IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29456-1-III (cons. with No. 29457-9-III)**
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
DAVID JOHN EATON,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — This appeal follows convictions for third degree theft, two counts of second degree theft, and a single count of second degree malicious mischief. The court imposed an exceptional sentence based on the jury's affirmative finding of rapid recidivism. The defendant challenges the exceptional sentence and urges that his lawyer should have done more to exclude statements he gave to the police and to limit the prosecutor's inquiry into his criminal past. The exceptional sentence is supported by the short time lag between his release from incarceration and these crimes. And we conclude that the court would have had to rule against the defendant on any motion to suppress statements or on limiting the State's cross-examination on his prior crimes. We then

affirm the convictions and the sentence.

FACTS

David Eaton is a self-proclaimed "scrapper." He collects things that he believes are abandoned and sells them. He lives in Dayton, Washington.

In January 2010, a local school district discovered that a meter base and switch box it owned had been taken; both were eventually located on property formerly rented by Mr. Eaton. In the spring of 2010, a red flatbed trailer was reported missing. On April 24, 2010, a county undersheriff saw the trailer being pulled by Mr. Eaton's truck and stopped him. On May 21, 2010, police arrested Mr. Eaton for cutting and taking railroad rails that belonged to the Port of Columbia.

The State charged Mr. Eaton in two separate charging documents. Both were consolidated for trial and Mr. Eaton was ultimately charged with (1) third degree theft related to the railroad rails incident, (2) second degree theft for the flatbed trailer incident, (3) second degree theft for the meter base and switch box incident, and (4) second degree malicious mischief related to the railroad rails incident.

At trial, the officer who stopped Mr. Eaton, after he saw the trailer, testified that he asked Mr. Eaton "if he owned the trailer or not." Report of Proceedings (RP) (Sept. 28, 2010) at 244. The officer reported that Mr. Eaton said he did not own the

trailer and that he had borrowed it from a friend named Nutt Nutt and his mother, Dixie. Mr. Eaton later denied making the statement about Nutt Nutt or Dixie and instead explained that he borrowed the trailer from Bill Waltermire. Mr. Waltermire owned the trailer and had reported it stolen.

The State also asked Mr. Eaton about his prior criminal convictions for possession of a stolen vehicle, seven convictions for taking a motor vehicle without the owner's permission, attempting to elude police, and second degree burglary. Mr. Eaton's defense counsel did not object.

The jury found Mr. Eaton guilty as charged. The trial court, over defense objection, then submitted a question to the jury on whether Mr. Eaton's most recent crimes supported the aggravating factor of rapid recidivism. Mr. Eaton had been released in November 2009 from incarceration on an earlier conviction. He was released on April 28, 2008, but then was again incarcerated until November 2009, following a number of community custody violations. The current crimes were committed in January, April, and May 2010. The jury found that the requirements for the aggravating factor of rapid recidivism had been satisfied. And the court imposed an exceptional sentence of 60 months on each count that were to run concurrently.

DISCUSSION

Exceptional Sentence—Rapid Recidivism

Mr. Eaton contends that his most recent crimes do not amount to rapid recidivism when properly viewed. He argues that he was released from his prior term of incarceration on April 28, 2008. And his further confinement was the result of two minor violations of his conditions of community custody. These violations, he continues, were not crimes for purposes of rapid recidivism. And, moreover, he argues that a theft in mid-January 2010 does not amount to rapid recidivism, even assuming a November 25, 2009, release date.

We review de novo a trial court's determination that an aggravating factor justifies an exceptional sentence. RCW 9.94A.585(4); *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005).

The aggravating sentencing factor of rapid recidivism requires a showing that the defendant committed the current offense(s) shortly after being released from incarceration. RCW 9.94A.535(3)(t). The statute does not require a connection between the offenses. *State v. Combs*, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010). What constitutes a short period of time will vary with the circumstances of the crime involved, but six months is generally considered too long. *Id.*

In *Combs*, this court addressed what constitutes rapid recidivism after a defendant

committed the offense of attempting to elude a pursuing police vehicle six months after being released from prison for drug possession. *Id.* at 504. We noted that the time frame, and specifically when the defendant had the first opportunity to commit another crime, was relevant:

> If, for instance, Mr. Combs had been delayed in returning to Asotin County from prison or living under close supervision at a work release facility and committed a crime in his first opportunity to do so, it could conceivably constitute rapid recidivism.

Id. at 507 n.4.

Here, Mr. Eaton was first released from incarceration in April 2008. But he then violated conditions of his supervision twice and was returned to prison. He was not finally released until November 25, 2009. We conclude that Mr. Eaton's additional terms of incarceration were not for any additional crimes, but that the community custody conditions were a part of his original sentence and that the terms of incarceration associated with those violations are then part of his original sentence. Accordingly, the correct release date for the rapid recidivism evaluation was November 25, 2009.

Mr. Eaton took the meter base and switch box belonging to the local school district in January 2010—just over a month after his release from incarceration. He argues that no one ever established the exact date the equipment was stolen. But John Hutchens, the maintenance supervisor for the local school district, testified that a storm damaged the equipment on January 1, 2010, and then

"several days" later the equipment was gone. Mr. Hutchens located the equipment in July 2010 on property formerly rented by Mr. Eaton. The reasonable inference is that Mr. Eaton took the equipment no later than mid-January. And it was only a couple months after that when Mr. Eaton was caught towing the stolen flatbed trailer and then caught cutting railroad rails that were not his.

The circumstances here are sufficient to support the jury's finding of rapid recidivism as an aggravating sentencing factor. Mr. Eaton was released for just over one month before committing another offense. The theft convictions were not impulse crimes; they required some planning. The court then had authority to impose an exceptional sentence based on this aggravating factor.

Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Effective counsel is guaranteed by the Sixth Amendment to the United States Constitution and by article I, section 22 (amendment 10) of the Washington State Constitution. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To prove ineffective assistance of counsel, the defendant must show that defense counsel's representation fell below an objective standard of reasonableness, and that this deficient

representation prejudiced the defendant. *McFarland*, 127 Wn.2d at 334-35. We strongly presume effective representation. *Id.* at 335. The defendant carries the burden to show ineffective assistance based on the record established in the trial proceedings. *Id.*

Failure to Suppress

Mr. Eaton also contends that his counsel was ineffective in failing to move to suppress his prearrest statements to the police about possession of the stolen flatbed trailer. He contends that he was in custody while being interrogated and, thus, should have been given *Miranda*[1] warnings. But the record suggests otherwise.

The officer first made a proper investigative stop based on probable cause; he was not required to give *Miranda* warnings. *State v. Hilliard*, 89 Wn.2d 430, 434-36, 573 P.2d 22 (1977). Police are required to give *Miranda* warnings only when the interrogation is custodial. *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995). A custodial interrogation involves express questioning initiated after a person is in custody or otherwise significantly deprived of his freedom. *State v. Hawkins*, 27 Wn. App. 78, 82, 615 P.2d 1327 (1980). "'Custody' for *Miranda* purposes is narrowly circumscribed and requires 'formal arrest or restraint on freedom of movement of the degree associated with formal arrest.'" *State v. Post*, 118 Wn.2d 596, 606, 826 P.2d 172, 837 P.2d 599

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

(1992) (internal quotation marks omitted) (quoting *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984)).

Here, an officer stopped Mr. Eaton after he saw him driving his truck with a stolen red flatbed trailer attached. The initial questioning of Mr. Eaton about where he got the trailer was an investigative encounter to confirm whether that trailer was the one reported stolen. Mr. Eaton was not in custody when he said that he borrowed the trailer from Nutt Nutt.

Once Mr. Eaton told the officer that he had borrowed the trailer, the officer seized him, placed him in the back of the patrol car and read him his *Miranda* rights. There were then no grounds to suppress. The stop was investigative. Mr. Eaton was not in custody.

Failure to Object

Mr. Eaton next contends his counsel was ineffective in failing to object to evidence of his prior convictions. He contends that the State's repeated references to his prior convictions and propensity type arguments should have raised objections from defense counsel.

Prior convictions for crimes of dishonesty or false statements are admissible for impeachment purposes. ER 609(a)(2). If a prior conviction falls within the scope of ER

609(a)(2), it is per se admissible and the court is not required to balance its probative value against its prejudicial effect. *State v. Brown*, 113 Wn.2d 520, 532-33, 782 P.2d 1013, 787 P.2d 906 (1989). Burglary can be a crime of dishonesty. *See State v. Schroeder*, 67 Wn. App. 110, 115, 834 P.2d 105 (1992). Possession of stolen property is a crime of dishonesty. *State v. McKinsey*, 116 Wn.2d 911, 913, 810 P.2d 907 (1991). Taking a motor vehicle without permission is a crime of dishonesty. *State v. Teal*, 117 Wn. App. 831, 843, 73 P.3d 402 (2003), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004).

The State here asked about Mr. Eaton's prior criminal history without objection:

> Q You're a convicted felon aren't you?
> . . . .
> Q Okay. Isn't it true that in August of 2000 you were convicted of possession of a stolen vehicle felony?
> . . . .
> Q Isn't it true in March of 2000 you were convicted of two counts of taking a motor vehicle without the owner's permission?
> . . . .
> Q Isn't it true in February of 2001 you were also convicted of two counts of taking a motor vehicle without permission in Washington State.
> . . . .
> Q Okay. Let's turn to the front and see what counts you were convicted of.
> A Taking a motor vehicle without the owner's permission.
> Q How many counts of that crime?
> A Two times. 11/28/2000. That's what it says right there date of crime.
> . . . .
> Q So let's see we are up to five felony convictions for taking things that weren't yours, right?
> . . . .

> Q I'm handing you what's been marked "P73". I'd like you to look at page 7 and page 8 of "P73" and tell me if you recognize anything on them.
>
> A 12/17/99 motor vehicle without the owner's permission.
>
> Q Did you recognize anything on those last two pages?
>
> A Ah let's see.
>
> Q You recognized your signature on the last Judgment and Sentence . . .
>
> A Yeah.
>
> Q . . . convicting you of two crimes.
>
> A Yes.
>
> Okay and what are the two crimes that you're convicted of in this Judgment and Sentence?
>
> A Oh taking a motor vehicle without the owner's permission, attempting to elude the police.
>
> Q And is that all of the counts?
>
> A Oh is there another taking a motor vehicle without the owner's permission? How could I do it twice? That, that's what I'm saying your records are messed up.
>
> . . . .
>
> Q And isn't it true that you've also been convicted of burglary in the second degree?
>
> A Yes.

RP (Sept. 28, 2010) at 335-39.

The State had the right to ask about this prior criminal history and there is nothing his lawyer could have done to stop it. This was not ineffective assistance of counsel.

We affirm the convictions.

A majority of the panel has determined that 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.

_____
Sweeney, J.

WE CONCUR:

_____ _____
Kulik, C.J. Brown, J.