

NO. 41886-0-II

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

STATE OF WASHINGTON, Respondent

v.

LORIN DEWAINE JONES, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01131-5

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court did not comment on the evidence when it stated for the record a fact that had occurred at trial.
- II. The trial court did not abuse its discretion when it did not sentence the defendant to the Drug Offender Sentencing Alternative.

B. STATEMENT OF THE CASE

III. Procedural Facts

Lorin DeWayne Jones (hereafter, “the defendant”) was charged by Amended Information with Count One: Possession of a Stolen Motor Vehicle and Count Two: Driving While License Suspended or Revoked in the Third Degree. (CP 3-4). Count Two was dismissed without prejudice. (CP 5). On January 31, 2011, following a trial by jury, the defendant was found guilty of Count One: Possession of a Stolen Motor Vehicle. (CP 20). Sentencing was held on February 17, 2011. (CP 21-28). With an offender score of 30 points, the defendant’s standard range sentence was 43-57 months confinement. (CP 23). The court ordered a sentence of 43 months confinement. (CP 23). This timely appeal followed. (CP 35).

IV. Summary of Substantive Facts

a. *Testimony at Trial*

On July 12, 2010, the defendant was found in possession of Kara Magistrale's stolen vehicle. A one-day jury trial was held on January 31, 2011, in the Clark County Superior Court. (RP 27). The defendant did not testify at trial.

Kara Magistrale testified that she owned a white, 2-door, 2008 Ford Focus, with an Oregon license plate number of 1-9-9 DTQ. (RP 38). Magistrale said she purchased the car when it was new in April of 2008. (RP 38-39). Magistrale said, on July 11, 2010, she drove her vehicle to Leverage Park, in Vancouver, Washington. (RP 39). Magistrale said she was on a kick-ball team and she was meeting her team at the park. (RP 39). Magistrale parked her car in the parking lot at the park. (RP 40). Magistrale said she played kick-ball for about three hours. (RP 39). Magistrale said, when she returned to the parking lot where she had parked her car, she saw that her car was gone and there was broken glass on the ground in her parking spot. (RP 40).

Magistrale said she kept a spare set of keys for her car in her glove compartment. (RP 40-41). Magistrale said she left her purse and wallet in the trunk of her car as well as all of her school books, clothes, and shoes.

(RP 40). Magistrale said her driver's license was in her wallet, which listed her name as "Kara Magistrale." (RP 41).

Magistrale testified that she called the police immediately after she found her car was gone in order to report it stolen. (RP 43). She said she received a call from Vancouver Police Department Officer Scott Telford the following day. (RP 43). Officer Telford told her he had recovered her car. (RP 43). Magistrale said she viewed the car that Officer Telford recovered one or two days later and confirmed it was, in fact, the vehicle she reported stolen. (RP 43).

Officer Telford testified that he came into contact with the defendant on July 12, 2010, while he was on-duty. (RP 51). Officer Telford came into contact with the defendant in response to a traffic complaint from dispatch. (RP 51). Dispatch described the vehicle involved in the traffic complaint as a white sedan with Oregon plates. (RP 51). Officer Telford conducted a traffic stop of this vehicle at 24th Street East and Roosevelt in Clark County, Washington. (RP 52). Officer Telford described the vehicle he stopped as a white, 2008 Ford Focus, Oregon license plate number 1-1-9 DTQ. (RP 53). Officer Telford said the driver of the vehicle identified himself as "Lorin DeWayne Jones." (RP 53). There were no other occupants in the vehicle. (RP 54). Officer Telford said the vehicle's engine was running when he stopped it. (RP

54). When Officer Telford made contact with the driver, he noticed the driver's-side window was gone and there was broken glass in the vehicle. (RP 54). Officer Telford said he also observed the driver of the vehicle was sitting on a blanket, which appeared to be covering much of the broken glass. (RP 55).

Officer Telford said, as he was processing the traffic-stop, he learned the vehicle he stopped had been reported stolen. (RP 54). Officer Telford said he confirmed the vehicle's status with dispatch, called for back-up, and then arrested the driver at the scene. (RP 55). The State asked Officer Telford if he saw the driver of the stolen vehicle in court today. (RP 53). Officer Telford responded affirmatively. (RP 53). Officer Telford then pointed to the defendant, who was sitting at counsel table with his attorney. (RP 53). Officer Telford said the defendant as wearing a blue t-shirt. (RP 53).

Officer Telford said, when he arrested the defendant on July 12, 2010, the defendant told him "a girl by the name of Kayla gave me the car. I didn't steal it." (RP 56). Officer Telford said the defendant told him he got into a fight with his girlfriend the previous night. (RP 57). The defendant said he waited outside his girlfriend's house when a woman named "Kayla" approached him. (RP 57). The defendant said Kayla told him that she got into a fight with her boyfriend as well. (RP 57).

According to the defendant, Kayla told him her boyfriend broke-out the window to her car. (RP 57). The defendant said he asked Kayla if he could “borrow” her car, to which Kayla responded “yes.” “[j]ust bring it back tomorrow.” (RP 57). Officer Telford asked the defendant if he knew of any way he could reach Kayla in order to confirm the defendant’s story. (RP 57). The defendant was unable to provide Officer Telford with Kayla’s last name, address, or phone number. (RP 57-58).

Kara Magistrale testified she did not know the defendant. (RP 44). Magistrale said she did not recognize the defendant in court. (RP 44). Magistrale said she did not give the defendant permission to take or use her car. (RP 44-45). Magistrale said her boyfriend did not break the window to her car and, when she left her car to play kick-ball on July 11, 2010, all windows were intact. (RP 44).

b. *Sentencing Hearing*

On January 31, 2011, after the jury returned its verdict, defense counsel asked the court for a two week set-over of sentencing. Defense counsel said the defendant had another pending felony case and he would like to try to work out a global resolution with this case, so that the defendant could potentially screen for DOSA.³ (RP 112-113). The

³ “DOSA” is the acronym for the “Drug Offender Sentencing Alternative” RCW 9.94A.660.

defendant's other pending felony case was Clark County Cause Number 10-1-01872-7, in which the defendant was charged by Information with Count One: Attempted Escape in the First Degree, occurring on or about November 26, 2009. (APPENDIX A).

Sentencing on the instant case was held on February 17, 2011. (RP 129). At the time of sentencing, the defendant had not resolved his other pending felony (Cause Number 10-1-01872-7). The anticipated trial date for the defendant's other pending case was at the end of March, 2011. (RP 110-111).

The State recommended 57 months confinement on the instant case. (RP 130). The State also advised the court that, if and when, the defendant resolved his other pending case, the State would be recommending consecutive sentences. (RP 130).

Defense counsel recommended a sentence at the bottom of the sentencing range. (RP 132). Defense counsel advised the court that the defendant's extensive criminal history was primarily due to his history of drug abuse. (RP 131). Defense counsel did not indicate that drugs were a factor in the instant case; however, he indicated the defendant was "high on meth" when he was arrested on his other pending case (Cause Number 10-1-01872-7). (RP 132). Because the State would be seeking a consecutive sentence on the defendant's other pending case, defense

counsel asked the court, if it did not consider DOSA now, to consider DOSA “the second time around” on the defendant’s other pending case. (RP 132).²

The defendant told the court, “I don’t steal cars anymore. This really was a loaner car that I borrowed from somebody.” (RP 139). The court asked the defendant, “[a]nd you were high on meth, that is alleged, with the [E]scape [charge]?” (RP 139). Defense counsel responded, “[a]ccording to the police officers.” (RP 139).

The court imposed a standard-range sentence of 43 months confinement on the instant case. (RP 139). In imposing this sentence, the court said “I’m considering your criminal history and that you need to be out of the community for a while. But also, you do need treatment.” (RP 139).

The court said the defendant had a right to screen for DOSA; however, it also said the Department of Corrections would not accept the defendant for the DOSA program while he had another felony case pending with a “full term sentenc[e]” pending with it. (RP 133). The court did not order DOSA on the instant case; however, the court said it

² With an offender score of 25-30 points, the defendant’s standard range sentence for Possession of a Stolen Motor Vehicle was 43 - 57 months confinement. The defendant’s standard range sentence for Attempted Escape in the First Degree was 47.25 - 63 months confinement. RCW 9A.56.068; RCW 9A.76.110; RCW 9A.28.020; RCW 9A.4A.510.

would consider a DOSA sentence on the defendant's other pending case, if and when the defendant resolved that case. (RP 135). The court said:

[l]et's look at prison based DOSA with the subsequent sentencing. I'm not ruling it out totally. I am ruling it out at this point because we have got something else out there that could make a prison based DOSA absolutely moot.

(RP 135). The court also said:

...with the amount of time you have done, and the amount of time you are going to get off with that 43 months, I don't think that you are going to sit that long. Because what they will do on a DOSA, if you get a reasonable kind of evaluation for that. We are going to cut half of that...[s]o I'm imposing the low-end."

- (RP 139-140).

C. ARGUMENT

V. The trial court did not comment on the evidence when it stated for the record a fact that had occurred at trial.

The defendant claims the trial court unconstitutionally commented on the evidence when the judge said the record would reflect the fact that Officer Telford identified the defendant in court. *Brief of Appellant*, p. 4. During the State's direct examination of Officer Telford, the following transpired:

Q: ...Can you describe for the jury, in more detail the vehicle - - what you saw the Defendant driving?

A: I have it listed as a 2008 Ford Focus, white in color with an Oregon plate 1-1-9 D-T-Q.

Q: And the person you saw driving that vehicle on that date, is that person here in the courtroom today?

A: Yes.

Q: And can you point him out verbally by his location and the color of shirt he is wearing?

A: He is sitting at the Defendant's table. Blue shirt, t-shirt.

State: If the record can reflect that Officer Telford identified the Defendant, Lorin Jones?

Judge: So shall it reflect.

(RP 52-53). The defendant did not object or request a curative instruction.

Article 4, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement by the trial court constitutes a comment on the evidence only if the court's attitude regarding the merits of the case or the court's evaluation of a disputed issue can be inferred from the court's statement. *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706 (1986). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth or value of the testimony of a witness has been communicated to the jury." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The

purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury.” *Lane*, 125 Wn.2d at 838. For example, in *City of Seattle v. Arensmeyer*, the reviewing court found the trial court unconstitutionally commented on the evidence when the court interrupted defense counsel during his closing argument to say:

[j]ust a minute - - that isn't the testimony. They both testified as to how long they were police officers, and they had actually been in the Academy at this occurrence, but they had been police officers before that. Now, don't give the impression they were just policemen that were put in the Academy...

Proceed.

6 Wn. App. 116, 120-121, 491 P.2d 1305 (1971) (finding, when the trial court interrupted defense counsel, it commented on the evidence by revealing what it believed the evidence to mean).

In contrast to *Arensmeyer*, in the instant case, the trial court never stated its opinion. The trial court did not comment on Officer Telford's testimony and, thereby, reveal what it believed to be the meaning of the officer's testimony. Also, the trial court did not comment on the credibility of Officer Telford's testimony. Rather, the court simply stated for the record a fact that had occurred at trial, to wit: Officer Telford identified the person he stopped in a 2008 Ford Focus on July 12, 2010 as the defendant. From this statement, a jury would not be able to infer “the

feeling of the trial court as to the truth or value of the testimony of Officer Telford or the court's opinion as to the merits of the case. *Lane*, 125 Wn.2d at 838; *Hansen*, 46 Wn. App. at 300.

In *State v. Rybolt*, the Arizona Court of Appeals found the trial court did not unconstitutionally comment on the evidence when an exchange took place during trial that is nearly identical to the exchange that took place here. 133 *Ariz.* 276, 650 P.2d 1258 (1982), *overruled on other grounds in State v. Diaz*, 142 *Ariz.* 119, 688 P.2d 1011 (1984).

The following occurred in *Rybolt* during the State's direction examination of the victim:

Q: The person that was with you and came into your house that day, is that person in the courtroom today?

A: Yes, he is.

Q: What's he wearing?

A: He's wearing a brown shirt open at the collar. I can't see his pants.

Q: Where is he seated?

A: He's seated next to Mr. Shaw, the defense attorney.

State: May the record reflect the identification, Your Honor?

Court: The record shall so reflect.

- *Rybolt*, 133 *Ariz.* at 281.

The court in *Rybolt* analyzed the defendant's claim under article 6, section 27 of the Arizona State constitution, which provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law..." *Rybolt*, at 281 (emphasis removed). Arizona case law provides, in order to violate art. 6, § 27 of the State constitution, "the court must express an *opinion* as to what the evidence proves." *Id.* at 281-282, citing *State v. Barnes*, 124 Ariz. 586, 590, 606 P.2d 802, 806 (1980) (emphasis in original). The Court found the trial court's comment was not an expression of opinion because the court was simply re-stating a fact that occurred at trial (i.e. the witness identified the defendant). *Id.* at 282. Certainly, Arizona case law is not controlling here; however, the Court's holding in *Rybolt* is instructive because Ariz. Const. art. 6, § 27 mirrors Wash. Const. art. 4, § 16 and because Arizona's interpretation of this constitutional provision mirrors Washington's interpretation of the identical constitutional provision.

Moreover, even if the trial court's statement *could* be interpreted as an expression of opinion, the court did not render its opinion on a disputed fact. *Hansen*, at 301 (finding, when the statement goes to a peripheral issue, not a disputed fact, it does not constitute a comment on the evidence). Officer Telford stopped the defendant while he was driving Kara Magistrale's vehicle. (RP 54-55). Officer Telford arrested the

defendant at Magistrale's vehicle, once he learned it had been reported as stolen. (RP 55). The identity of the person who was driving Magistrale's stolen vehicle was not in dispute. Rather, the defendant disputed whether he "knew" the vehicle he was driving was stolen. During closing argument, defense counsel stated:

[the defendant] meets [Kara Magistrale] and he says "can I borrow your car?" She says "[f]ine, take it back. My boyfriend and I just got into an argument. He busted out the window."

He then got in the car and left. She said bring it back tomorrow.

Now, that may not be something that you or I would do necessarily, but we can't pass judgment...

- (RP 98).

Also, the fact that defense counsel did not object to the State's question or to the court's response demonstrates the comment was of little moment at the time it was made. *Hansen*, at 301 (finding, when the trial court interrupted the State's cross-examination of the defense expert by rephrasing the State's question to the expert, "[t]he absence of any reaction at the time by defense counsel would seem to suggest the incident was considered inconsequential"). In addition, the jury is presumed to follow the court's instructions. *State v. Bordinoski*, 97 Wn.2d 335, 342, 644 P.2d 1173 (1982). Any possible misinterpretation of the court's statement by

the jury was averted by the court's instructions to the jury. *State v. Hawkins* 53 Wn. App. 598, 604-605, 769 P.2d 856, *review denied*, 113 Wn.2d 1004 (1989) (finding, "even if [the court's] comment were improper, the court's instruction to disregard comments on the evidence would have cured any error"). Instruction 1 provided:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

- (Instruction No. 1; CP 9).

For each of these reasons, the trial court did not unconstitutionally comment on the evidence. Consequently, the defendant cannot demonstrate manifest error affecting a constitutional right. The defendant failed to preserve this issue for review when he did not object to the court's comment or request a curative instruction at the time the comment was made. *State v. Leavitt*, 49 Wn. App. 348, 357, 743 P.2d 270 (1987), *aff'd* Wn.2d 66, 758 P.2d (1982).

VI. The trial court did not abuse its discretion when it did not sentence the defendant to the Drug Offender Sentencing Alternative.

The defendant claims the trial court categorically refused to consider his request for a DOSA sentence. *Br. of Appellant*, p. 8. This claim is without merit.

The trial court's imposition of a standard-range sentence may not be appealed. RCW 9.94A.585(1). Accordingly, the trial court's decision to impose a standard-range sentence, instead of the Drug Offender Sentencing Alternative under RCW 9.94A.660, may not be appealed. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005), *citing* RCW 9.94A.585(1). A defendant may challenge the "procedure" by which a sentence was imposed; however the reviewing court's examination of the trial court's imposition of a standard-range sentence is limited. *Grayson*, 154 Wn.2d. 335, 338. The trial court is afforded great deference when it imposes a standard-range sentence and its decision is reviewed only for an abuse of discretion. *Id.* at 335. A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971), *see State v. Blight*, 89 Wn.2d 38, 40-41, 569 P.2d 1129 (1977), *superseded on other grounds, State v. Crutchfield*, 53 Wn. App. 916, 929, 771 P.2d 746 (1989) (finding discretion is abused only

where it can be said no reasonable [person] would take the view adopted by the trial court”).

Here, the trial court did not categorically refuse to consider DOSA as a sentencing alternative. *Grayson*, at 342 (finding, when a defendant requests a sentencing alternative, the court abuses its discretion in not ordering the sentencing alternative only when the court “refuses categorically” to consider it). At sentencing, the trial court considered the defendant’s criminal history. The court stated “I’m considering your criminal history.” (RP 139). The trial court considered whether the defendant would benefit from treatment. The court stated “you do need treatment.” (RP 139). The trial court inquired with the defendant whether his actions in the instant case were a result of his drug addiction. The defendant indicated he was “high on meth” when he committed the crime charged in his other pending case (Attempted Escape in the First Degree); however, he was adamant that his actions in the instant case were not a result of his drug abuse when he said “I don’t steal cars anymore... [t]his really was a loaner car that I borrowed from somebody.” (RP 139). The trial court considered whether the defendant or the community would benefit from the imposition of DOSA in the instant case. The court stated “you need to be out of the community for a while.” (RP 139).

In addition, even though the trial court considered DOSA on the instant case, it was under no obligation to do so because the defendant did not actually request DOSA at the time of sentencing. At the time of sentencing, the defendant conceded that he did not qualify for DOSA on the instant case; however, he said he hoped the court would consider him for DOSA in the future. Specifically, defense counsel said: if the court did not consider DOSA now, he hoped it would consider DOSA “the second time around” on the defendant’s other pending case. (RP 132). The court agreed to do so when it said: “[I]et’s look at prison based DOSA with the subsequent sentencing. I’m not ruling it out totally.” (RP 135).

Also, it was not manifestly unreasonable for the trial court to deny DOSA on the instant case because the defendant had another pending felony case. The purpose of DOSA is to provide treatment for offenders who are likely to benefit from it. *Grayson*, at 337. Neither the trial court nor the Department of Corrections could have assessed whether the defendant was likely to benefit from treatment when the defendant had not yet taken responsibility for another crime he committed while under the influence of drugs. Furthermore, the DOSA program gives eligible offenders a decreased sentence in exchange for increased supervision in the community, during which the offenders obtain treatment “in an attempt to help them recover from their addictions.” *Id.* Neither the trial

court nor the Department of Corrections could have determined whether the defendant would benefit from an increased term of community custody when the defendant would not be able to serve that term of community custody until he completed an approximately four-year term of total confinement on his other pending case.³

For each of these reasons, the trial court did not abuse its discretion when it did not order DOSA on the instant case. Assuming arguendo this Court finds the trial court *did* abuse its discretion, the defendant is not entitled to reversal of his conviction. The State agrees with the defendant that, if this Court finds any error occurred, the limited remedy to which the defendant is entitled is to have his case remanded to the trial court for reconsideration of his request for prison-based DOSA. *Br. of Appellant*, p. 11.

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³ The defendant's standard-range sentence on his other pending case was 47.25 - 63 months confinement. See FN 2, *supra*. Pursuant to the SRA, the defendant would serve this sentence consecutive to his sentence on the instant case. RCW 9.94A.589(1)(a). Also, pursuant to the SRA, the defendant would not begin to serve his community custody term on the instant case until he completed his term of total confinement on his other case. RCW 9.94A.589(5).

D. CONCLUSION

This Court should affirm the defendant's conviction.

DATED this 1 day of December, 2011.

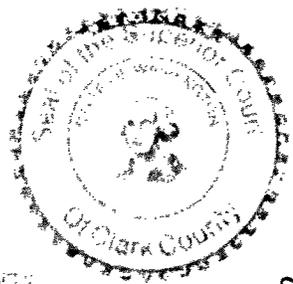
Respectfully submitted:

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Clark County, Washington

By:


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Deputy Prosecuting Attorney

APPENDIX A



FILED

2010 NOV 19 PM 3: 29

Sherry W. Parker, Clerk
Clark County

STATE OF WASHINGTON
 COUNTY OF CLARK
 I, Scott G. Weber, County Clerk and Clerk of the Superior Court of
 Clark County, Washington, do hereby certify that the
 document described in the captioned case is a true and correct
 copy of the original on file in the office of the County Clerk.
 I give my hand and seal of office at Vancouver, Washington,
 this 12-1-11 day of December, 2011.

Scott G. Weber, County Clerk
SGW

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. LORIN DEWAYNE JONES Defendant.	INFORMATION No. 10-1-01872-7 (CCSO 09-17119)
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COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

COUNT 01 - ATTEMPTED ESCAPE IN THE FIRST DEGREE - 9A.76.110 /9A.28.020(3)(c)
 That he, LORIN DEWAYNE JONES, in the County of Clark, State of Washington, on or about November 26, 2009, with intent to commit the crime of Escape in the First Degree, the elements of which are: while being detained pursuant to a conviction of Possession of a Controlled Substance – Methamphetamine and Bail Jumping in Clark County Superior Court Cause No. 00-1-01123-7, a felony, did knowingly escape from the custody of the Clark County Jail, a detention facility did an act which was a substantial step toward the commission of that crime; contrary to Revised Code of Washington 9A.76.110(1) and 9A.28.020(3)(c).

ARTHUR D. CURTIS
 Prosecuting Attorney in and for
 Clark County, Washington

Date: November 19, 2010

BY: *[Signature]*
 Robert W. Shannon, WSBA #15519
 Deputy Prosecuting Attorney

DEFENDANT: LORIN DEWAYNE JONES			
RACE: W	SEX: M	DOB: 4/20/1973	
DOL: JONES-LD-272J0 WA		SID: WA14076209	
HGT: 602	WGT: 220	EYES: BRO	HAIR: BRO
WA DOC: 963734		FBI: 692213LA5	
LAST KNOWN ADDRESS(ES):			
HOME - 37114 NE WIEHL RD, LA CENTER WA 98629			

[Handwritten mark]

CLARK COUNTY PROSECUTOR

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