IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent,	)	No. 30519-8-III
v.	)	UNPUBLISHED OPINION
JOSEPH DEAN BYRD, Appellant.	)	

Sweeney, J. — This is an appeal from a conviction for possession of drugs. The court allowed the arresting officer to testify that he arrested the defendant on authority of an outstanding unrelated warrant. The defendant objected but did not request a limiting instruction. We conclude that the testimony was properly admitted to explain why the officer seized and arrested the defendant and that the failure to request a limiting instruction waived the right to assign error here on appeal. We also conclude that counsel was not ineffective for failing to request a limiting instruction because it would have done little more than highlight the fact that the defendant had an outstanding warrant. We also

affirm the court's sentence.

FACTS

Quincy police officer Thomas Clark saw Joseph Byrd walk down a street around 7:45 pm on July 15, 2011. Officer Clark knew that Mr. Byrd had an outstanding arrest warrant and followed him. Mr. Byrd saw Officer Clark approach and immediately put his right hand into his right front pocket. The officer asked Mr. Byrd to take his hand out of his pocket. Mr. Byrd removed his hand with a blue cloth from his pocket and dropped the cloth behind a nearby garbage can. Officer Clark arrested Mr. Byrd on the warrant. Officer Clark retrieved the blue cloth; next to the cloth was a pipe that contained methamphetamine.

The State charged Mr. Byrd with possession of a controlled substance. He moved to prohibit any reference to his outstanding warrant and argued that admission of that evidence would amount to evidence of a prior bad act and would be unduly prejudicial. The court concluded that the evidence explained the officer's arrest of Mr. Byrd and denied his motion.

A jury found Mr. Byrd guilty of possession of a controlled substance. And the court sentenced Mr. Byrd to a mid-range sentence of 18 months based on an offender score of 7.

DISCUSSION

Limiting Instruction—Evidence of the Warrant

The officer seized and arrested Mr. Byrd on authority of an outstanding warrant. And he was allowed to explain that to the jury. Mr. Byrd says this amounted to the admission of ER 404(b) evidence and therefore the court should have weighed the probative value of the evidence against its potential prejudice and limited the jury's consideration of this evidence by an appropriate instruction. The State responds that this was not evidence of prior bad acts under ER 404(b) but rather evidence of the circumstances of the arrest, i.e., res gestae evidence, for which no ER 404(b) analysis was required and for which no limiting instruction was necessary. The questions raised on appeal are whether it was error to admit the evidence in the first place and whether counsel was ineffective because he did not request a limiting instruction.

A defendant has a right to have a limiting instruction to minimize any undue prejudice that may attend the admission of the evidence. ER 105;[1] *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). But the defendant must have proposed such an instruction to assign error to the failure to give the instruction. RAP 2.5(a); *State v.*

[1] ER 105 provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

Schaler, 169 Wn.2d 274, 282, 236 P.3d 858 (2010); *Goodman v. Boeing Co.*, 75 Wn. App. 60, 75, 877 P.2d 703 (1994) ("If a party does not propose an appropriate instruction, it cannot complain about the court's failure to give it."), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). Moreover, we do not believe that the admission of this evidence was error here for a number of reasons.

First, the officer's testimony was limited to the fact that he approached, seized, and arrested Mr. Byrd because he was wanted on the warrant. The officer did not testify to any details of the warrant including why or when it had been issued. Next, there would have been no explanation for the jury of why the officer would arrest Mr. Byrd in the first place without evidence of the outstanding warrant. It is then relevant res gestae evidence that explains the factual context of the crime, not the defendant's mindset. ER 401;[2] *State v. Grier*, 168 Wn. App. 635, 646, 278 P.3d 225 (2012). Finally, there was no request for the limiting instruction Mr. Byrd now says should have been given.

In a related assignment of error, Mr. Byrd also contends that his lawyer was ineffective for not requesting a limiting instruction. We review the challenge de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

[2] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22. We start with a strong presumption of counsel's effectiveness. *State v. Gerdts*, 136 Wn. App. 720, 726, 150 P.3d 627 (2007); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish ineffective assistance of counsel, a defendant must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 334-35.

We are particularly deferential to counsel's decision to not request a limiting instruction in these circumstances because the instruction might emphasize the very evidence Mr. Byrd wants to de-emphasize—that there was an outstanding warrant for his arrest. *See State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27 (2005); *State v. Yarbrough*, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993).

We conclude that the trial court properly admitted evidence of the warrant to explain why the officer would arrest Mr. Byrd. We conclude that any prejudice that would have followed was minimized by the brief and cryptic reference to the warrant. And counsel was not ineffective for not requesting a limiting instruction that would again

have highlighted the testimony that there was an outstanding warrant.

Sentencing—Evidence of Prior Convictions

Mr. Byrd next contends that the State failed to meet its burden to prove his criminal history at sentencing. He points out that he did not affirmatively acknowledge his criminal history at sentencing and, therefore, he argues, he is entitled to resentencing. The State all but concedes the oversight.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999). We review de novo a sentencing court's calculation of an offender score. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

To properly calculate a defendant's offender score and sentence, the sentencing court must determine a defendant's criminal history based on his prior convictions and the level of seriousness. RCW 9.94A.505; *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The State must prove a defendant's criminal history by a preponderance of the evidence. *State v. Hunley*, 161 Wn. App. 919, 927, 253 P.3d 448 (2011), *aff'd*, ___Wn.2d ___, 287 P.3d 584 (2012). "The best evidence of a prior conviction is a certified copy of the judgment." *Ford*, 137 Wn.2d at 480. The court may, however, rely on other comparable documents or transcripts as long as they provide minimum indicia of

reliability. *Id.* at 481.

In *State v. Mendoza*, the court held that a defendant must affirmatively acknowledge the "*facts and information*" the State introduces at sentencing before the State is relieved of its duty to prove criminal history by a preponderance of the evidence. 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009). The defendant's failure to object to the criminal history related by the State does not constitute such an affirmative acknowledgment. *Id.* at 928. And a defendant's silence on the issue is not sufficient to constitute such waiver. *Hunley*, 161 Wn. App. at 928-29.

Nor is a defendant deemed to have affirmatively acknowledged the State's asserted criminal history based on his or her agreement with the sentencing recommendation. *Mendoza*, 165 Wn.2d at 928. Counsel's agreement to an offender score calculation is not affirmative acknowledgment of criminal history. *State v. Lucero*, 168 Wn.2d 785, 789, 230 P.3d 165 (2010). However, when counsel affirmatively acknowledges a defendant's criminal history, the State is entitled to rely on such acknowledgement. *Bergstrom*, 162 Wn.2d at 96.

At sentencing, the prosecutor asked for a high end standard range sentence based on Mr. Byrd's offender score of "7" and his history of "continuing criminal behavior." Report of Proceedings (Jan. 4, 2012) (RP) at 9. Defense counsel agreed with the State's

calculation of Mr. Byrd's offender score and stated that Mr. Byrd had "that history." RP (Jan. 4, 2012) at 10. The State was entitled to rely on that affirmative acknowledgement. *Bergstrom*, 162 Wn.2d at 96.

We affirm the conviction and sentence.

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.

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Sweeney, J.

WE CONCUR:

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Kulik, .J.

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Brown, J.