IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID LEE SANDHOLM, Appellant.	No. 38772-7-II UNPUBLISHED OPINION

Hunt, J. — David Lee Sandholm appeals his sentence for second degree burglary. He contends that it is disproportionate to the seriousness of his crime and, therefore, violates the prohibition against cruel and unusual punishment in both the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution. In his statement of additional grounds (SAG) [1], he challenges his conviction based on his right to counsel, access to certain evidence, and the propriety of the State's rebuttal testimony. We affirm.

FACTS

David Lee Sandholm burglarized a St. Vincent De Paul thrift store, which keeps outdoor merchandise in a large fenced area attached to the main building. Sandholm stood on a chair and reached over the fence with a long pole in an attempt to acquire some of that merchandise.

[1] RAP 10.10.

Neighbor, Larry Rickbeil, observed this activity and told friends to call the police.

When Tacoma police officers arrived, Sandholm was near his truck, with two black "soaker" hoses attached to the tailgate, extending outward, as though trying to straighten them. Checking the area near the fence, one officer found a chair and a wooden pole with pliers or wire strippers fastened to the end to form a hook. Inside the fenced area, he saw some hoses that appeared identical to those attached to Sandholm's truck, except that the ones in Sandholm's possession had no fittings. Sandholm admitted that the pole with the hook was his, claiming he had used it to retrieve the hoses from blackberry bushes outside the fence.

The State charged Sandholm with second degree burglary. At trial, his friend testified that on the afternoon of the incident, Sandholm had arranged to go "four-wheeling" with her and others on vacant land near the thrift store; but he (Sandholm) had sent them on ahead while he searched the area next to the store for a piece of hose to use for transferring gas from a can into his truck tank. Sandholm did not testify. The jury convicted him as charged.

Sandholm's offender score was 12, based on 10 prior felony convictions, which included burglary, trespass, and theft. He also had 18 misdemeanor convictions, including vehicle prowl, theft, and shoplifting. His standard sentencing range for the current burglary was 51-68 months of confinement. Sandholm argued for an exceptional sentence downward, based on mitigating factors. But the court imposed 51 months of incarceration. Sandholm appeals.

ANALYSIS

I. Sentence

Through counsel, Sandholm argues that his sentence is unconstitutionally excessive in

light of the nature of his crime. The State asks us to dismiss this appeal because a standard range sentence is not appealable. RCW 9.94A.585(1). The State is correct that we will not review the trial court's discretionary decision to deny Sandholm's request for a mitigated sentence. But the challenge here is to the constitutionality of the sentencing reform act of 1981 (SRA) insofar as it provides the punishment imposed on Sandholm. That issue is properly before us and, therefore, we will review it.

Article I, section 14 of the Washington Constitution prohibits cruel punishment. *State v. Fain*, 94 Wn.2d 387, 392, 617 P.2d 720 (1980). Only punishment that is grossly disproportionate to the gravity of the offense, or, in other words, clearly arbitrary and shocking to the sense of justice, violates that prohibition. *State v. Draxinger*, 148 Wn. App. 533, 536, 200 P.3d 251 (2008), *review denied*, 166 Wn.2d 1013 (2009). In analyzing claims of cruel punishment, we consider (1) the nature of the offense, (2) the legislative purpose behind the statute that sets the guidelines for the punishment, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *State v. Thorne*, 129 Wn.2d 736, 773, 921 P.2d 514 (1996) (citing *Fain* at 397).

A. Nature of the Offense

Sandholm argues that his burglary involved no harm or threat to any person or property. But he does not account for the risk of harm inherent in all burglaries, where confrontations and more than property loss are possible. Moreover, although his sentence may appear harsh within the context of this single incident, Sandholm has a history of burglary and theft convictions that present an ongoing danger to the public and justify his 51-month sentence. *See State v. Rivers*,

129 Wn.2d 697, 714-15, 921 P.2d 495 (1996).

B. Legislative Purpose

The purposes of the SRA are (1) to ensure that punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; (2) to promote respect for the law by providing punishment which is just; (3) to provide commensurate punishment between offenders who commit similar offenses; (4) to protect the public; (5) to offer the offender an opportunity to improve himself; (6) to make frugal use of state and local government resources; and (7) to reduce the risk of reoffending in the community. RCW 9.94A.010.

Sandholm's argument ignores his criminal history. Lenience in the face of repeated offenses often results in additional crimes. *See State v. Garnier,* 52 Wn. App. 657, 664, 763 P.2d 209 (1988), *review denied*, 112 W.2d 1004 (1989), *overruled on other grounds by State v. Stephens*, 116 Wn.2d 238, 803 P.2d 319 (1991). Thus, it is a longstanding rule that repetition of criminal conduct aggravates the guilt of the last conviction and, therefore, justifies a heavier penalty. *Rivers*, 129 Wn.2d at 714-15. Offenders who have repeatedly put themselves and others at risk with their multiple violations of the law represent a clear danger to the public, one that incarceration neutralizes for at least the duration of the sentence.[2]

Sandholm argues that his exceptional term of incarceration unjustly denies him an opportunity for treatment of his drug problems. But the record shows that that he failed to avail himself of this opportunity when it was previously offered. For example, when he committed this burglary, he was on community custody for a previous conviction, for which drug treatment was a

[2] *See* RCW 9.94A.010, which states, "Reduce the risk of reoffending by offenders in the community," as a legislative purpose for the SRA.

condition of his probation; yet he made no apparent effort to participate in his treatment. And while he was awaiting sentencing for this most recent burglary, for which he had requested a below-standard-range sentence, he failed to appear for an evaluation to determine his eligibility for a Drug Offender Sentencing Alternative (DOSA)[3] sentence. Given the circumstances of this case, Sandholm's sentence is consistent with the legislative purposes of the SRA.

C. Punishment in Other Jurisdictions

Using Idaho, Oregon, and California for comparison, Sandholm contends that he would have received considerably shorter sentences in other jurisdictions. Again, he fails to take his criminal history into account, which would undoubtedly result in longer sentences than the minimums on which he focuses. For example, the Idaho Court of Appeals upheld a five-year sentence for second degree burglary: Rejecting that defendant's argument that the sentence violated cruel and unusual punishment, the court held that five years was the minimum sentence available in light of the defendant's criminal history. *State v. Angel*, 103 Idaho 624, 626, 651 P.2d 558 (1982). Angel's five-year sentence in Idaho was longer than Sandholm's 51-month sentence here. Thus, Sandholm's argument on this point fails.

D. Punishment for Other Crimes in Washington

Sandholm also seeks to compare his crime with third degree theft by focusing on the value of the property taken. But that is not a valid comparison: Theft is not a prerequisite for or an element of burglary, and value is irrelevant. On the contrary, burglary involves unlawful entry into a building[4] with intent to commit a crime inside, conduct that can result in many kinds of

[3] RCW 9.94A.660.

harm.

Again, Sandholm fails to take into account his criminal history. Even misdemeanors can properly result in long sentences where multiple crimes are involved. *See Wahleithner v. Thompson,* 134 Wn. App. 931, 939-40, 143 P.3d 321 (2006). And here, as we have already noted, Sandholm's extensive criminal record increased his statutory standard sentencing range, such that comparison to sentences for lesser crimes is not appropriate.

Sandholm having failed to show that any of the *Fain* factors support his claim, we hold that the SRA as applied here does not violate constitutional bars to cruel and unusual punishment.

II. SAG Issues

A. Continuance

In his SAG, Sandholm first argues that the trial court denied him the right to the attorney of his choice because it refused to grant a continuance to provide time for him to hire a replacement for his appointed counsel. This argument fails.

Among the components of the constitutional right to counsel is "'the right to a reasonable opportunity to select and be represented by chosen counsel.'" *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994) (quoting *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir.1978)), *review denied*, 126 W.2d 1016 (1995). But that right does not include the right to delay the proceedings unduly. *Roth*, 75 Wn. App. at 824 (citing *United States v. Lillie*, 989 F. 2d 1054,

[4] Jury instruction 9 explained that for burglary purposes a "building" includes any fenced area used mainly for carrying on business or for the use, sale, or deposit of goods. Clerk's Papers (CP) at 45. The State argued that the "legislature specifically considered fenced in properties" in promulgating RCW 9A.52.030 (1). Report of Proceedings (RP) at 363. And Sandholm did not argue that the fenced area into which he intruded was not a "building."

1056 (9th Cir. 1993)). Trial courts have broad discretion in ruling on motions for continuances based on the right to counsel; "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'" violates the defendant's right to counsel. *Roth*, 75 Wn. App. 824 (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)) (internal quotation marks omitted).

The burglary charge against Sandholm had been pending for 240 days. His trial had already been continued four times. Yet on the day trial was finally scheduled to begin, Sandholm requested this continuance for another 10 weeks to allow new defense counsel adequate time to prepare. Sandholm did not explain why he had not obtained different counsel earlier. Sandholm's was not a "'justifiable request for delay.'" *Roth*, 75 Wn. App. at 824 (quoting *Morris*, 461 U.S. at 11-12). We hold, therefore, that the trial court did not abuse its discretion in refusing to delay the trial again.

Sandholm next claims that in denying his request for a continuance, the trial court improperly denied him access to evidence, namely the CAD[5] log at trial to impeach Rickbeil's testimony. Apparently, the 911 operator had been told that someone was actually removing things from the fenced enclosure. Rickbeil, however, testified that he did not see Sandholm remove anything. The 911 tape had been erased; thus the only evidence of what had been said during the 911 call was the CAD log, which was already in defense counsel's possession. The trial court's denial of a continuance did not deny Sandholm access to evidence.

[5] "CAD" is an abbreviation for "Computer Aided Dispatch" or "Computer Assisted Dispatch" software used by police departments. See www.911dispatch.com. At trial, the parties referred to the "CAD report" and the "CAD log." RP at 25-26.

B. Rebuttal Testimony

Sandholm also asserts that the State presented improper rebuttal testimony—the two officers involved in the investigation whom the State called to rebut defense witnesses' testimony that Sandholm was only looking for a piece of cast-off hose to use to transfer gas from a can to his truck. The officers' rebuttal testimony included descriptions of the hoses in Sandholm's possession. Sandholm contends that testimony did not rebut any evidence before the court; this contention is not correct. The description of the hoses as new or almost new "soaker" hoses was relevant to the defense testimony about the intended use of old cast-off hoses and the area in which they were found. Accordingly, this testimony was proper rebuttal.

C. Effective Assistance of Counsel

Finally, Sandholm asserts that trial counsel was unprepared for trial and did not provide effective assistance. He complains that counsel (1) made no pretrial motions, (2) did not interview witnesses, (3) did not propose an instruction on the lesser included crime of trespass, (4) did not present evidence to impeach Rickbeil's testimony, (5) did not challenge Rickbeil's estimate of the distance from his deck to the St. Vincent de Paul property, (6) did not enter into evidence the hoses in question, and (7) did not object to the rebuttal testimony. These arguments fail.

To prove ineffective assistance, a defendant must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). As to his first two complaints, Sandholm does not indicate what motions counsel should have made or what information he should have obtained from witness interviews. As to his third complaint, a

trespass instruction could properly have been given, but it would not likely have been of any benefit to Sandholm: His use of the pole strongly supported an inference of criminal intent, making any trespass a burglary.

His fourth claim apparently pertains to counsel's failure to offer the CAD log into evidence. Admissibility of this evidence is questionable. *See State v. Davis*, 154 Wn.2d 291, 299-306, 111 P.3d 844 (2005), *aff'd, Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2226, 165 L. Ed. 2d 224 (2006); and *State v. Powers*, 124 Wn. App. 92, 94-102, 99 P.3d 1262 (2004) (calls to police not admissible if testimonial, calls for assistance not testimonial, and calls reporting crimes generally testimonial). Even if the CAD log were admissible, it would not have helped Sandholm: Rickbeil did not make the 911 call; thus, the CAD log of the call could not have been used to impeach him.

The record does not support Sandholm's fifth complaint. Contrary to his assertion, defense counsel did challenge Rickbeil's "distance" testimony: Counsel presented a video that apparently indicated Rickbeil had significantly underestimated the distance between the deck and the thrift store property. As to Sandholm's sixth complaint, the hoses were not needed to prove the burglary; therefore, their condition was largely irrelevant. Regarding the seventh complaint, as noted above, the rebuttal testimony was proper; thus, there was no basis for objection. We hold that Sandholm has not met the requirements of the *Strickland* test to show ineffective assistance of counsel: Sandholm has not shown either deficient performance by defense counsel

or prejudice from his alleged failures.

We affirm.

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.

_____
Hunt, J.

We concur:

_____
Van Deren, CJ.

_____
Penoyar, J.