IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS LEWIS HALL, Appellant.	No. 41774-0-II UNPUBLISHED OPINION

Van Deren, J. — Thomas Lewis Hall appeals his sentence following his convictions for failure to register as a sex offender and unlawful manufacture of a controlled substance with a school bus route stop enhancement. He argues that the State failed to prove his prior convictions that the trial court used to determine his offender score and, thus, remand for resentencing is necessary. Because Hall did not stipulate to his prior convictions and the State did not prove their existence by a preponderance of the evidence, we agree and remand for resentencing. Hall argues further that the State must be held to the record at the time of sentencing and may not present new evidence at resentencing. Under RCW 9.94A.530(2), the parties may present evidence relating to Hall's criminal history at resentencing. Accordingly, we remand to the trial court for resentencing where both parties may present additional evidence.

FACTS

The State charged Hall with failure to register as a sex offender (count I) and unlawful

manufacture of a controlled substance, to wit: marijuana, with a school bus route stop enhancement (count II). At his bench trial, Hall appeared pro se with standby counsel present.[1] As part of the State's evidence on the charge of failure to register as a sex offender, the State successfully offered, without objection, a certified copy of the March 22, 1991, judgment and sentence for Hall's prior convictions for second degree rape and unlawful imprisonment.[2] In the criminal history section, the March 22, 1991, judgment and sentence listed a prior conviction for indecent liberties.[3] The trial court convicted Hall as charged.

Hall requested that his standby counsel represent him at sentencing. The State recommended that the trial court sentence Hall to 12 months for failure to register as a sex offender, 18 months for unlawful manufacture of a controlled substance, and to 24 months for the school bus route stop enhancement—to be served consecutively to the concurrent sentences for failure to register and unlawful manufacture—resulting in 42 months' total confinement. The State's recommendation was on the high end of the standard ranges for each count. On Hall's behalf, standby counsel recommended a sentence at the low end of the standard ranges. Hall also argued that the school bus route stop enhancement was not a proper enhancement for a manufacturing charge. The trial court adopted the State's sentencing recommendation.

The judgment and sentence entered in this case listed five prior convictions in the criminal

---

[1] "[S]tandby counsel's role is to provide the pro se defendant with technical information and 'to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.'" *State v. Pugh*, 153 Wn. App. 569, 580, 222 P.3d 821 (2009) (internal quotation marks omitted) (quoting *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d 829 (1987)); *see also State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001).

[2] Hall committed second degree rape and unlawful imprisonment on August 10, 1990. He was sentenced on March 22, 1991, in King County.

[3] Hall was sentenced for indecent liberties on April 11, 1983, in King County.

history section: indecent liberties, second degree rape, unlawful imprisonment, possession of marijuana, and battery. Hall's resulting offender score was not discussed on the record, but the judgment and sentence show it as seven for failure to register and as four for unlawful manufacture of a controlled substance.

Hall refused to sign the judgment and sentence and stated, "Since I don't agree with the proceedings, I don't agree with this sentence." Report of Proceedings (RP) (Jan. 7, 2011) at 12. Hall also refused to sign a stipulation on his prior record and offender score.

Hall's standby counsel informed the sentencing court of Hall's objection to the standard range and his prior criminal history. The following exchange took place between Hall's standby counsel and the sentencing court:

> [THE STATE]: Your Honor, the State would request further that you make a finding that the Court is counting Mr. Hall's prior sex offenses and prior offenses in the offender score that the Court sentenced him on today. And the State did provide the certified Judgment and Sentence related to the underlying sex offenses to the Court during the course of the trial and I believe those are part of the trial record.
>
> [The Court]: That's correct.
>
> [The State]: Would the Court like me to just indicate that finding on the—I could put it on the stipulation. Would that be the—
>
> [The Court]: That's fine. It's right in the Judgment and Sentence what his criminal history is and I've been advised and there wasn't any objection to what his standard range was for each count.
>
> [Hall's Standby Counsel]: And, Your Honor, Mr. Hall is not signing the standard range. He indicates he believes it to be inaccurate. He believes several of these crimes are not him. And that's what he's told me, Your Honor.
>
> [The Court]: And the State has just indicated that the Judgments and Sentences were provided and admitted during the trial to verify his criminal history.
>
> [Hall's Standby Counsel]: I'm not arguing with the Court. I'm simply telling the Court that Mr. Hall believes that these are not his convictions and he is going to decline to sign this.

RP (Jan. 7, 2011) at 15-16. Hall's standby counsel signed both the judgment and sentence and

the stipulation on prior record and offender score. Standby counsel wrote "refused to sign" in place of Hall's signature on both documents. Clerk's Papers (CP) at 99. Hall timely appeals his sentence.

ANALYSIS

I. Standard of Review

"We review a sentencing court's calculation of an offender score de novo." *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). "Prior convictions are used to determine the offender score which in turn is used to determine the applicable presumptive standard sentence range." *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796 (1986) (citing former RCW 9.94A.360 (1984);[4] former RCW 9.94A.370 (1984)).[5] "[I]llegal or erroneous sentences may be challenged for the first time on appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "[U]se of a prior conviction as a basis for sentencing under the [Sentencing Reform Act of 1981] is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence."[6] *Ford*, 137 Wn.2d at 479-80; *see also* RCW 9.94A.500(1) (stating the preponderance standard). Accordingly, "'[i]t is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination.'" *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540 (2010) (quoting *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009)).

[4] Recodified as RCW 9.94A.525 by Laws of 2001, ch. 10, § 6.

[5] Recodified as RCW 9.94A.530 by Laws of 2001, ch. 10, § 6.

[6] A convicted defendant has a liberty interest protected by minimal due process which is satisfied by requiring the State to prove prior convictions used for sentencing by a preponderance of the evidence. *Ammons*, 105 Wn.2d at 186.

II. Evidence of Prior Convictions

The sentencing court found that Hall's criminal history included Washington convictions for indecent liberties, second degree rape, and unlawful imprisonment; and out-of-state convictions for possession of marijuana and battery. Hall argues that the State failed to prove the existence of the prior convictions that support the sentencing court's determination of his offender score.[7] In response, the State argues that Hall waived any objection by stipulating to his prior offenses and to the calculation of his offender score and, alternatively, that the State provided sufficient evidence to meet its burden. We hold that (1) Hall did not stipulate to his prior offenses and calculation of his offender score and that (2) the State's evidence was insufficient to support the trial court's determination of Hall's offender score.

A. Stipulation

The State argues that Hall waived objection to the trial court's calculation of his offender score by stipulating to his prior offenses at sentencing. Because Hall did not sign the stipulation, we disagree.

"[T]he State must provide evidence of a defendant's criminal history, generally a certified copy of the judgment and sentence, unless the defendant affirmatively acknowledges

[7] Hall does not argue that the prior convictions do not exist, only that the State did not meet its burden of proving that they exist. "The absence of any argument as to the accuracy of the criminal histories presented by the State should not be construed against the defendants." *Mendoza*, 165 Wn.2d at 926 n.6 (same situation).

the criminal history on the record."[8] *Mendoza*, 165 Wn.2d at 930. "[T]he court may rely on the defendant's stipulation or acknowledgement of prior convictions to calculate the offender score." *State v. James*, 138 Wn. App. 628, 643, 158 P.3d 102 (2007). Agreement with the ultimate sentencing recommendation is not deemed an affirmative acknowledgement of the prosecutor's asserted criminal history. *Mendoza*, 165 Wn.2d at 928.

In *State v. Calhoun*, 163 Wn. App. 153, 158 n.2, 257 P.3d 693 (2011), *review denied*, 173 Wn.2d 1018 (2012), the record contained a "'Stipulation on Prior Record and Offender Score'" labeled for use with guilty pleas even though the defendant was convicted following a jury trial. The document was signed by the defendant, but someone had written on the document, "'Defendant objects to the calculation of his offender score.'" *Calhoun*, 163 Wn. App. at 158 n.2, quoting *Calhoun* Clerk's Papers at 16). Notwithstanding the signed document, the parties seemed to agree that the defendant had not stipulated to either his offender score or prior history and that the record did not reveal how or why the "stipulation" was signed or entered into the record. Therefore, this court did not rely on the stipulation to resolve the case.

Similarly, our record here contains a document entitled "Stipulation on Prior Record and Offender Score." CP at 97. The stipulation is signed by the deputy prosecuting attorney and Hall's standby counsel, but Hall refused to sign it. The record does not show why it was signed by Hall's standby counsel or became part of the record without Hall's signature.

Here, Hall clearly refused to stipulate to the listed prior convictions and offender score by

[8] In 2008, the legislature amended RCW 9.94A.530(2) to provide that failure to object to a prosecutor's statement of criminal history constitutes acknowledgement of the criminal history. Laws of 2008, ch. 231, § 4. We held this amendment unconstitutional on due process grounds in *State v. Hunley*, 161 Wn. App. 919, 928-29, 253 P.3d 448, *review granted*, 172 Wn.2d 1014, (2011). Because the State does not argue that Hall acknowledged his criminal history by failing to object, we do not rely on *Hunley* in reaching our decision in this case.

refusing to sign the stipulation, and Hall did not otherwise affirmatively acknowledge the listed prior convictions. On the contrary, he objected on the record to the standard ranges and the alleged prior convictions. When the trial court indicated that there was not an objection to Hall's standard range for each count, Hall's standby counsel corrected the trial court:

> [Hall's Standby Counsel]: And, Your Honor, Mr. Hall is not signing the standard range. He indicates he believes it to be inaccurate. He believes several of these crimes are not him. And that's what he's told me, Your Honor.
>
> [The Court]: And the State has just indicated that the Judgments and Sentences were provided and admitted during the trial to verify his criminal history.
>
> [Hall's Standby Counsel]: I'm not arguing with the Court. I'm simply telling the Court that Mr. Hall believes that these are not his convictions and he is going to decline to sign this.[9]

RP (Jan. 7, 2011) at 15-16.

Nevertheless, the trial court accepted the State's listed criminal history and sentenced Hall accordingly. But the record on appeal does not support the conclusion that Hall waived his objection to the State's failure to meet its burden to prove his prior convictions by stipulating or by affirmatively acknowledging his prior criminal history. Therefore, the State must be held to its burden.

B. Proof of Prior Convictions

Hall argues that the State did not prove his prior convictions by a preponderance of the evidence. We agree.

"[T]he best method of proving a prior conviction is by the production of a certified copy of the judgment, but 'other comparable documents of record or transcripts of prior proceedings' are admissible to establish criminal history." *Adolph*, 170 Wn.2d at 568 (quoting *Ford*, 137

[9] Standby counsel is likely referring to the before-mentioned stipulation.

Wn.2d at 480). "The State must establish the conviction's existence by a preponderance of the evidence, but that burden is 'not overly difficult to meet' and may be satisfied by evidence that bears some 'minimum indicia of reliability."' *Adolph*, 170 Wn.2d at 569 (quoting *Ford*, 137 Wn.2d at 480-81). "[I]t is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'" *Ford*, 137 Wn.2d at 480 (quoting *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)).

Here, Hall's judgment and sentence for his convictions for failure to register as a sex offender and unlawful manufacture of a controlled substance with a school bus route stop enhancement listed his alleged prior offenses, including Washington offenses for indecent liberties, second degree rape, and unlawful imprisonment; and out-of-state convictions for possession of marijuana and battery. At sentencing, the State specifically referred to the March 22, 1991, judgment and sentence on his second degree rape and unlawful imprisonment convictions, which the trial court had admitted at trial as evidence of the underlying offenses that required Hall to register as a sex offender.

Hall argues that his prior convictions for second degree rape and unlawful imprisonment could not be considered by the sentencing court because they were not proven at sentencing. On the contrary, RCW 9.94A.530(2) provides, "In determining any sentence[,] . . . *the trial court may rely on* no more *information* than is admitted by the plea agreement, or admitted, acknowledged, or *proved in a trial or at the time of sentencing*." (Emphasis added.) At sentencing, the judge acknowledged that the March 22, 1991, judgment and sentence was admitted at trial and became part of the trial record. Thus, the sentencing court properly

considered Hall's convictions for second degree rape and unlawful imprisonment because they were proven at trial.

But the State provided no copies of judgment and sentence documents relating to Hall's other alleged prior convictions. The 1991 judgment and sentence listed a conviction for indecent liberties in its criminal history section. The State provided no other evidence of the indecent liberties conviction. The out-of-state convictions for possession of marijuana and battery were not listed in the 1991 criminal history and the State provided no other evidence of them at sentencing.

But the mere mention of a conviction in the criminal history section of a prior judgment and sentence is inadequate to meet the preponderance standard.[10] Although a certified copy of the judgment and sentence for each of Hall's prior convictions is not strictly required to prove the existence of the conviction under *Adolph*, 170 Wn.2d at 568-69, here, the State's evidence of the Washington conviction for indecent liberties and the out-of-state convictions for possession of marijuana and battery were not proven by a preponderance of the evidence in the absence of

[10] We note that in *Adolph*, our Supreme Court held that a certified department of licensing (DOL) driving record abstract and a copy of the defendant's case history from the District and Municipal Court Information System (DISCIS) showing a prior driving under the influence conviction was more than the minimum indicium of reliability necessary to meet the State's preponderance burden. 170 Wn.2d at 570. The *Adolph* court reasoned that "[a] DOL driving record abstract and a DISCIS defendant criminal history are thus comparable to a certified judgment and sentence because they are official government records, based on information obtained directly from the courts, and can be created or modified only by government personnel following procedures established by statute or court rule." 170 Wn.2d at 570. A DOL driving record abstract is compiled by the director of licensing in Olympia based on abstracts of each record of conviction containing identifying information of the party, the nature of the offense, and the judgment forwarded from the court clerk. *Adolph*, 170 Wn.2d at 569. The DISCIS is a case management system that can produce a log of any individual's criminal history by drawing on entries made into the Judicial Information System. *Adolph*, 170 Wn.2d at 569-70.

Hall's stipulation to his prior record and his criminal history.

In *State v. Mitchell*, Division Three of this court held that "[w]hen a defendant objects to the State's use of a Washington judgment to prove the existence of out-of-state convictions, . . . the State is required to present additional evidence to carry its burden of proving the convictions by a preponderance of the evidence." 81 Wn. App. 387, 390, 914 P.2d 771 (1996). This reasoning applies with equal force to proving in-state prior convictions. The State may not satisfy its burden to prove a prior offense by presenting a certified copy of a judgment and sentence reflecting a prior conviction in the defendant's criminal history or offender score calculation if the defendant objects to the use of the document.[11] *State v. Cabrera*, 73 Wn. App. 165, 168-69, 868 P.2d 179 (1994).

Here, at sentencing, when the State asked the trial court to make findings that the court was relying on previous sex crimes proven by the 1991 judgment and sentence, Hall objected through counsel, stating that some of those crimes were not his. Hall did not acquiesce in the use of the 1991 judgment and sentence for determination of all of his prior offenses and offender score.[12] The judgment and sentence was admitted at trial without objection as part of the State's evidence that Hall was required to register as a sex offender. Thus, those two predicate offenses were proven by a preponderance of the evidence. But the prior convictions for indecent liberties,

---

[11] A defendant's objection may no longer be required in light of *Mendoza*, 165 Wn.2d 928, holding that the State bears the burden of proving criminal history unless a defendant affirmatively acknowledges his criminal history and *Hunley*, 161 Wn. App. at 928-29, holding unconstitutional the 2008 amendment to RCW 9.94A.530 which provides that failure to object to a prosecutor's statement of criminal history constitutes acknowledgement of the criminal history.

[12] Hall did not object when the 1991 judgment and sentence was admitted at trial, but that was likely because it was admitted to prove the second degree rape conviction as the basis for the charge for failure to register. When it was used to prove his prior convictions at sentencing, he objected to its use.

possession of marijuana, and battery were not proven by a preponderance of the evidence by use of the criminal history section of the 1991 judgment and sentence because Hall objected to its use and because it does not include the prior convictions for possession of marijuana and battery. Nor were the prior convictions for indecent liberties, possession of marijuana, and battery supported by an unsigned stipulation or other evidence.

We hold that a conviction listed in the criminal history section of a prior judgment and sentence is not comparable to the actual judgment and sentence for the prior conviction. Although a judgment and sentence is reliable evidence of the current conviction, it is substantially less reliable evidence of prior convictions listed in its criminal history section. The criminal history section of a judgment and sentence is attenuated evidence of prior convictions. Unlike a department of licensing driving record abstract or a District and Municipal Court Information System criminal history that are created from records of judgments forwarded by a court clerk or entered into the Judicial Information System, the criminal history section of any particular judgment and sentence may not be based on court records of judgments, but rather on a prosecutor's belief that they are accurate for the listed defendant.[13]

The record on appeal shows that the sentencing court relied upon the prior judgment and sentence from 1991 and the unsigned stipulation to find the existence of Hall's prior convictions

[13] The State argues that a prior offense listed on a judgment and sentence is reliable evidence of the prior conviction because it means that Hall either stipulated to the offense previously or it was found to be a prior offense committed by him when that judgment and sentence was entered. But as this case demonstrates, prior convictions may be listed in the criminal history section of a judgment and sentence without having been stipulated to or proved by a preponderance of the evidence. For example, no evidence was presented of Hall's prior out-of-state convictions for battery and possession of marijuana, yet those convictions were included in the criminal history section of the current judgment and sentence. The unsigned stipulation is a mere allegation by the State and not evidence of the convictions.

and to determine Hall's offender score.[14] Because this evidence is insufficient to prove prior convictions for indecent liberties, possession of marijuana, and battery, we remand for recalculation of Hall's offender score and for resentencing based on Hall's prior criminal history proven by the State by a preponderance of the evidence.

III. Resentencing on Remand

The parties dispute whether the State may present evidence of Hall's prior convictions at resentencing, or whether the State is limited to the record as it existed at the prior sentencing. We hold that pursuant to RCW 9.94A.530(2) both parties may present evidence relevant to Hall's past convictions at resentencing.

RCW 9.94A.530(2) provides, "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." *See also* former RCW 9.94A.525(22) (2008) ("Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence."). Thus, both parties may present evidence relating to Hall's criminal history on remand.

We hold that the State failed to prove Hall's prior convictions for indecent liberties, possession of marijuana, and battery and remand for recalculation of Hall's offender score and

[14] The sentencing court appears to have relied heavily on the ineffective stipulation document because the document's content is reproduced in the court's judgment and sentence; notwithstanding, that no other evidence in the record mentions the out-of-state convictions or the date of the indecent liberties conviction.

resentencing based on evidence from both parties relating to Hall's criminal history.

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.

Van Deren, J.

We concur:

Hunt, J.

Bridgewater, J. Pro Tem