

No. 41409-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ORLEN WILLIAM PAGEL,

Appellant.



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

The Honorable Gary Tabor, Judge
Cause No. 10-1-00348-1

BRIEF OF RESPONDENT

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A. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

1. Did the information charging Pagel provide constitutionally sufficient notice of the offenses with which he was charged, such that he was capable of preparing and mounting a defense at trial?

2. Did the sentencing court properly exercise its discretion when it declined to determine whether Pagel's convictions for second-degree theft and second-degree burglary encompass the same criminal conduct?

3. Did the performance of Pagel's defense counsel provide Pagel with effective representation so as to satisfy Pagel's Sixth and Fourteenth Amendment rights?

4. Did the sentencing court properly determine that Pagel had been convicted of six adult felonies in accordance with Pagel's Sixth and Fourteenth Amendment rights?

B. STATEMENT OF THE CASE.

The State accepts Pagel's statement of the case. Brief of Appellant, at 3-4.

C. ARGUMENT

1. The information charging Pagel was constitutionally sufficient to notify him of the charges he was facing such that he was able to prepare and mount a defense at trial.

An accused has a right to be informed of the criminal charge against him so that he will be able to prepare and mount a defense at trial. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); see U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10). The "essential elements" rule requires that, in order

to provide adequate notice to a criminal defendant, a charging document must allege facts supporting every material element of the offense, in addition to adequately identifying the crime charged. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (quoting State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). The primary goal of the rule is simply to “give notice to an accused of the *nature* of the crime” with which he has been charged. Kjorsvik, 117 Wn.2d at 101 (emphasis added).

A charging document that is challenged for the first time on appeal, however, will be construed liberally in favor of its validity and will be found sufficient if the necessary elements of the offense appear in any form, or by fair construction may be found, on the face of the document. McCarty, 140 Wn.2d at 425. Viewed in this way, the charging document will be held to include all facts which are necessarily implied by the language of the allegations. See Kjorsvik, 117 Wn.2d at 109. Provided that the necessary elements appear in some form on the face of the document, a defendant can succeed in challenging the sufficiency of the information only where he was “actually prejudiced by the inartful language” of the charges. McCarty, 140 Wn.2d at 425; Kjorsvik, 117 Wn.2d at 103, 106 (noting that a liberal construction and requirement of actual

prejudice would prevent defendants from “sandbagging,” or challenging an information only after defects could no longer be remedied).

The information charging Pagel, liberally construed in favor of its validity, meets the requirements of the “essential elements” test by alleging several facts supporting each material element of each offense, such that Pagel had notice of the *nature* of the crimes for which he was accused. Specifically, the facts alleged by the information are that on October 31 and November 1, 2009, Pagel (1) entered or remained in a building; (2) that he did so unlawfully; and (3) that he did so with the intent to commit a crime against a person or property. [CP 2]. The information further alleges that on November 1, 2009, Pagel (1) wrongfully obtained or exerted control over property or services of another or the value thereof; (2) that he did so without authorization; (3) that he intended to deprive another person of those property or services; and (4) that the value of the property or services exceeded \$750.00. [CP 3]. Liberally construed, the document accusing Pagel of these acts necessarily implied that all of the above *facts* were true and, once proved, would satisfy each material element of the crimes with which Pagel was charged. [CP 2-3].

While Pagel asserts that the information must always go beyond the language of the statute, this is incorrect. Brief of Appellant, at 6-7. While use of the “statutory language in the charging document *may* be inadequate” (emphasis added), this is not the case “if the statute defines the offense with certainty.”¹ Kjorsvik, 117 Wn.2d at 98-99.

Contrary to Pagel’s suggestion, a charging document is not required to describe in detail exactly *how* the defendant is believed to have committed the acts constituting the crime. Brief of Appellant, at 7; see State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991) (holding that an information need not specify the “when, where, or how” of the charged offense); State v. Elliott, 114 Wn.2d 6, 13, 785 P.2d 440 (1990) (holding that an information need not elect the specific means, out of several possible, that a defendant might have violated the statute); State v. Plano, 67 Wn. App. 674, 678-79, 838 P.2d 1145 (1992) (holding that an information charging assault need not specify which person the accused allegedly

¹ Pagel argues that the statutory language is “abstract,” however, this is inaccurate. Brief of Appellant, at 7. The factual allegation that Pagel “entered a building,” for example, is not abstract since the *meaning* of the allegation is clear, allowing any person charged to understand the nature of the fact alleged. Rather, criticism that the allegation does not specify *which* building Pagel entered would not affect the *meaning* of the factual allegation but, at most, would make that allegation vague.

assaulted). Indeed, Pagel has not pointed to a single instance in which a charging document was found to be constitutionally deficient solely on the grounds that its *factual* allegations were insufficiently specific. Brief of Appellant, at 5-6, 8.

In challenging his charging document, Pagel has ignored the distinction drawn in State v. Bonds, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982), between “a constitutionally defective information and one which is merely deficient due to vagueness.” State v. Holt; 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). The courts have repeatedly pointed out that an information which accurately defines the elements of an offense, but is vague as to other matters deemed significant by the defendant, may be corrected by requesting a bill of particulars. See, e.g., State v. Noltie, 116 Wn.2d at 843-44. A defendant who chooses not to request a bill of particulars, however, has apparently found the information to be sufficiently specific and cannot challenge the document’s vagueness on appeal. See id. In this way, a defendant who believes that the information has failed to specify the “when, where, or how” of its allegations, and who believes that these particular details are necessary to present a defense, may request greater

specificity while the prosecution still has an opportunity to provide it. See id.

The factual allegations made against Pagel were sufficient to inform him of the nature of the charges he was facing. If Pagel was confused as to any particular detail of the acts that he was accused of committing, or believed that greater specificity was necessary to present a defense, *i.e.*, if he found the prosecution's charges *vague*, he had every right to request a bill of particulars. He did not do so, and cannot now attack those charges.

In determining whether a defendant suffered actual prejudice as a result of a charging document's lack of specificity, a court is permitted to look outside the document itself. State v. Williams, 162 Wn.2d 177, 186, 170 P.3d 30 (2007). Where an information is accompanied by a statement of probable cause that includes details of how the defendant is alleged to have committed the offense, such that the defendant can be shown to have had notice of the nature of the charges, the defendant cannot demonstrate that the information's lack of specificity caused him actual prejudice. See id. In this case, the information charging Pagel was accompanied by a certification of probable cause specifying exactly where and when Pagel was alleged to have committed the offense,

the specific items Pagel was alleged to have exerted control over, and the evidence linking Pagel to the commission of the offense. [Supp. CP ____] With these details, Pagel must have actually understood the nature of the charges against him and would have had sufficient information to prepare a defense. He has not, therefore, suffered actual prejudice.

The information charging Pagel, liberally construed in favor of its validity, was sufficient to provide him notice of the nature of the charges he was facing and to adequately prepare a defense. He did not suffer actual prejudice as a result of the information's lack of specificity and therefore his conviction should be affirmed.

2. The sentencing court properly exercised its discretion when it declined to consider whether Pagel's convictions for burglary and theft constituted the "same criminal conduct."

RCW 9.94A.589(1)(a) provides that, where a sentencing court determines that two or more of a defendant's current offenses encompass "the same criminal conduct," those multiple offenses are to be counted as a *single* crime for the purpose of calculating that individual's offender score. RCW 9.94A.589(1)(a). This occurs where both crimes "require the same criminal intent, are committed at the same time, and involve the same victim." *Id.* Only where a sentencing court has clearly abused its discretion or misapplied the

law in calculating an offender score will an appellate court disregard a sentencing court's discretion in determining that two offenses did, or did not, encompass the same criminal conduct. State v Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Pagel's argument that the trial court abused its discretion in failing to determine whether his convictions for second-degree burglary and second-degree theft encompass the same criminal conduct mischaracterizes the application of RCW 9A.52.050, the burglary antimerger statute. Brief of Appellant at 12. RCW 9A.52.050 provides that "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary." RCW 9A.52.050. Recognizing that "burglaries involve a breach of privacy and security" and would often warrant separate consideration for punishment, the Supreme Court held in State v. Lessley that the effect of RCW 9A.52.050 is to authorize sentencing judges to provide separate punishment for burglary "even where [the burglary] and an additional crime encompass the same criminal conduct." Lessley, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992) (specifically allowing burglary and first-degree kidnapping to be treated as separate crimes for purposes of calculating an offender score). In doing so, the Court

affirmed the decision of the Court of Appeals that burglaries were “exempt” from the otherwise standard “same criminal conduct” analysis at the discretion of the sentencing judge. State v. Lessley, 59 Wn. App. 461, 467, 798 P.2d 302 (1990); see Lessley, 118 Wn.2d at 781-82.

Pagel seems to argue that, from a procedural standpoint, the court must always engage in the ‘same criminal conduct’ analysis and may only *afterwards* note that, under the anti-merger statute, it will disregard that analysis. Brief of Appellant, at 12. While a trial court could seemingly *choose* to proceed in this way, Pagel’s suggestion that a sentencing judge be required to engage in analysis that it is authorized to ignore entirely, and might even consider to be a waste of time, is not supported by case law.² Id. A requirement that a sentencing court fully explore arguments that it considers to be irrelevant, on both sides of an issue that it properly deems superfluous, would sacrifice much in judicial economy in pursuit of little procedural clarity.

² While Pagel contends that a “failure to exercise discretion” is always reversible error, this is misleading. Brief of Appellant, at 9 (citing State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). Contrary to Pagel’s suggestion, a sentencing court abuses its discretion where a defendant has *requested* a sentence below the standard range, and the sentencing court “refuses categorically” to consider the request “under any circumstances.” Grayson, 154 Wn.2d at 342. The sentencing court in this case, in entering an offender score to which both parties agreed and that was specifically authorized by the burglary anti-merger statute, cannot be said to have met this standard.

Under RCW 9A.52.050, the court sentencing Pagel was granted the authority to treat his convictions for burglary and theft as separate crimes in calculating his offender score *regardless* of whether or not it might consider those offenses to encompass the same criminal conduct. Lessley, 118 Wn.2d at 781-82. In this sense, Pagel is faulting the sentencing court for disregarding an analysis that it is statutorily authorized to disregard. Id. The sentencing court at issue, articulating the same concerns for privacy and security recognized by the Supreme Court in Lessley, calculated Pagel's offender score in a manner perfectly consistent with the application of both RCW 9A.52.050 and 9.94A.589(1)(a). See [RP (10/28/10) 19-20]; Lessley, 118 Wn.2d at 782. For these reasons, the sentencing court's determination was a proper exercise of its discretion and should be affirmed.

3. Pagel received effective assistance of counsel such that his Sixth and Fourteenth Amendment rights were satisfied.

An appellant claiming ineffective assistance of counsel must demonstrate (1) that his "counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances"; and (2) that the "deficient representation prejudiced the defendant, *i.e.*, there is a reasonable

probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” State v. McDonald, 138 Wn.2d 680, 697-98, 981 P.2d 443 (1999) (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). In determining whether an appellant has met this burden, an appellate court will entertain a “strong presumption [that] counsel’s representation was effective.” State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001).

In order to demonstrate that his counsel’s representation was deficient, an appellant must “show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct.” McFarland, 127 Wn.2d at 336. In this case, Pagel’s defense counsel might reasonably have decided that, in light of the authority granted to the court by the burglary antimerger statute, a request for analysis of whether or not Pagel’s actions encompassed the same criminal conduct would have been unlikely to affect his ultimate sentence. RCW 9A.52.050; see Lessley, 118 Wn.2d at 781-82. With this in mind, defense counsel might have determined that such a request would do little more than draw the court’s attention to the testimony it had heard only a few minutes earlier

about the effects of the burglary and theft upon the children of the school and upon the community. [RP (10/28/10) 13-15].

Rather than reminding the court of Pagel's criminal purpose or the identity of his victim, a better sentencing strategy might actually have been to point out that Pagel had committed no violent offenses and had made a real effort to "turn his life around," that the State was requesting twice the midpoint of the standard sentencing range, and that Pagel's eligibility for an exceptional sentence was only a result of the doubling effect of a burglary.³ [RP (10/28/10) 15-17]. Indeed, the Court of Appeals, Division Three, has held that defense counsel's choice of a "mercy argument" instead of a legal objection might be "strategic and tactical" such that it cannot be said to fall below an objective standard of reasonableness. State v. Goldberg, 123 Wn. App. 848, 853, 99 P.3d 924 (2004). For these reasons, Pagel has not shown that his defense counsel's failure to argue that his convictions encompass the same criminal conduct amounted to deficient representation.

Pagel has also failed to demonstrate that, had defense counsel argued that Counts I and III encompass the same criminal conduct, there would be a reasonable probability that the result of

³ The State finds no evidence in the record to support Pagel's assertion that counsel's efforts on these matters were "half-hearted." Brief of Appellant, at 15.

the proceedings would have been different. McDonald, 138 Wn.2d at 698. While Pagel argues that such a reasonable possibility exists solely on the grounds that the two offenses can be considered the “same criminal conduct,” he does so by ignoring the application of the burglary antimerger statute. *Compare* Brief of Appellant, at 15-16; *with* RCW 9A.52.050. In this sense, defense counsel would have needed to persuade the court not only that Pagel’s convictions encompass the same criminal conduct, but also that the court should refuse to exercise its authority to provide separate punishment for burglary even where the “same criminal conduct” test is satisfied. Lessley, 118 at 781-82. By ignoring the application of RCW 9A.52.050, however, Pagel has failed to provide any possible explanation for *why* the court might have refused to exercise the above authority and, for this reason, has failed to establish any reasonable probability that his sentence would have been different. Brief of Appellant at 16.

Pagel has failed to demonstrate that his counsel’s representation was deficient or that any deficiency resulted in prejudice. This court should therefore affirm his sentence.

4. Pagel's right to a jury determination of any fact authorizing an increased penalty, beyond a reasonable doubt, does not extend to evidence of a prior conviction.

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348 (2000) (emphasis added)). Although Pagel asserts that recent statements by the U.S. Supreme Court have cast doubt on this line of reasoning, he concedes that the Court has not revisited its conclusion, stated above, that the “fact of a prior conviction” is an *exception* to the general rule requiring a jury determination of proof beyond a reasonable doubt. Brief of Appellant, at 18 (acknowledging that the Court has been “careful to distinguish prior convictions from other facts” that *would* require such a determination).⁴

⁴ While Pagel correctly notes that the U.S. Supreme Court's decision in Almendarez-Torres v. United States, 523 U.S. 224, 226-27, 118 S. Ct. 1219 (1998) (holding that a defendant's prior conviction is not an element of an offense when used to enhance a sentence), has been criticized by more recent U.S. Supreme Court decisions, this criticism does not reflect any change in the law as it is currently applied by the courts. Brief of Appellant, at 18; *compare* Apprendi, 530 U.S. at 489-90; *with* Blakely, 542 U.S. at 301.

While Pagel is also correct that the U.S. Supreme Court's decision in Almendarez-Torres did not expressly hold that a prior conviction is *not* a fact requiring a jury determination of proof beyond a reasonable doubt, Almendarez-Torres, 523 U.S. 224, 248, 118 S. Ct. 1219 (1988),⁵ such an observation is not relevant to the legitimacy of his sentence. Brief of Appellant, at 19. Contrary to Pagel's suggestion, anything left unanswered by the U.S. Supreme Court in Almendarez-Torrez has been definitively answered, and repeatedly reaffirmed, by the Washington State Supreme Court. See, e.g., State v. Smith, 150 Wn.2d 135, 155-56, 75 P.3d 934 (2003); State v. Wheeler, 145 Wn.2d 116, 124, 34 P.2d 799 (2001); State v. Thorne, 129 Wn.2d 736, 783, 921 P.2d 514 (1996).

In Wheeler, the Washington Court pointed out that the U.S. Court "did not overturn Almendarez-Torres" in deciding Apprendi, and that no federal case had required a prior conviction to be proved to a jury beyond a reasonable doubt. Wheeler, 145 Wn.2d at 124. In doing so, the Washington Court reaffirmed its holding

⁵ The Supreme Court has not, however, recognized such a reservation on the effect of Almendarez-Torres in more recent decisions. See Blakely v. Washington, 542 U.S. at 301 ("*Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.*").

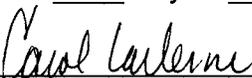
from Thorne that prior convictions could easily be proved by certified copies of the defendant's judgment and sentence, and that a sentencing judge was qualified to find the existence of that fact without a jury determination. 129 Wn.2d at 783. The Washington Court reaffirmed these holdings in State v. Smith, where it concluded that "neither the sixth amendment to the United States Constitution nor article I, sections 21 and 22 of the Washington Constitution includes the right to a jury determination of prior convictions at sentencing." Smith, 150 Wn.2d at 156. In addition, the Washington Court has endorsed the position that the State must prove a prior conviction only by a preponderance of the evidence. State v. Jones, 110 Wn.2d 74, 77, 750 P.2d 620 (1980).

The United States and Washington State Supreme Courts have already answered the question of whether Pagel was entitled to a jury determination of his prior conviction beyond a reasonable doubt, and have determined that he was not. For these reasons, the sentencing court's reliance upon certified copies of judgment and sentence from Pagel's prior convictions, and subsequent determination that he had six adult felony convictions, did not violate Pagel's constitutional rights. [RP (10/28/10) 3-5]. This Court should affirm his sentence.

D. CONCLUSION

The information charging Pagel provided constitutionally sufficient notice of the charges he was facing such that Pagel was capable of understanding the nature of those charges and preparing a defense. In addition, the sentencing court, after appropriately concluding that his prior convictions had been demonstrated by a preponderance of the evidence, properly exercised its discretion in calculating Pagel's offender score and sentencing him accordingly. Through all of this, Pagel was represented by effective defense counsel. For these reasons, the State respectfully asks this court to affirm both his conviction and sentence.

Respectfully submitted this 29th day of June, 2011.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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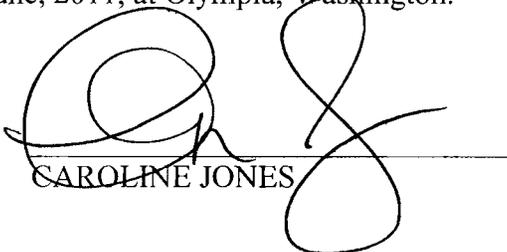
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 29 day of June, 2011, at Olympia, Washington.


CAROLINE JONES