuance tolls the speedy trial period. CrR 3.3(e)(3), (f)(2). Here, the trial court found, and noted on the record, the good cause justifying each continuance, such as the prosecutor's involvement in another trial and both the defense counsel's and the State's ongoing difficulty in scheduling vital witnesses for interviews or for testimony at trial. The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The decision is reviewed under an abuse of discretion standard. Id. Here, there was good cause and the trial court did not abuse its discretion in granting the continuances. Because the time during Cisneros's continuances was excluded from the speedy trial calculation under CrR 3.3(e)(3), his CrR 3.3 right to a speedy trial was not violated.

Next, Cisneros does not argue how or why the informant's testimony was tainted by self-interest, nor does he provide support for his claim that the informant's testimony was hearsay that should be barred.

Finally, he alleges he received ineffective assistance of counsel, but does not point to any particular behavior or decision on the part of his counsel, nor does he allege or show that he was prejudiced in any way by his representation.

None of Cisneros's arguments have merit.

We affirm the conviction and remand for resentencing and correction of the scrivener's error.

WE CONCUR: