IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29378-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
SAMUEL EDWARD OSBORNE,	)	**UNPUBLISHED OPINION**
Appellant.	)	

Brown, J. — Samuel E. Osborne appeals his two attempted second degree burglary convictions, contending the trial court erred in its jury instructions and miscalculated his offender score. Mr. Osborne's concerns in his pro se statement of additional grounds for review (SAG) include speedy trial, prosecutorial misconduct, the amended charging document, and ineffective assistance of counsel. We affirm.

FACTS

On May 29, 2010, while on motorcycle patrol in an isolated area south of Warden, Washington, Grant County Sheriff's Corporal Richard LaGrave became suspicious when he saw a cut lock and fence and then a van driving inside the fence. Nearby were two

shop buildings outside former missile silos on properties belonging to David Jones and Robert Echols. Mr. Jones and Mr. Echols had recently reported shop thefts and Corporal LaGrave became aware that a similar van had been seen on one property. Corporal LaGrave called for backup when he found the van empty near Mr. Echols's shop. When officers arrived, they searched Mr. Echols's building and found Mr. Osborne hiding outside under a tarp. Charles Mitchell, the van owner, was found hiding in nearby sage brush. Copper items, including copper wire bundles similar to those taken from Mr. Jones were located in the van.

Relevant here, the State partly charged Mr. Osborne with two counts of second degree burglary, each with an alternate count of second degree attempted burglary. At trial, the court instructed the jury regarding the first count of attempted burglary:

> A person is guilty of attempt to commit a crime when, with intent to commit that crime, he does any act which is a substantial step toward commission of that crime. A "substantial step" is conduct which strongly indicates a criminal purpose and which is more than mere preparation.
>
> To convict the defendant of the crime of attempted burglary in the second degree, as charged in Count 2, the State must prove each of the following elements beyond a reasonable doubt:
>
> 1. That on or about May 29, 2010, the defendant did an act which was a substantial step toward commission of burglary in the second degree.
> 2. That the act was done with the intent to commit burglary in the second degree.

Clerk's Papers (CP) at 27 (Instruction No. 7).

Regarding the second attempted burglary count, the court instructed:

> To convict the defendant of the crime of attempted burglary in the second degree, as charged in Count 4, the State must prove each of the following elements beyond a reasonable doubt:
> 1. That on or about May 29, 2010, the defendant did an act which was a substantial step toward commission of burglary in the second degree.
> 2. That the act was done with the intent to commit burglary in the second degree other than any incident of burglary in the second degree found by you to establish an element of Count 1 or Count 2.

CP at 29 (Instruction No. 9). The judge admonished the jury to consider the jury instructions "as a whole." CP at 21.

The jury found Mr. Osborne guilty solely of 2 counts of attempted second degree burglary. Before sentencing, defense counsel handed the court a judicial information system printout he had put together showing Mr. Osborne's criminal history. Additionally, the State acknowledged Mr. Osborne's lengthy criminal history, which included 3 prior burglaries, 2 other felonies, 2 thefts, 12 other gross misdemeanors, 7 misdemeanors, and 6 other crimes (classification unknown) totaling an offender score well above 9. Based on his lengthy criminal history, the judge calculated Mr. Osborne's offender score the maximum of 9. The judge asked, "Does defendant have any contest with the State's calculation of his offender score at 9?" Report of Proceedings (RP) (Aug. 31, 2010) at 24. Defense counsel responded, "No, Your Honor, we agree with that sentence range." RP (Aug. 31, 2010) at 24. The court imposed a 44.5 month standard range sentence.

The matter was renoted for sentencing correction on November 8, 2010, because Mr. Osborne's fingerprints and signature were not on the judgment and sentence. The State notified the court it had learned Mr. Osborne had additional criminal history. Because Mr. Osborne had previously scored 9, the top of the scoring range, it did not change his offender score or his sentencing range. Mr. Osborne appealed.

ANALYSIS

A. Instructions

For the first time on appeal, Mr. Osborne contends the jury instructions violated his due process rights by relieving the State of its burden to prove that he took a substantial step toward burglary under the second count of attempted burglary. In general, the failure to object to jury instructions at trial precludes appellate review. RAP 2.5(a). But, an instruction relieving the State of its burden to prove every element of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Hanna*, 123 Wn.2d 704, 709-10, 871 P.2d 135 (1994) (quoting *Francis v. Franklin*, 471 U.S. 307, 313, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985)). Because "substantial step" is an element of the crime, the failure to set out this element is "an error of constitutional magnitude." *State v. Stewart*, 35 Wn. App. 552, 555, 667 P.2d 1139 (1983). The failure to define an element, however, is not an error of constitutional magnitude. *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988).

Nevertheless, "[j]ury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). We review de novo whether a jury instruction correctly states the relevant law. *State v. Linehan*, 147 Wn.2d 638, 643, 56 P.3d 542 (2002). "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

Here, the jury was correctly instructed regarding the first count of attempted burglary that "[a] 'substantial step' is conduct which strongly indicates a criminal purpose and which is more than mere preparation." CP at 27 (Instruction No. 7). This definition was not included when instructing the jury regarding the second count of attempted burglary. But, the court instructed the jury to consider the jury instructions "as a whole." CP at 21. A jury is presumed to follow the trial court's instructions. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007) (quoting *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)). Because the court had already provided a correct definition and it related to the same charged offense, we presume the jury read the instructions as a whole in finding Mr. Osborne guilty of both counts. Mr. Osborne fails to show error.

B. Offender Score

The issue is whether Mr. Osborne waived his objection to the offender score calculation. He now contends much of his criminal history washed out.

We review de novo a sentencing court's offender score calculation. *State v. Knight*, 134 Wn. App. 103, 106, 138 P.3d 1114 (2006), *aff'd*, 162 Wn.2d 806, 174 P.3d 1167 (2008). But, as the State notes, Mr. Osborne did not raise this issue at sentencing. When a defendant fails to ask the sentencing court to make a discretionary call of a dispute regarding the issue of prior crimes, he or she cannot raise the issue on appeal. *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 496, 158 P.3d 588 (2007). Notably, "if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed." *State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P.3d 816 (2007) (citing *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)).

Here, before sentencing, defense counsel handed the court a judicial information system printout showing Mr. Osborne's criminal history. Based on his lengthy criminal history, his offender score was well above a 9. The judge calculated Mr. Osborne's offender score at 9, the maximum. The judge asked, "Does defendant have any contest with the State's calculation of his offender score at 9?" RP (Aug. 31, 2010) at 24. Defense counsel responded, "No, Your Honor." RP (Aug. 31, 2010) at 24. "The State is

entitled to rely on representations advanced" by the defendant. *Bergstrom*, 162 Wn.2d at 96. Accordingly, Mr. Osborne waived his right to object to his criminal history and offender score on appeal. Even assuming he did not waive his right to object, his washout theories would not reduce his offender score below 9.

C. Statement of Additional Grounds for Review

Mr. Osborne raises multiple concerns in his SAG. His sentencing concern has been adequately addressed by counsel. *See* RAP 10.10(a) (purpose of statement of additional grounds for review is to permit appellant, "to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel"). Mr. Osborne's remaining concerns relate to whether he should be granted a new trial based on (1) an alleged speedy trial violation, (2) prosecutorial misconduct, (3) improper charging document amendment, and (4) ineffective assistance of counsel.

Mr. Osborne first baldly contends his speedy trial rights were violated because he did not sign waivers. But he does not explain his concerns in this record. We are "not obligated to search the record" to understand a defendant's allegations. RAP 10.10(c). Without more, Mr. Osborne does not show his speedy trial rights have been violated.

Next, Mr. Osborne contends the prosecutor wrongly discussed prior bad acts before the jury. Again, Mr. Osborne does not point to where such comments were made. Indeed, without knowing whether an objection was made, we cannot apply the correct standard of review. *See State v. Dunaway*, 109 Wn.2d 207, 221, 743 P.2d 1237 (1987) (without a defense objection, a prosecutor's allegedly improper argument cannot be urged as error on appeal unless the comment was so flagrant and ill-intentioned that an instruction could not have cured the prejudice) (quoting *State v. Kendrick*, 47 Wn. App. 620, 638, 736 P.2d 1079 (1987)); *see also State v. Davis*, 141 Wn.2d 798, 840, 10 P.3d 977 (2000) (If defense counsel objects, a defendant on appeal must show the prosecutor's conduct was both improper and prejudicial.). Accordingly, Mr. Osborne has not met his burden to establish prosecutorial misconduct.

Mr. Osborne next challenges the State's late amendment of the information. But, CrR 2.1(d) allows an information "to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." The defendant has the burden of showing prejudice. *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). The trial court's ruling on a motion to amend an information is reviewed for an abuse of discretion. *State v. James*, 108 Wn.2d 483, 490, 739 P.2d 699 (1987). Mr. Osborne was on notice that he was being charged with burglary. In allowing the amendment, the trial court noted, "in the Court's view the attempt to commit burglary . . . involve[s] a substantial

step toward that crime [which] is included in the allegation of the completed crime." RP (Aug. 18, 2010) at 6. Since Mr. Osborne knew about the burglary charge, he cannot meet his burden to show prejudice regarding attempted burglary.

Mr. Osborne lastly contends he was denied effective assistance of counsel because defense counsel did not call Mr. Mitchell to testify on his behalf. To prevail on a claim of ineffective assistance of counsel, Mr. Osborne must establish both deficient representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "The decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel." *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). Given Mr. Mitchell's involvement with the crimes, his testimony may have hurt Mr. Osborne more than helped him. Thus, it was clearly a legitimate trial tactic to not call him as a witness on Mr. Osborne's behalf. Defense counsel's representation was not deficient.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

____
Brown, J.

WE CONCUR:

____
Sweeney, J.

____
Korsmo, A.C.J.