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Division III
State of Washington
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COA No. 36004-1-III

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

STATE OF WASHINGTON,

Respondent

v.

JULIAN CAMERON LESTER

Appellant.

Appeal from Whitman County Superior Court
The Honorable Gary Libey
No. 18-1-00038-38

BRIEF OF RESPONDENT

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I. INTRODUCTION

A jury convicted the Defendant of felony physical control of a motor vehicle while under the influence of alcohol. The Defendant was sentenced and the court found his offender score to be 8 making the standard range: 53-60 months. The court sentenced the Defendant to the top of the standard range, 60 months.

The Defendant now appeals claiming several assignments of error.

II. ASSIGNMENTS OF ERROR

1. Whether the Defendant's counsel was ineffective when it did not pursue a "safely off the roadway" defense?
2. Whether the Defendant's counsel was ineffective for failing to request a limiting instruction after the State admitted a witness' inconsistent statement as impeachment evidence?
3. Whether the trial court erred in admitting statements made by the Defendant during a DUI interview after he had invoked his right to counsel?
4. Whether the court miscalculated the Defendant's offender score?

III. STATEMENT OF THE CASE

During the evening of February 8, 2018, several deputies came upon two vehicles parked on the shoulder of the highway, facing each

other. RP 45. The Defendant was seated in the driver's seat of one of the vehicles, and the vehicle's engine was idling. RP 45-46. As the deputies pulled up to the two vehicles, the Defendant exited his vehicle and approached the deputies. RP 46. Upon making personal contact with the Defendant, the deputies observed that he was very heavily impaired; he had very slurred speech, blood shot and watery eyes, and he had the odor of intoxicants coming from him. RP 47, RP 54. Based on his appearance, the deputies asked the Defendant about consuming alcohol, to which the Defendant was very forthright. RP 58. The Defendant explained that he had consumed "four 40s." RP 54. When one of the deputies attempted to administer field sobriety tests, the Defendant repeated again that he had "four 40s," that he had been "drinkin' like a champ," and that doing field sobriety tests was "kind of ridiculous and a waste of time." RP 77-79. Deputies also observed a partially consumed 40-ounce Steel Reserve on the passenger's seat of the Defendant's vehicle. RP 55.

The Defendant explained to the deputies that he had been working on the vehicle, that he had just got back from getting a new battery, and that he had just gotten the vehicle to start up. RP 55, 57. Ryan Benson, a friend of the Defendant's, testified that the Defendant had asked him to give the Defendant a ride out to the Defendant's vehicle. RP 63. Mr. Benson testified that he drove the Defendant to the location of his vehicle,

where they removed the battery. RP 63. Mr. Benson then testified that he drove the Defendant to the store, where the Defendant purchased a new battery. RP 63. Mr. Benson testified that he next drove the Defendant back to his vehicle and the Defendant put the new battery in his vehicle. RP 63.

Mr. Benson testified at trial that he did not know what the plan was once it got started and that he told the deputies that he was “planning on driving him back after—or following him back in.” RP 65. In response to this explanation, the State admitted Mr. Benson’s statements on the date of incident when he told the deputies that he was waiting for the Defendant to get the vehicle running so he could follow the Defendant as he drove back to his house. RP 68-70. Defense counsel did no object to the admission of these statements. RP 69.

The Defendant was arrested for being in physical control of a motor vehicle while under the influence of alcohol. The Defendant provided a BAC sample that evening showing that his BAC was a .133. RP 133.

During closing argument, the State argued that the Defendant was in actual physical control because the Defendant was in “a position to control the movement or lack of movement of the vehicle” because he was sitting in the driver’s seat of a running vehicle. RP. 158. Defense counsel argued that “whether you believe [the Defendant] was going to drive or

not...[is] immaterial.” RP 162. Defense counsel further argued that the State “has to convince each one of you beyond a reasonable doubt that he could have drove away, that it was drivable. That’s what it has to show here, and it hasn’t.” RP 163.

After the jury found the Defendant guilty, a sentencing hearing was held. The sentencing judge ruled that the Defendant’s offender score was an 8. RP 230. This was partially based on a deferred prosecution that was granted for a previous DUI. RP 183, CP 71. His offender score was also based on a prior felony theft conviction where the Statement of Defendant on plea of guilty did not correctly set forth the correct elements. RP 215.

IV. ARGUMENT

1. Ineffective Assistance of Counsel

The Defendant claims that he received ineffective assistance of counsel because his counsel at trial decided not to pursue a “safely off the roadway” defense and because his counsel failed to request a limiting instruction after the State introduced a witness’ hearsay statements for impeachment purposes.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (Div 2, 2009), *reversed on other grounds*, 171 Wn.2d 17, 246 P.3d 1260 (2011). In order

for the Defendant to overcome the presumption of effective representation he must demonstrate the following: 1) that his lawyer's performance was so deficient that the Defendant was deprived counsel for Sixth Amendment Purposes, and 2) that there is a reasonable probability that the claimed deficient performance prejudiced his defense. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007) citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). Under the first prong "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995)(citation omitted). "The Court must distinguish between tactical decisions and ineffectiveness." *Id.* (citation omitted). Regarding the second prong, in order to establish prejudice, the Defendant must show "with reasonable probability, that but for the counsel's errors the outcome of the proceedings would have been different." *Id.* (citation omitted).

- a. Defendant's trial counsel was not ineffective when it chose not to request a "safely off the roadway" defense because doing so would have defeated the Defendant's primary defense; that he was not guilty because the vehicle was not mobile.

During trial, while the Defendant did not call any of his own witnesses, his counsel did engage in cross examination of the State's witnesses. During cross examination of almost every one of the State's

witnesses, Defense counsel made it a strong point to highlight that there was no evidence that the vehicle was mobile. RP 23, 60, 67, 143. Further, Sgt. Keith Cooper testified that he was told by the Defendant that he had been working on the vehicle, and that he had gone with another person to O'Reilly's to get a battery. RP 55. During closing his closing argument, Defense counsel argued:

Ladies and gentlemen, the State hasn't proven that—actually physical control. That's what they charged him with here, not DUI, not attempted DUI; actual physical control. In order to prove that, they gotta prove that the vehicle was operating—at the time he was in it. And we have no evidence on that point other than it was running, but not that it was mobile. RP 164.

The actual physical control statute was enacted to protect the public by “(1) deterring anyone who is intoxicated from getting into a car except as a passenger, and (2) enabling law enforcement to arrest an intoxicated person before that person strikes.” *State v. Votava*, 149 Wn.2d 178, 184, 66 P.3d 1050 (2003). In that case, the court held that a defendant is entitled the “safely off the roadway” defense if “the defendant caused the vehicle to be moved off the roadway.” *Id.* at 188. In that case, the court found that the defendant was entitled to the defense because, although he did not technically *drive* the vehicle to a safe spot, he caused the vehicle to be *moved* safely off the roadway when he requested that the driver pull over. *Id.* at 181.

However, the court of appeals found that a defendant was not entitled to the “safely off the roadway” defense when there is no evidence to show that the he moved the vehicle to its safe position. *City of Yakima v. Godoy*, 175 Wn. App. 233, 305 P.3d 1100 (Div 3, 2013). In that case, the defendant was having car problems and his vehicle was parked in an empty lot. *Id.* at 235. On the date of incident, the defendant had a friend drop him off at his parked car where he planned to wait for a mechanic. *Id.* While waiting for the mechanic, the defendant sat in his vehicle and proceeded to drink alcohol to the point of intoxication. *Id.* The Court held that “[a]lthough the car here was safely off the roadway, there is no evidence that [the defendant] moved it there. Accordingly, the court correctly refused to instruct the jury on the “safely off the roadway” defense.” *Id.* at 238.

The facts in the case at hand are different than those in *Votava*, because in *Votava*, there was evidence that the defendant caused the vehicle to be moved to its safe position. Here we have no such facts. Instead, the facts here are almost identical to those in *Godoy*. In both cases, the vehicles in question were positioned safely off the roadway prior to the defendants arriving. In both cases, once at their respective vehicles, the defendants proceeded to consume alcohol to the point of intoxication while remaining in physical control of the vehicles.

Defense counsel was not ineffective when it chose not to request a “safely off the roadway” defense. Given the facts of the case, and the holdings in *Votava* and *Godoy*, said defense was not an option. Further, as stated above, this Court is to consider tactical decisions made by trial counsel. Here, given the subject of cross examination of the State’s witnesses, as well as defense counsel’s statements during closing arguments, it is clear that the defense was that the vehicle was not mobile and therefore, arguably not a vehicle. If the Defendant had pursued a “safely off the roadway” defense as well, he would have completely contradicted himself.

Because there was a tactical reason to not bring the defense, this court should find that it was not ineffective for counsel to choose not to do so.

- b. Defendant’s trial counsel was not ineffective for choosing to not request a limiting instruction because doing so would have highlighted the evidence for the jury. Further, the evidence at issue was not relevant to the crime charged.

The Defendant argues that trial counsel was ineffective when it failed to request a limiting instruction when the State admitted an inconsistent statement for the purpose of impeaching a witness.

Generally, “[a] party who fails to ask for a limiting instruction waives any argument on appeal that the trial court should have given the

instruction.” *State v. Stein*, 140 Wn. App. 43, 70, 165 P.3d 16 (Div 2, 2007). However, in this instance, the Defendant is not alleging error by the trial court, but instead that the counsel was ineffective for not requesting a limiting instruction. The State Supreme Court has been clear that [j]udicial review of an attorney’s performance is highly deferential... and such performance is not deficient if it can be considered a legitimate trial tactic.” *State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014).

Applying the first prong addressed in *Thiefault*, the court is to decide whether failing to request a limiting instruction was so deficient that it deprived the Defendant of counsel. As addressed above, this court is to consider whether the choice to not ask for an instruction was a legitimate trial tactic. Asking for such an instruction would have arguably highlighted the evidence for the jury and required them to consider it for longer than necessary.

If the Court were to find that not asking for an instruction was egregious enough to deprive the Defendant of counsel, it is then to apply the second prong: did the deficient performance prejudice the Defendant’s defense. The Statement at issue was admitted after the testimony of Mr. Benson, the Defendant’s friend, was different than what he told law enforcement on the date of incident. The evidence was appropriate impeachment evidence to show the witness may not be testifying

truthfully. While the statement was mentioned in the State's closing, it is important to acknowledge that the subject of the statement is not relevant to any element that the State had the burden of proving. The State had to show that the Defendant was in "actual physical control" of a motor vehicle; not that the Defendant was actually going to drive the vehicle.

Because it very well could have been a tactical decision on the part of the defense to not highlight the evidence, this Court should find that it was not deficient for the trial counsel to choose not to ask for a limiting instruction. Further, even if it was deficient, this court should find that it did not prejudice the Defendant because the subject matter was not relevant to any element the State had the burden of proving.

2. Defendant's Post-Arrest Statements.

The State concedes that admission of the statements made by the Defendant after he spoke with an attorney, answers to the questions contained in the DUI questionnaire, was error. The U.S. Supreme Court has held that once a defendant has invoked his Fifth Amendment right to counsel, officers may not reinitiate questioning without counsel present, even if the individual has been given the opportunity to speak with a lawyer. *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486 (1990).

However, even though the Court should not have admitted the Defendant's answers to the DUI questionnaire, this admission of these

statements was harmless error because of the overwhelming abundance of untainted evidence.

Improperly admitted statements are subject to harmless error analysis. *State v. Rueben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (Div 3, 1991). “The Washington Supreme Court has adopted the “overwhelming untainted evidence” standard in harmless error analysis; therefore, we look only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilty.” *Id. citing State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

The only statements that are being challenged by the Defendant were those that were made in response to the DUI questionnaire. From the DUI questionnaire, the only ones admitted at trial are as follows:

Q: And did you ask him what he was drinking?

A: Yes.

Q: And do you recall how he answered?

A: He told me again four 40-ounce beers.

...

Q: What type of beer was it?

A: 211 Steel Reserve.

Q: Did you ask him if he believed his ability to drive was affected by alcohol -- or drug usage?

A: Yes I did.

Q: What did he say?

A: He said that yes, it would have been—from what I remember.

RP 82-83.

These statements are harmless because all of the same evidence was obtained prior to the Defendant answering the questionnaire. Sgt. Cooper testified that the Defendant had told him he had been drinking and that he had had four 40-ounce beers. RP 54. Cooper also testified that he observed a half-consumed 40-ounce Steel Reserve on the passenger seat of the Defendant's vehicle. RP 55. Deputy Langerveld also testified, and his body camera footage that was admitted showed, that the Defendant told him he had four 40s. RP 76. The Defendant also told Deputy Langerveld "I've been drinkin' like a champ." RP 78. The Defendant also told Langerveld that doing the field sobriety tests was "kind of ridiculous and a waste of time..." RP. 79.

The only element of the crime to which these statements are relevant was whether the Defendant was under the influence of or affected by alcohol. As shown above, all the statements that were admitted in error were just repeated statements of those which were rightfully admitted. The Defendant's pre-arrest statements, coupled with the deputies' observations

of the Defendant's intoxication and his .133 BAC, provide overwhelming untainted evidence to prove the Defendant's impairment.

This Court should find that admission of the statements in question was harmless error.

3. Defendant's Offender Score.

Review of a Defendant's offender score is de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The State has the burden of establishing a defendant's offender score by a preponderance of the evidence. *State v. Jones*, 110 Wn.2d 74, 77, 750 P.2d 620 (1988). "An appellate court will reverse a sentencing court's decision only if it finds a clear abuse of discretion or misapplication of the law. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citation omitted).

a. The Defendant's prior deferred prosecution for DUI

The State has reviewed the Defendant's argument concerning the use of the Defendant's deferred sentence and agrees that it may have merit.

Because the state has found no authority to the contrary, it will defer to the court of appeals on this issue.

b. It was appropriate for the court to use the Defendant's prior adjudication for theft in the first degree because the State admitted a certified Order of Disposition.

The Defendant argues that his prior adjudication for first degree theft should not have been used in calculating his offender score because, although no problems are claimed on the actual Order of Disposition and Commitment, the statement on plea of guilty contained an error.

In proving a defendant's criminal history, "The best evidence of a prior conviction is a certified copy of the judgment." *State v. Atkins*, 156 Wn. App. 799, 817, 236 P.3d 897 (Div 1, 2010). The Court of Appeals has acknowledged that "the State's burden is easily met," but has made it clear that the State must "introduce 'evidence of some kind to support the alleged criminal history.'" *State v. Payne*, 117 Wn. App. 99, 105, 69 P.3d 889 (Div 2, 2003)(citation omitted). While a certified copy of the judgment suffices to prove the conviction, the court is not bound by the four corners of said document. *In re Coats*, 173 Wn.2d 123, 138, 167 P.3d 324 (2011).

To prove the conviction at issue, the State introduced two documents: 1) Exhibit 7: Order of Disposition and Commitment, and 2) Exhibit 8: Determination of PC Pursuant to LR 16. To aid in his objection, defense counsel introduced an exhibit, Defendant's exhibit 20, Statement on Plea of Guilty. RP 215. The Defendant argues that this document renders the conviction invalid due to the fact that it appears to lay out the elements of "possession" of stolen property rather than "theft." However,

it is important for the court to consider that on page 7 of the Statement on plea of guilty, the Defendant indicates the following: “Instead of making a statement, I agree that the judge may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” This inclusion is important because State’s Exhibit 8 is a statement of probable cause, signed by the prosecutor, and it is the State’s position that it is more than sufficient to provide a factual basis for the then deciding judge to rely on in accepting the Defendant’s plea and entering an order of disposition for the crime of theft in the first degree.

This Court should find no error in the use of the Defendant’s prior theft in the first degree when calculating the Defendant’s offender score because, considering all the documents admitted as a whole, the conviction is valid.

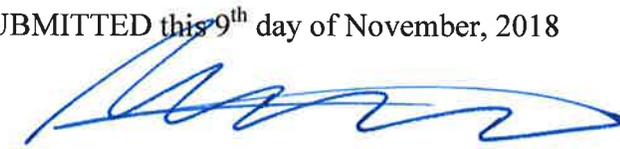
V. CONCLUSION

The court should affirm the Defendant’s conviction because none of the issues raised in the Defendant’s appeal warrant a new trial.

Further, while it is the State’s position that the Defendant’s prior felony theft conviction at issue is constitutionally valid, it will defer to the court on whether or not it was an error for the sentencing court to use the

Defendant's deferred prosecution on a DUI to calculate the Defendant's offender score.

RESPECTFULLY SUBMITTED this 9th day of November, 2018



Merritt Decker, WSBA 46248
Senior Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

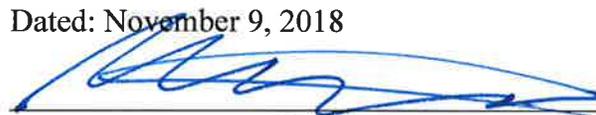
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Dated: November 9, 2018



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WHITMAN COUNTY PROSECUTOR'S OFFICE

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