NO. 47351-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHAWN D. OLLISON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY COURT
The Honorable Carol Murphy, Judge
Cause No. 14-1-01309-8

BRIEF OF APPELLANT

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03. The trial court erred in permitting Ollison to be represented by counsel who provided ineffective assistance by failing to object or by inviting error to the miscalculation of his offender score.

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02. Whether the sentencing court miscalculated Ollison's offender score for his convictions for burglary in the first degree and attempting to elude by adding a point for his conviction for theft of a motor vehicle where the court had found that the theft conviction constituted the same criminal conduct as Ollison's conviction for robbery in the first degree? [Assignment of Error No. 2].

06. Whether Ollison was prejudiced as a result of his counsel's failure to object or by inviting error to the miscalculation of his offender score? [Assignment of Error No. 3].

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C. STATEMENT OF THE CASE

01. Procedural Facts

Shawn D. Ollison was charged by second amended information filed in Thurston County Superior Court March 2, 2015, with seven felonies and one gross misdemeanor: robbery in the first degree while armed with a deadly weapon, count I, burglary in the first degree while armed with a deadly weapon, count II, theft of a motor vehicle, count III, three counts of assault in the second degree, counts IV-VI, attempting to elude a pursuing police vehicle with special allegations, count VII, and hit and run attended (gross misdemeanor), count VIII, contrary to RCWs 9A.56.200(1)(a)(i) and/or (1)(a)(ii), 9.94A.825, 9.94A.533(4), 9A.52.020(1), 9A.56.065(1), 9A.56.020(1)(a), 9A.36.021(1)(c), 46.61.024, 9.94A.834, and 46.52.020(2)(3)(5), respectively. [CP 207-09].

Trial to a jury commenced March 3, the Honorable Carol Murphy presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 03/10/15 131]. Ollison was found not guilty of counts IV-VI (assault second) [CP 159-161], but guilty of the remaining counts as charged. [CP 154-58, 162-64]. He was sentenced within his standard range after the court found that count I (robbery) and count III (theft of a motor

vehicle) constituted the same criminal conduct, and timely notice of this appeal followed. [CP 184-195].

02. Substantive Facts[1]

02.1 Counts I-II: Robbery and Burglary

On August 25, 2014, just after 8:00 in the morning, Aleta Miller was getting ready to leave for work when an individual later identified as Ollison entered the kitchen of her home holding a wooden board like a baseball bat. [RP 109, 111-12, 409].[2] It measured one inch by one inch by two feet. [RP 03/09/15 99]. He came within a foot of her and asked for her car keys, saying he would smash her if she didn't cooperate. [RP 111, 122]. Miller was frightened, thinking she "had a good chance of being dead" if she didn't comply. [RP 112]. She gave him her car keys as he grabbed $60 dollars from her hand before running outside. [RP 123, 125]. When Miller followed while attempting to call 911 on her cell phone, Ollison turned around and "yelled at (her) not to call anybody or he'd kill her(,)" before running back toward her to retrieve her phone that she had thrown into the nearby ivy. [RP 123-25].

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[1] The facts are limited to the offenses for which Ollison was convicted.

[2] Unless otherwise indicated, all references to the verbatim report of proceedings are to the transcripts entitled Volumes I-III.

02.2 Count III: Theft of Motor Vehicle

After Ollison got into Miller's car, a 2013 Subaru that was parked in her driveway, Bob Rude, Miller's neighbor, confronted him with a gun while the driveway gate was closed in an attempt to prevent Ollison from leaving. [RP 126-27, 132, 134, 140, 182, 368, 381, 387]. The gate was adjoined to a chain link fence. [RP 137]. Ollison got out of the car and onto the ground at gunpoint, "screaming that it was a matter of life and death." [RP 133]. At some point, Miller's dog jumped into the car. [RP 136].

> Ollison eventually got up from the ground and approached the fence and was kind of challenging Bob to shoot him, which he really didn't want to do, and then he eventually got back in my car and drove it over the retaining wall straight at Bob and his wife and the passerby and left.

[RP 136].

> He went straight through the fence, and as soon as he got through, it was gone.
> ....
>
> He gunned it. It was as fast as that car could accelerate.

[RP 137].

02.3 Counts VII-VIII: Eluding and Hit and Run

Sheriff John Snaza, who was in uniform

and driving a patrol vehicle with lights and siren activated [RP 194, 209-10], began to chase Ollison, along with several other law enforcement agencies, as he drove down Interstate 5. [RP 197, 207, 214]. Ollison was driving in an erratic manner, cutting off cars, swerving across all three lanes, zig-zagging in and out of traffic, and driving on the outside shoulders on both sides of the road. [RP 211-12, 215]. The speed of the chase fluctuated between 80 and 125 miles an hour. [RP 214]. When Ollison drove over a spike strip, the tire casings on the front of his vehicle came off. [RP 217-18, 239]. After striking a car driven by Karen Black, he continued driving before being penned against a barrier and forced to stop by one of the following patrol vehicles. [RP 255, 257-58, 265, 350-51, 357-300]. Ms. Black was injured as a result of the collision. [RP 359-360]. Miller's dog was found in the car and her cash and phone were seized from Ollison. [RP 150, 168, 170, 320-21; RP 03/09/15 102].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN MAKING OLLISON WEAR A LEG BRACE DURING TRIAL.

Following argument, the trial court ruled that Ollison would be required to wear a leg brace during trial, the reasoning for which is worth quoting at more than modest length:

> The Court finds that the use of the leg brace in this case is appropriate, and the Court is allowing that leg brace to be used on Mr. Ollison through this trial. The Court understands that bail was set for Mr. Ollison at $100,000, which is a significant amount. In looking at the record, it appears that one of the reasons for that was the allegations in this case, and although they are only allegations, they are serious. Corrections has determined that Mr. Ollison has the maximum custody level at this point and has certain procedures in place in order to ensure that he remains in custody.
>
> The Court understands and accepts the testimony of Officer Davis regarding the device that is being used, that it is not painful to Mr. Ollison, and that he controls the ability to unlock it if the device locks. My experience has been that it actually is not noticeable when the wearer of the device moves around the courtroom. Maybe that is just my take on it. I don't think people really focus on specifics of a person's gait. My experience has been that the wearer can extend their leg almost fully, not quite fully, and that it isn't noticeable
>
> But to the extent that it would be noticeable to the jury if Mr. Ollison were to move about the courtroom, for instance, for the purpose of taking the witness stand, that can be adjusted so that Mr. Ollison can do that during a break in proceedings rather than run the risk of having the jury notice the device.

[RP 40-41].

Further noting that the device "is not visible under Mr. Ollison's clothing," and requesting that the attorneys notify the court if there is a

risk the jury might see or become aware of the device, the court concluded:

> But based upon the concerns expressed on the record and the fact that the device is not painful and is locked only under certain circumstances which Mr. Ollison has been provided notice of and that it is able to be unlocked by Mr. Ollison in the event that it becomes locked unintentionally, I believe that it is an appropriate device for security in this trial and the Court is allowing it.

[RP 41].

Except in extraordinary situations, a defendant in a criminal trial is entitled to appear in open court free of physical restraint, the purpose for which is to safeguard his or her right to a fair and impartial trial under the Sixth and Fourteenth Amendments of the United States Constitution and article I, sections 3 and 22 of the Washington Constitution. State v. Finch, 137 Wn.2d 792, 842-43, 975 P.2d 967 (1999), cert. denied, 528 U.S. 922 (1999) (physical restraint encroaches upon right to a fair trial because it violates right to presumption of innocence); see State v. Damon, 144 Wn.2d 686, 691, 25 P.3d 418 (2001) (physical restraints affect right to fair trial because jury may view defendant as dangerous and not trustworthy). Courts must consider less restrictive alternatives before imposing physical restraints, which should be used only as a "last resort." State v. Finch, 137 Wn.2d at 850.

Restraints may be justified "to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape." State v. Finch, 137 Wn.2d at 846. Even in such limited circumstances, however, justification for the restraint will be found only if based upon "specific facts relating to the individual" that are founded upon a factual basis set forth in the record." Id.

This record fails to support the court's determination requiring Ollison wear a leg brace during the proceedings. There was no showing that he was an escape risk or that he exhibited any type of disorderly conduct or that anyone in the courtroom was at risk of physical injury. Before imposing the restraint, the court never less restrictive alternatives. And the fact that Ollison's jail classification was maximum "due to his charges [RP 27](,)" serious though they were, does not itself mean there was a risk of violence in the context of courtroom security. The use of physical restraint was not justified in this case.

This court must consider whether the error was harmless. State v. Damon, 144 Wn.2d 686, 693, 25 P.3d 418 (2001). As this court noted in State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002), case law is not clear regarding whether unconstitutional shackling creates a presumption of prejudice that the State must overcome or whether the defendant must demonstrate that the restraint was prejudicial. In State v. Hutchinson, 135

Wn.2d 863, 888, 959 P.2d 1061 (1998), our Supreme Court placed the burden on the defendant to show that the restraint had a substantial or injurious effect or influence on the jury verdict. More recently, however, the same court held that "[t]he error will not be considered harmless unless the State demonstrates that the shackling did not influence the jury's verdict." State v. Damon, 144 Wn.2d at 692. The State cannot satisfy this latter standard as it relates to Ollison's convictions for either robbery or burglary while armed with a deadly weapon, counts I-II, where Ollison was armed with nothing but a stick measuring one inch by one inch by two feet. As a result of the shackling, the jury may have perceived Ollison as a dangerous person who would have used the stick he was carrying to harm Miller, especially since there is no way to prove the jury didn't observe the restraint sometime during the trial. Citing State v. Finch, 137 Wn.2d at 862, the court in Damon considered whether unconstitutional shackling was harmless based on the overwhelming evidence test to determine whether "the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." Damon, 144 Wn.2d at 421 (quoting State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)). The evidence in this case does not meet the test as to Ollison's convictions for either robbery or burglary while armed with a deadly weapon, with the result that this court should reverse and remand for a new trial.

02. THE SENTENCING COURT MISCALCULATED OLLISON'S OFFENDER SCORE FOR HIS CONVICTIONS FOR BURGLARY IN THE FIRST DEGREE AND ATTEMPTING TO ELUDE BY ADDING A POINT FOR HIS CONVICTION FOR THEFT OF A MOTOR VEHICLE WHERE THE COURT HAD FOUND THAT THE THEFT CONVICTION CONSTITUTED THE SAME CRIMINAL CONDUCT AS OLLISON'S CONVICTION FOR ROBBERY IN THE FIRST DEGREE.

An appellant may challenge his offender score for the first time on appeal. State v. Mendoza, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009). "'In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). As a matter of law, where a standard range sentence is given, the amount of time imposed may not be appealed. RCW 9.94A.585(1); State v. Friederich-Tibbets, 123 Wn.2d 250, 866 P.2d 1257 (1994); State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). An appellant, however, may challenge the procedure by which a sentence within the standard range was imposed. Mail, at 710-11; State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986).

If two current offenses encompass the same criminal conduct, then those current offenses will count only as one point in calculating the

offender's score. State v. Haddock, 141 Wn.2d 103, 108, 3 P.3d 733 (2000); RCW 9.94A.589. Here, though the court found that count I (robbery) and count III (theft) constituted the same criminal conduct [CP 186], the court included the theft conviction in determining an offender score of 4 for Ollison's conviction for burglary in the first degree [CP 169, 186] and in determining an offender score of 4 for Ollison's conviction for attempting to elude pursuing police vehicle. [CP 171, 186]. Accordingly, remand is required for resentencing with an offender score of 3 for each offense.

03. OLLISON WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S AGREEMENT TO THE MISCALCULATION OF HIS OFFENDER SCORE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Should this court determine that counsel waived the issue of the miscalculation of his offender score as set forth in the preceding section by agreeing to the offender score [RP 03/24/15 29], then both elements of ineffective assistance of counsel have been established.

The record does not, and could not, reveal any tactical or strategic reason why trial counsel would have agreed to the offender score for the reasons argued in the preceding section. The prejudice is self-evident: but for counsel's failure to object or by inviting error, Ollison was sentenced

for his burglary and attempting to elude convictions based on an offender score of 4 for each count instead of the correct offender score of 3 for the respective convictions. Remand for resentencing should follow.

E. CONCLUSION

Based on the above, Ollison respectfully requests this court to remand consistent with the arguments presented herein.

DATED this 31st day of October 2015.

Thomas E. Doyle

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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 3rd day of November 2015.

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