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72598-0

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March 31, 2015

Court of Appeals

Division I

NO. 72598-0-I

State of Washington

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PATRICK KING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. INTRODUCTION

An information provides the defendant with fair notice of the charges. Where the State attempts to prove its case with uncharged alternative means, due process is violated. Here, the charging document alleged specific tools were burglar tools, including a saw and flashlight. At trial, the state introduced evidence of other tools, including a vest, hack saw and magnetic tool. The court's instructions to the jury did not cure this error, allowing the jury to find alternative means of conviction other than those alleged in the information. As a result, Mr. King was denied his right to notice and a fair trial and reversal is required.

At sentencing, the state introduced evidence of five prior convictions, all of which on their face appear to have "washed out". No findings were entered to suggest that the court found there were intervening facts that demonstrate the convictions did not "wash out". As a result, Mr. King was sentenced to 12.75 months based upon the court's erroneous finding that he had 5 points of criminal history, when the evidence establishes that his criminal history score should have been zero. Mr. King now seeks relief in this court.

B. ASSIGNMENTS OF ERROR

1. The jury was permitted to convict Mr. King based upon uncharged alternative means.

2. The trial court miscalculated Mr. King's offender score.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Principles of due process require that the prosecution provide fair notice of the charged offense. The prosecution's information alleged possession of specific tools, a flashlight and saw, but at trial evidence of other potential tools was introduced and the court's instructions on possession of burglar's tools mirrored the general language of the statute rather than the specifics of the state's information. Did the state fail to provide the essential notice to Mr. King of the acts underlying his conviction?

2. The prosecution must prove all essential elements of an offense to a unanimous jury. While the state's information specifically alleged that it intended to prove possession of burglar's tools by showing that Mr. King possessed a saw and flashlight, the state's evidence at trial included several other potential tools, including a vest, hack saw and magnetic tool to prove possession of burglar's tools. The court's instructions on possession of burglar's tools broadly interpreted the means of committing this offense and did not constrict it to the

allegations alleged in the state's information, causing the jury to potentially find uncharged alternative means to convict Mr. King. Did the prosecution's argument and the courts instructions undermine Mr. King's right to a fair trial and unanimous jury verdict on the essential elements of possession of burglary tools as charged?

3. A sentencing court must specify those offenses which it determines make up a defendant's criminal history. The trial court's calculation of the person's offender score is in turn based upon that criminal history. RCW 9.94A.525 (2) provides that prior Class B felonies "shall not be included" in an individual's offender score unless the court finds that the person did not spend ten or more year in the community without a criminal offense. C felonies "shall not be included" in an individual's offender score unless the court finds the person did not spend five or more years in the community without a criminal offense. Where the court's finding of criminal history does not include any offense in the more than ten year period following a conviction for a non-violent B Felony and more than five years elapsed following convictions for the class C Felonies, can those offenses be included in the offender score calculation?

4. In calculating any offender score a sentencing court undertakes a three step analysis: (1) identify the criminal history; (2) exclude any offenses which have washed out; and (3) apply the scoring rules of RCW 9.94A.525 to the identified criminal history. Here the sentencing court findings indicate that Mr. King's criminal history had washed out. Did the court erroneously determine those offenses yield a score of 5?

D. STATEMENT OF THE CASE

On October 31, 2013, Patrick King was arrested for burglary in the second degree when he was found near an enclosed Century Link yard near the Interurban Trail. CP 1. According to testimony, he was arrested within about 30 seconds of when the alarm was triggered in the yard. 7/9/14 RP 50¹. This alarm was silent, but was linked directly to the police department, allowing for the police to arrive quickly after the alarm was triggered. 7/9/14 RP. 18.

The first officer saw Mr. King near the Interurban Trail. 7/9/14 RP 51. No one was seen within the fenced in area. 7/9/14 RP 51. Mr. King followed the officer's request to lie down. 7/9/14 RP 53. When co-

¹ 7/9/14 RP refers to the "Verbatim Report of Proceedings" dated from July 9-17, 2014.

defendant Bradley Bachmann fled the scene, Mr. King never left and was arrested shortly after being seized. 7/9/14 RP 54. A saw and flashlight were found on him. 7/9/14 RP 56.

In conducting a search for Mr. Bachmann, police found several items, including a yellow reflective jacket, a hack saw and a magnetic tool. 7/9/14 RP 56-57. Mr. Bachmann was later arrested at a different location. 7/9/14 RP 56.

Mr. King was originally charged with burglary in the second degree. CP 1. The information was later amended to attempted burglary in the second degree and possession of burglar tools. CP 7. To support the charge of possession of burglar's tools, the information specifically alleged that Mr. King possessed a "flashlight and saw." CP 7.

At trial, evidence was introduced regarding additional potential burglary tools, including those not specifically charged against Mr. King. See 7/9/14 RP 57, Ex. 13. In her closing argument, the prosecutor specifically argued that "they [Mr. King and Mr. Bachmann] had saws; they had pliers or wire cutters to cut open that fence; they had a flashlight to help them see; and they had the other times that you've seen over the court of this trial". 7/9/14 RP 111. The prosecutor also highlighted the "yellow, reflective vest" that "was only located

because Officer Whitley went back and searched for it.” 7/9/14 RP 117.

In arguing for a conviction on the burglary tools, the state further argued that Mr. King should be found guilty as “We also know what his intent was because the other tools at the scene, the plier, the wire cutter, were hanging from the fence, and had, in fact, been used to gain entry into that business”. 7/9/14 RP 119.

The to-convict instruction for possession of burglar’s tools did not limit the jury to the items charged in the information, instead closely mirroring the broader language found in RCW 9A.52.060.² CP 31. Mr. King was convicted after trial of both attempted burglary in the second degree and possession of burglar’s tools. CP 11-12.

At sentencing, the court was provided with a statement of criminal history by the state, which was incorporated into the judgment and sentence. CP 52. This history was otherwise uncontested and included the following convictions:

Crime	Sentencing Date	Adult or Juv. Crime
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² Making or Possessing Burglar’s Tools is defined as “Every person who shall make or mend or cause to be made or mended, or have in his or her possession, any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a burglary, or knowing that the same is intended to be so used, shall be guilty of making or having burglar tools.” RCW 9A.52.060.

Protection Order: Violent Felony	10/05/2007	AF
Tampering with a Witness	10/05/2007	AF
Bail Jumping	10/05/2007	AF
Controlled Substance-Possession No Subscription	11/30/2005	AF
Controlled Substance Violation: Mfg/delvr/p	4/19/1995	AF

No other convictions, evidence of incarceration or other intervening information that would have demonstrated that a conviction had not washed out was introduced. *Id.* Based on this information, the court determined that Mr. King had a criminal history score of 5. *Id.* He was sentenced to 12.75 months for the burglary and 364 days to run concurrently for the possession of burglary tools. See, CP 49, 54.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT

1. Reversal Is Required Because Jury Was Permitted to Convict Mr. King Based Upon Uncharged Alternatives Means

a. Mr. King Can Only Be Convicted As Charged

An accused person has a constitutional right to be informed of the charges he or she will face at trial. *State v. Brewczynski*, 173 Wn.App. 541, 548, 294 P.3d 825 (2013); U.S. Const. Amend. VI;

Const. Art. I, sec. 22 (amend. 10) . A charging document is adequate only if it includes all essential elements of a crime—statutory and non-statutory—so as to inform the defendant of the charges and to allow the defendant to prepare a defense. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). Because the information alleged the specific instruments which Mr. King was alleged to have possessed in order to have committed the crime of possession of burglary tools, but the jury instructions pled a far broader definition, reversal is required.

The state amended its information to include possession of burglary tools immediately prior to trial and nine months after the first information was filed. The new information specifically alleged that Mr. King did have in his possession “a tool or implement commonly used for the commission of burglary, to wit: flashlight and saw under circumstances evincing an intent to use or employ or allow the same to be used or employed in the commission of a burglary.” CP 9-10. The information did not reference the pliers, the wire cutter or the reflective vest that the state would introduce into evidence and include in her closing arguments. See CP 9-10; 7/9/14 RP 111; 7/9/14 RP 117.

b. Mr. King’s Jury was permitted to convict on uncharged alternative means

The court's to-convict instruction contained far broader language than the state alleged in the information, allowing the jury to convict Mr. King by finding that he possessed "any engine, machine, tool, false key, pick lock, bit, nippers or implement adapted, designed or commonly used for the commission of a burglary." CP 31. No instruction limited the jury to convicting for possession of burglary tools to the tools or implements alleged in the information.

The jurors may have concluded that items other than the flash light and saw seized from the scene constituted burglary tools. For example, the state elicited testimony from a number of witnesses that yellow vests were recovered from the scene. 7/9/14 RP 56. Although there was no significant argument as to why the vest was relevant to the burglary except potentially to make it look like Mr. King and Mr. Bachmann were employees, the fact that this vest was recovered from within the Century Link lot makes it even more likely that some jurors may have concluded that the vest constituted an implement adapted, designed or commonly used in the commission of a burglary. 7/9/14 RP 117. Likewise, the state introduced evidence that a "plier type wire cutters" and a "winding handle thing." 7/9/14 RP 30. While these tools were highlighted in the state's closing argument, none of them were

alleged in the information and no limiting instruction was given to the jury.

Permitting the jury to convict a person based on an uncharged alternative is a constitutional error that is presumed prejudicial and requires reversal. *State v. Chino*, 117 Wn.App. 531, 538, 72 P.3d 256 (2003). It may be harmless only in the narrow circumstance where other instructions “clearly and specifically defined the charged crime.” *Id.* at 540. Because jury instructions omitting elements of the charged crime constitute “a manifest error affecting a constitutional right,” this court may consider the issue for the first time on appeal. RAP 2.5(a)(3); *see State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996).

c. The error requires relief

It is error to instruct the jury on alternative means that are not contained in the charging document. *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); *Chino*, 117 Wn.App. at 540. The error is not harmless where no other instructions clearly limit the crime to the charged alternatives. *Severns*, 13 Wn.2d at 549; *Chino*, 117 Wn.App. at 540. Here, none of the other instructions limit the jury to consider solely the flashlight and saw for purposes of finding proof beyond a reasonable doubt of possession of burglar tools. Moreover, in her

closing arguments, the prosecutor discussed other evidence of burglar's tools, specifically when she referenced the other tools at the scene, the pliers, the wire cutter ..." 7/9/14 RP 119. Consequently, the error it is not harmless because it remains possible that the jury convicted Mr. King on the basis of uncharged alternatives. This error requires remand for a new trial.

2. The Court Miscalculated Mr. King's Offender Score

a. A Sentencing Court Must Base Its Offender Score Calculation On the Criminal History It Determines Exists At the Time Of Sentencing.

Sentencing authority derives strictly from statute. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). A sentencing court's failure to follow the dictates of the SRA may be raised on appeal even if no objection was raised below. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999); *In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

In broad terms, when a court undertakes to calculate an offender score under RCW 9.94A.525 it takes "three steps: (1) identify all prior convictions; (2) eliminate those that wash out; (3) 'count' the prior convictions that remain in order to arrive at an offender score." *State v.*

Moern, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). With respect to the first step, RCW 9.94A.500 (1) requires in relevant part

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

“Criminal history”

means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere . . . The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration

RCW 9.94A.030 (11).

“Bare assertions, unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction.” *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). Instead, due process requires the State bear the “ultimate burden of ensuring the record” supports the individual’s criminal history and offender score. *Ford*, 137 Wn.2d at 480-81.

b. The Trial Court’s Findings Do Not Support the Offender Score.

The Supreme Court has said “[i]n the absence of a finding on a factual issue we must indulge the presumption that the party with the

burden of proof failed to sustain their burden on this issue.” *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (citing *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); and *State v. Cass*, 62 Wn. App. 793, 795, 816 P.2d 57 (1991), *review denied*, 118 Wn.2d 1012 (1992).

RCW 9.94A.525 (2)(b) provides in relevant part:

. . . class B prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525 (2)(c) provides in relevant part:

. . . class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525 (2) does not require inclusion of a prior offenses in the offender score “unless” they are shown to have washed out. Instead, the statute provides they “shall not be included” unless they have been

shown to have not washed out. The term “shall” indicates a mandatory duty on the trial court. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Thus, before a court can include a Class B felony in an offender score the court must determine the person has not spent ten crime-free years from the date of release from confinement to the date of the next offense. RCW 9.94A.525(2)(c). To permit such a determination, the trial court must find the dates of the offense, sentencing, and release, for any intervening misdemeanor convictions which may have prevented the listed offenses from washing out.

The judgment and sentence in this case contains a section entitled “II. FINDINGS.” Within this section, is paragraph 2.3 entitled “Criminal History,” which references Appendix C, which contains the court’s finding of criminal history. CP 52. “Appendix C” in turn provides:

“The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime
Protection Order: Violent Felony	10/05/2007	AF
Tampering with a Witness	10/05/2007	AF
Bail Jumping	10/05/2007	AF

Controlled Substance- Possession No Subscription	11/30/2005	AF
Controlled Substance Violation: Mfg/delvr/p	4/19/1995	AF

CP52.

With no evidence of an intervening event, this history establishes an offender score of zero.

- i. The court could not include Mr. King's 1995 controlled substance conviction because more than ten years intervened between that conviction and the next proven conviction.**

Pursuant to RCW 9.94A.525 (2)(b), a Class B felony cannot be included in the offender score unless the court finds the person has not spent ten consecutive years in the community without committing a new offense. Mr. King's first conviction was for a Controlled Substance Violation, which, as established in the Judgment and Sentence, is a B felony, which would wash out after ten years spent in the community. RCW 69.50.401. The trial court's findings do not include any offense in the findings of fact that show that any period of confinement in this ten year period that does not require the conviction to wash out. Thus, pursuant to RCW 9.94A.525 (2)(b) that offense cannot be included in Mr. King's offender score.

The Court's findings do not include any subsequent conviction in Mr. King's history that occurred between the Class B felony drug conviction and the Class C drug offense sentenced in 2007. More than ten years passed between these convictions.

The absence of a finding of an intervening conviction requires this court to presume that the trial court found insufficient proof of such offenses. *Armenta*, 134 Wn.2d at 14 . In the absence of such a finding, Mr. King's 1995 conviction offense cannot be included in his offender score.

ii. The court could not include the Class C convictions because more than five years had intervened between those convictions and this charge.

RCW 9.94A.525 (2)(b) states that a Class C felony cannot be included in the offender score unless the court finds the person has not spent five consecutive years in the community without committing a new offense that subsequently results in a conviction. The remainder of the court's findings regarding Mr. King's history include Protection Order Violation – Felony, Tampering with a Witness, Bail Jumping and Possession of a Controlled Substance, are of which are C felonies. See, RCW 26.50.110; RCW 9A.76.170; RCW 69.50.401.

While the findings indicate an intervening conviction for the possession charge, no intervening conviction is proven after the 2007 sentences. The trial court's findings do not include any period of confinement in the findings of fact that show that this five year period was ever interrupted. Because there is no finding that Mr. King did not spend five year in the community without committing any crime that resulted in a conviction, these offenses cannot be included in Mr. King's offender score. RCW 9.94A.525(2)(c).

The absence of such a finding requires this Court to presume the court found insufficient proof of such offenses. In the absence of such a finding, Mr. King's class C felonies cannot be included in his offender score.

3. Appeals Costs Should Not Be Imposed

Should Mr. King not prevail on his appeal, he asks that no costs of appeal be authorized under RAP 14. Legal Financial Obligations are defined as restitution, costs, fines, and other assessments as required by law. RCW 9.94A.760. Trial courts must make an individualized finding of current and future ability to pay before the court it imposes LFOs. *State v. Blazina*, --- Wn.2d ---, No. 89028-5, 2015 WL 1086552, at *6 (Wash. Mar. 12, 2015). This is because the legislature intended each

judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual's circumstances. *Id.* at *3. In recognizing that “national and local cries for reform of broken LFO systems demand” review of LFO orders, this court must make finding of Mr. King's ability to pay before imposing costs in this case. *Id.*

In fact, no discretionary costs were imposed against Mr. King in the judgment and sentence. The trial court waived all non-mandatory fees, including court costs, recoupment fees to the King County Public Defense Program, fines, the King County Interlocal Drug Fund, the State Crime Laboratory Fee and the costs of incarceration. CP 48, 55. Without a basis to determine that Mr. King has a present or future ability to pay, this court should not assess appellate court costs against him in the event he does not substantially prevail on appeal.

F. CONCLUSION

Mr. King was deprived of fair notice of the charges against him when the State attempted to prove possession of burglar's tool by alternative means not included in the information filed against him. With jury instructions that did not specifically allege the tools that the state intended to use to prove possession of burglar's tools, but instead instructing the jury generally on the possession of burglary tools

charge, this court cannot be confident that the jury's verdict was unanimous. These errors warrant remand for a new trial.

At sentencing, the court erred in finding that Mr. King's criminal history was five. Instead, the evidence established that his former convictions had "washed out" because no intervening convictions or other events were shown to prevent washout. Mr. King was improperly sentenced on this charge.

Should Mr. King not prevail on this appeal, he asks that appellate costs be waived. No finding of ability to pay was made by the trial court and costs should not be imposed until the trial court makes such a finding.

DATED this 30th day of March 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "T. Stearns", with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 72598-0-1
)	
PATRICK KING,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	(X)	E-MAIL BY AGREEMENT
516 THIRD AVENUE, W-554		VIA COA PORTAL
SEATTLE, WA 98104		
[paoappellateunitmail@kingcounty.gov]		

[X] PATRICK KING	(X)	U.S. MAIL
6000 CALIFORNIA AVE SW	()	HAND DELIVERY
SEATTLE, WA 98136	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF MARCH, 2015.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710