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FILED
July 24, 2015
Court of Appeals
Division I
State of Washington

NO. 72598-0-I

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 REPLY BRIEF

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A. ARGUMENT IN REPLY

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

Because the information alleged only a flashlight and saw, but the jury instructions pled a far broader definition of possession of burglar's tools, reversal is required. The right to be informed of all of the essential elements of a crime requires the state to inform the defendant of the charges, allowing him to prepare a defense. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

When the State made closing arguments, it argued outside the scope of the information, stating the jury could find Mr. King guilty of possession of the burglar's tools, which were "primarily the flashlight and saw." 2 RP 114. This argument clearly extended the definition of the possession to the other instruments discovered the night Mr. King was arrested.

The only instruction the jurors were given contained far broader language than 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 other instruction limited this definition.

The conviction of a person based on an uncharged alternative is a constitutional error which 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. The court committed error by instructing the jury on alternative means not contained in the charging document. *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942). No other instructions limited the crime to the charged alternatives to justify a harmless error analysis. *Id.*, 13 Wn.2d at 549; *Chino*, 117 Wn.App. at 540. This error requires remand for a new trial.

2. The Court Miscalculated Mr. King’s Offender Score which must be based upon the findings of the court contained in the judgment and sentence.

Sentencing authority derives strictly from statute. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). The 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).

“Criminal history” is defined by RCW 9.94A.030 (11).¹ “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.

This Court must rely upon the written findings made below and not upon. 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):

¹ RCW 9.94A.030 (11) provides in pertinent part that “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

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. This matter should be remanded for a new sentence consistent with the established criminal history.

B. CONCLUSION

Mr. King requests this court to grant the relief he requested in his opening brief.

DATED this 24th day of July 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	
)	
PATRICK KING,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF JULY, 2015, I CAUSED THE ORIGINAL **REPLY 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:

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