IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MATTHEW VERNON PRICE, Appellant.	No. 41612-3-II UNPUBLISHED OPINION

Worswick, C.J. — Matthew Price appeals his second degree burglary and second degree possession of stolen property convictions.[1] On appeal, Price argues that the trial court (1) erred in admitting Price's statements to Montesano police officers, (2) violated Price's right to be free from double jeopardy by sentencing him on his convictions for both burglary and possession of stolen property, and that the State (3) failed to present sufficient evidence to sustain his possession of stolen property conviction. We affirm.

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[1] Price also appealed his exceptional five year sentence, arguing that the sentencing court (1) lacked proof of his criminal history, (2) erred in making a judicial determination that Price's unscored misdemeanor history led to a sentence that was clearly too lenient, (3) lacked jurisdiction to impose an exceptional sentence, (4) violated separation of powers by circumventing the legislative early release statute, (5) abused its discretion in refusing to consider Price's request for a drug offender sentencing alternative sentence, and (6) erred in increasing Price's offender score based on the same criminal conduct.

The State conceded that it did not meet its burden of establishing Price's criminal history at sentencing and that the court lacked authority to impose an exceptional sentence based on the court's own finding that Price's unscored misdemeanor history led to a standard range sentence that was too lenient. After considering these issues, we accepted the State's concessions and entered an order vacating Price's exceptional sentence and remanding for imposition of a standard range sentence. Order of Partial Remand, *State v. Price*, No. 41612-3-II, (Wash. Ct. App. March 23, 2012). Accordingly, the six issues relating to Price's sentence are no longer before us.

FACTS

Between midnight and 5:00 am on July 24, 2010, Price and two of his friends burglarized Tony's Shortstop, a convenience store at a Shell gas station in Montesano, Washington. Investigating officers discovered plywood and drywall had been removed from the back wall of Tony's Shortstop, forming a hole approximately six to eight feet above the ground. The store's owner, Tony Kim, reported that approximately $3,695.04 in cigarettes, chewing tobacco, and lottery scratch tickets were stolen and that damage to the building totaled approximately $3,513.98. In investigating this crime, the Montesano police placed a notice in the local paper about the burglary and their investigation.

Responding to the notice in the paper, Roberta Falkner called the police and notified them that she believed that Price, her boyfriend, was involved in the burglary. Falkner reported that both she and Price were at home at 10:00 pm on July 23, when she went to sleep but that he was gone when she awoke on the morning of July 24. Price arrived home shortly thereafter in a green pickup truck and was reluctant to tell Falkner where he had been. Sometime later, Falkner found several unscratched lottery tickets in a broken and seldom used dresser drawer in their home.

Police searched Falkner and Price's home and seized 10 scratch tickets. The scratch tickets matched the serial numbers of the tickets taken from Tony's Shortstop. Police then set out to interview Price.

Montesano police discovered that Price was in custody on unrelated charges in neighboring Jefferson County. Montesano chief of police, Brett Vance, went to the Jefferson County jail with a fellow officer to interview Price on July 29. In the jail's interview room, the

officers advised Price of his *Miranda*[2] rights according to a standardized form. Price acknowledged that he understood his rights, signed the standardized *Miranda* form, and agreed to speak with the officers.

Price denied being in Montesano on July 24. Instead, Price claimed that he had been out fishing in a rural area with a friend when he ran into another friend, Mike Simpson and Mike's girl friend Mary Stutesman. Price said that because Simpson owed him money, Simpson gave Price 15 or 20 lottery scratch tickets. But even though Price had "a winner," he was not able to collect on it because it was not "validated." Ex. 24.

Price further stated that Jefferson County jail officials collected some of these tickets when they processed his personal property. Montesano officers then seized five additional scratch tickets from Price's property in the Jefferson County jail, which also matched the serial numbers of the stolen tickets. The face value of the scratch tickets police seized from Price's home and from his personal effects during their interview totaled just over $30.00.

After interviewing Price, officers investigated his statements and discovered that his alibi was not accurate. Accordingly, Montesano officers returned to the Jefferson County jail to interview Price for a second time on July 31. Although Price said he remembered his rights, officers again read him his *Miranda* rights from a standardized form. Price again acknowledged that he understood his rights by signing that form and agreed to speak with the officers about the Montesano burglary. This time, in response to the officer stating that video surveillance footage placed him in Montesano at the time of the burglary, Price admitted that he had been in

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Montesano and at Tony's Shortstop.

Price further stated that in the early morning hours of July 24, while on route to a casino with Simpson and Stutesman, he overheard them discussing breaking into a convenience store to steal money. Price stated that he overheard Simpson and Stutesman talking about how one of Stutesman's friends used to work at Tony's Shortstop and told them they could get in through an old window. Then, Simpson, Stutesman, and Price stopped in Montesano, near Tony's Shortstop. Price said that Simpson exited the truck with an army bag and tools, including a bolt cutter, a hatchet, and a spike and walked towards Tony's Shortstop. Price denied ever entering Tony's Shortstop.

The State charged Price with second degree burglary and second degree possession of stolen property.[3] The trial court conducted a CrR 3.5 hearing. At this hearing, Montesano police officers testified about Price's July 29 and July 31 statements as described above. The trial court found that the officers read Price his *Miranda* rights and that Price knowingly, intelligently, and voluntarily waived them when he agreed to speak with the officers. Thus, the trial court found Price's statements were admissible.[4]

At trial, Stutesman testified that when she, Simpson, and Price left Aberdeen in the early

[3] The State alleged alternative theories of the crimes. The State alleged that Price was liable for the crimes charged as a principal or that he was liable as an accomplice.

[4] The trial court made its findings aloud at the CrR 3.5 hearing but it failed to enter written findings of fact or conclusions of law after the hearing. Nonetheless, the trial court entered a stipulated order finding Price's statements were admissible and, further, its oral findings are sufficient to permit appellate review in accordance with *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008).

morning hours of July 24 in her green pickup truck, it was Price who brought up the idea of committing a burglary. Stutesman claimed that she was not involved in that discussion and that, after they arrived in Montesano, it was Price not Simpson, who took the tools from the back of the truck and headed for Tony's Shortstop. Stutesman further testified that after the burglary Simpson returned to the pickup truck and instructed her to drive around the building to meet Price by the dumpsters. Thus, immediately after the burglary, Simpson and then Price got back into Stutesman's green pickup truck with her and the three of them eventually returned to Aberdeen together. Price took some of the stolen cigarettes and scratch tickets because "they were his" since he took them from the store. Report of Proceedings (RP) at 79-80. Moreover, Stutesman testified that Price later asked for additional cigarettes from Simpson and Stutesman. Lastly, Stutesman claimed that Price never attempted to dissuade Simpson from burglarizing Tony's Shortstop.

Conversely, Price testified at trial that Simpson and Stutesman were already discussing a prospective burglary when they picked him up at his Aberdeen home. Further, according to Price, he repeatedly tried to talk Simpson out of committing the burglary and he neither helped cut the hole in the back wall of Tony's through which Simpson entered nor entered the store himself.

Although Tony's Shortstop is within close proximity to the Montesano Police Department, Price admitted he did not walk there to alert officers of the burglary in progress because he feared getting in trouble. Price further testified that he did accept some lottery scratch tickets and one pack of cigarettes from Simpson in partial repayment of a loan.

The jury found Price guilty of both second degree burglary and second degree possession

of stolen property. Price requested a drug offender sentencing alternative (DOSA) sentence, claiming that he has a severe addiction problem and was "high on methamphetamine" during the burglary.[5] Clerk's Papers (CP) at 94-95. The State countered that there was no evidence that Price had a substance abuse problem. The sentencing court denied Price's request for a DOSA sentence because it wanted to sentence him without delay.

The State also submitted a chart it prepared, summarizing Price's alleged criminal history and listing 20 convictions, most of which were misdemeanors. But the State offered only one official record documenting Price's prior convictions. That official document showed that Price pleaded guilty to and was sentenced for committing second degree vehicle prowling and third degree theft in Jefferson County on July 25, only one day after the burglary at Tony's Shortstop. Both of those crimes were gross misdemeanors. Arguing that Price had no respect for property rights, instead of Price's standard range sentence of 17 to 22 months, the State recommended an exceptional sentence of five years.

Without a jury's factual finding, the sentencing court found that Price's "unscored misdemeanor history result[ed] in a sentence that is too lenient." CP at 97. In imposing this exceptional sentence, the court stated:

> [B]ottom line, when I looked at all of [the evidence], I didn't believe one word you said, not one word.
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> . . . .
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> And I think you ought to go for five, and I find the [State's] recommendation is appropriate.

[5] Although sentencing issues are no longer before us because we vacated Price's sentence and remanded to the sentencing court by order dated March 23, 2012, we set out the applicable sentencing facts for context. Order of Partial Remand, *State v. Price*, No. 41612-3-II (Wash. Ct. App. March 23, 2012).

> The bad news is, because they're property crimes . . . he's probably eligible for the . . . Blue Light Special; you know the 50 percent off time. You know, he'll be out before you get the [C]ourt of [A]ppeals' decision back.

RP (Dec. 13, 2010) at 6-7. Price appealed both his conviction and his sentence.

ANALYSIS

I. Custodial Statements

Price argues for the first time on appeal that, although the State established that Montesano police officers complied with Price's *Miranda* rights, those officers obtained Price's statements while he was in custody in neighboring Jefferson County on an unrelated matter. Thus, Price argues that the trial court erred in admitting Price's statements to Montesano police because the State failed to show that those statements were untainted by previous *Miranda* violations by officers in Jefferson County. Price cannot raise this issue for the first time on appeal.

To preserve a challenge to post-*Miranda* custodial statements for appeal, an appellant must raise the issue during the CrR 3.5 hearing or during the fact-finding portion of trial. *State v. Campos-Cerna*, 154 Wn. App. 702, 710, 226 P.3d 185 (2010), *review denied*, 169 Wn.2d at 1021 (2010); RAP 2.5(a)(3). However, we may consider a challenge to the appellant's waiver of his or her *Miranda* rights raised for the first time on appeal if the alleged error is manifest and affects a constitutional right. *Campos-Cerna*, 154 Wn. App. at 710. But where the record on appeal does not contain the facts necessary to evaluate the claimed error, the appellant cannot show actual prejudice and the error is not manifest. *State v. Jones*, 163 Wn. App. 354, 359-60, 266 P.3d 886 (2011). Only if an appellant establishes both the presence of a manifest error and

that it affects a constitutional right do we review the merits to determine if that error was harmless beyond a reasonable doubt. *State v. Grimes*, 165 Wn. App. 172, 187-88, 267 P.3d 454 (2011).

Here, Price argues that the State failed to meet its burden of showing that Price's statements to Montesano officers were not tainted by any earlier *Miranda* violations by Jefferson County officers. But Price does not argue that his statements to Montesano officers were involuntary. Moreover, the trial court found at the end of the CrR 3.5 hearing that "[t]here's no dispute that [Price] was properly advised of his *Miranda* rights on both occasions. [Price] understood his rights, he stated so, he waived his rights and agreed to talk to the [Montesano] officers on both occasions . . . . So [Price's statements to Montesano police officers are] admitted for [CrR] 3.5 purposes." RP at 16. Price does not challenge those findings.

Although a *Miranda* violation would implicate Price's constitutional rights, Price failed to preserve the issue because he failed to raise it during the CrR 3.5 hearing, and failed to cite any authority for the proposition that his statements to Montesano officers after proper *Miranda* advisements could be tainted by potential *Miranda* violations by Jefferson County. *See State v. Spearman*, 59 Wn. App. 323, 325-26, 796 P.2d 727 (1990). There is no support in the record for Price's claim that the trial court prejudiced him by admitting his statements to Montesano police because those statements were possibly tainted by the actions of Jefferson County officers. Price acknowledges that the record does not contain the facts required to review this issue. Because the record does not contain the facts necessary for us to review Price's alleged *Miranda* error and because there is no support in the record for Price's claim that this alleged error prejudiced Price,

the error is not manifest in accordance with *Jones*. 163 Wn. App. at 359-60. And because Price's alleged error is not manifest, Price cannot raise it for the first time on appeal. *Jones*, 163 Wn. App. at 359-60. Thus, Price's argument fails.

II. Double Jeopardy

Price next argues that the trial court violated his right to be free from double jeopardy when it sentenced him on his convictions for both second degree burglary based on theft and also possession of property stolen during that theft. Thus, Price argues that both convictions must be reversed. We disagree.

Double jeopardy violations are questions of law, which we review de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). Both our federal and state constitutions prohibit "'being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense.'" *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (quoting *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)); U.S. Const. amend. V; Wash. Const. art I, § 9. For purposes of double jeopardy, a conviction, even without an accompanying sentence, can constitute punishment. *Turner*, 169 Wn.2d at 454-55; *Womac*, 160 Wn.2d at 656-58.

However, a trial court does not violate double jeopardy protections if it enters convictions for multiple crimes that the legislature expressly intends to punish separately. *State v. Elmore*, 154 Wn. App. 885, 899-900, 228 P.3d 760 (2010), *review denied*, 169 Wn.2d at 1018 (2010). The legislature enacted the burglary antimerger statute that expressly allows for a defendant to be convicted and punished separately for burglary and all crimes committed during that burglary. RCW 9A.52.050; *Elmore*, 154 Wn. App. at 900. The fact that the State can establish multiple offenses with the same conduct does not alone violate double jeopardy. *State v. Mandanas*, 163 Wn. App. 712, 720 n. 3, 262 P.3d 522 (2011).

Price first argues that his convictions violate double jeopardy because the State had to prove one offense in order to prove the other. However, the elements the State had to establish beyond a reasonable doubt for Price's burglary conviction[6] differ from those required for his possession of stolen property conviction.[7] Moreover, the trial court instructed the jury that it must decide each charge separately and that its verdict on one charge could not control its verdict on the other charge. Thus, this argument fails.

Next, Price argues that courts violate double jeopardy protections if they enter multiple punishments for convictions based on the same statutory chapter because such offenses are "presumed to constitute a single unit of prosecution." Br. of Appellant at 10. Price goes on to argue that the trial court violated double jeopardy by entering two convictions because theft and possession of stolen property are both codified in the same statutory chapter.[8] But the trial court did not enter convictions for theft and possession of stolen property. Instead, the trial court entered convictions for burglary and possession of stolen property. Price's burglary conviction is based on RCW 9A.52.030(1) and his possession of stolen property conviction is based on RCW

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[6] To convict Price of second degree burglary, the State had to prove that Price unlawfully entered the building of another with the intent to commit a crime against a person or property therein. RCW 9A.52.030. The trial court instructed the jury that, to convict Price of second degree burglary as charged, the State had to prove Price, or his accomplice, unlawfully entered the building with the intent to commit theft.

[7] To convict Price of second degree possession of stolen property, the State had to prove that Price knowingly possessed property (other than a firearm or a vehicle) that he knew was stolen and that exceeded $750.00 in value. RCW 9A.56.160(1)(a). The trial court instructed the jury that, to convict, the State had to prove that Price "knowingly . . . receive[d], retain[ed], possess[ed], conceal[ed], or dispose[d] of stolen property knowing that it has been stolen . . . ." CP at 62.

[8] Chapter 9A.56 RCW.

9A.56.160(1)(a). Because Price's convictions are clearly based on different statutory chapters, this argument fails.

Price next claims that we must reverse both of his convictions because his burglary conviction is based on theft, thus the burglary and possession of stolen property charges constitute a single crime. However, the legislature enacted an antimerger provision specifically allowing courts to enter separate convictions for burglary as well as all other crimes committed in the course of that burglary. RCW 9A.52.050. Accordingly, the State *could have* charged Price with both burglary and theft, but it did not. Instead, the State charged Price with burglary and possession of stolen property. Then, the jury found Price guilty as charged and the trial court entered convictions for burglary and possession of stolen property. A trial court does not violate a criminal defendant's right to be free from double jeopardy by entering convictions for both burglary and for possession of stolen property, even if that property was taken during the burglary. *See State v. McPhee*, 156 Wn. App. 44, 51-57, 230 P.3d 284 (2010), *review denied*, 169 Wn.2d at 1028 (2010).

III. Sufficiency of the Evidence

Price next argues that the State presented insufficient evidence to sustain his conviction for possession of stolen property. We disagree.

In reviewing a challenge to the sufficiency of the evidence, we consider the evidence and all reasonable inferences from it in the light most favorable to the State. *McPhee*, 156 Wn. App. at 62. We reject a challenge to the sufficiency of the evidence if any rational trier of fact could have found that the defendant committed the crimes charged beyond a reasonable doubt.

McPhee, 156 Wn. App. at 62. By challenging the sufficiency of the evidence, a defendant admits the truth of all of the State's evidence. *McPhee*, 156 Wn. App. at 62.

To convict Price of second degree possession of stolen property, the State had to prove that Price knowingly possessed property (other than a firearm or a vehicle) that he knew was stolen and that exceeded $750.00 in value. RCW 9A.56.160(1)(a). An accomplice is guilty of the same underlying crime as the principal actor. RCW 9A.08.020(2)(c). A person can be liable as an accomplice if, with knowledge that his or her act will promote or facilitate a crime, he or she either "solicits, commands, encourages, or requests . . . [another] person to commit [the crime.]" RCW 9A.08.020(3)(a)(i).

In arguing that the State failed to present sufficient evidence that Price possessed stolen property worth at least $750.00, Price contends that he cannot be liable for second degree possession of stolen property as an accomplice under these facts. Specifically, Price asserts that the State only showed that Price encouraged knowing possession of stolen property by asking Simpson for additional cigarettes *after* the burglary.

However, Tony Kim testified that someone stole $3,695.04 worth of cigarettes, chewing tobacco, and lottery scratch tickets from Tony's Shortstop. Price admitted that he was at Tony's Shortstop the night of the burglary. Stutesman testified that Price was the person who took the tools from the back of the truck and headed for Tony's Shortstop. Stutesman further testified that immediately after the burglary, both Price and Simpson got into the pickup truck. Then, Price exerted control over the stolen property by participating in dividing up the stolen items from Tony's Shortstop, and by taking cigarettes and scratch tickets "because they were his." RP at 79-

80. A reasonable inference from this evidence is that, in the moments after the burglary, Price, Simpson, and Stutesman together possessed all $3,695.04 worth of the stolen scratch tickets and cigarettes in the pickup truck and that they then distributed that stolen property among themselves. Therefore, there is sufficient evidence to sustain Price's conviction as either a principal or as an accomplice. Thus, Price's argument fails.

Affirmed.

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.

Worswick, C.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.