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No. 37024-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Hiatt,

Appellant.

Spokane County Superior Court Cause No. 18-1-05601-3

The Honorable Judge Charnelle M. Bjelkengren

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Hiatt's conviction for possessing a stolen motor vehicle violated his Fourteenth Amendment right to due process.
2. Mr. Hiatt's conviction in count one was based on insufficient evidence.
3. The State failed to prove that Mr. Hiatt possessed the stolen Honda.
4. The trial court erred by adopting Finding of Fact on Verdict No. 1.
5. The trial court erred by adopting Conclusion of Law on Verdict No. 1.
6. The trial court erred by adopting Conclusion of Law on Verdict No. 2.
7. The trial court erred by adopting Conclusion of Law on Verdict No. 3 (regarding verdict).
8. The trial court erred by adopting Conclusion of Law on Verdict No. 4.
9. The trial court erred by adopting Conclusion of Law on Verdict No. 6.
10. The trial court erred by adopting Conclusion of Law on Verdict No. 7.
11. The trial court erred by adopting Conclusion of Law on Verdict No. 11.

ISSUE 1: A conviction for possessing a stolen motor vehicle requires proof of possession. Did the State failed to prove beyond a reasonable doubt that Mr. Hiatt was in possession of the stolen Honda Accord?

12. The trial court failed to properly determine Mr. Hiatt's criminal history, offender score, and standard range.
13. The prosecution failed to prove that Mr. Hiatt had prior felony convictions.
14. The trial court erred by including in Mr. Hiatt's criminal history offenses that were not admitted, acknowledged, or proved.
15. The trial court erred by sentencing Mr. Dunleavy with an offender score of 16.
16. The trial court erred by adopting Finding of Fact No. 2.2 (on Judgment and Sentence).
17. The trial court erred by adopting Finding of Fact No. 2.3 (on Judgment and Sentence).

18. The trial court erred by adopting Finding of Fact on Sentencing No. 1.
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31. The trial court erred by adopting Finding of Fact on Sentencing No. 14.
32. The trial court erred by adopting Finding of Fact on Sentencing No. 15.
33. The trial court erred by adopting Finding of Fact on Sentencing No. 16.
34. The trial court erred by adopting Conclusion of Law on Sentencing No. 6.
35. The trial court erred by adopting Conclusion of Law on Sentencing No. 7.
36. The trial court erred by adopting Conclusion of Law on Sentencing No. 8.
37. The trial court erred by adopting Conclusion of Law on Sentencing No. 9.

ISSUE 2: At sentencing, the state bears the burden of proving prior convictions. Did the court err by sentencing Mr. Hiatt

with an offender score of 16 absent any evidence that he had prior felony convictions?

38. Defense counsel infringed Mr. Hiatt's Sixth and Fourteenth Amendment right to autonomy when she stipulated to his criminal history over his objection.
39. If Mr. Hiatt's sentencing arguments are not preserved, he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
40. Mr. Hiatt was denied the effective assistance of counsel when his attorney stipulated to his criminal history over his objection.

ISSUE 3: An accused person has a constitutional right to set defense objectives. Did defense counsel interfere with Mr. Hiatt's constitutional right to autonomy when she stipulated to his criminal history over his objection?

ISSUE 4: An accused person has the right to the effective assistance of counsel at sentencing. Was Mr. Hiatt deprived of the effective assistance of counsel when his lawyer stipulated to his criminal history over his objection?

INTRODUCTION AND SUMMARY OF ARGUMENT

Michael Hiatt lived in his vehicle, a Ford Expedition that did not run. He granted a friend permission to chain and lock a Honda Accord to the SUV so it wouldn't be stolen. Mr. Hiatt did not have a key to the padlock that secured the Honda to his Expedition. Because the two vehicles were nose to nose, he would not be able to tow the Honda even if he were able to drive the Expedition. Under these circumstances, the State failed to prove that Mr. Hiatt possessed the Honda. His conviction for possessing a stolen motor vehicle must be reversed and the charge dismissed with prejudice.

At sentencing, Mr. Hiatt objected to the State's summary of his criminal history. Despite this, his attorney stipulated to the State's summary. This deprived Mr. Hiatt of his constitutional right to autonomy in setting defense objectives. It also deprived him of the effective assistance of counsel. His sentence must be vacated and the case remanded for a new sentencing hearing.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Michael Hiatt was homeless in Spokane and slept in his Ford Expedition. RP (7/15/19) 30, 47. The Expedition didn't run. RP (7/15/19) 55. At some point, a friend asked if he could attach his car to

Mr. Hiatt's, so that it would not get stolen, and Mr. Hiatt assented. RP (7/15/19) 28, 30.

It was Christmas day, and Mr. Hiatt was asleep in his Ford Expedition. RP (7/15/19) 19, 61. Officer Wilke had noted a Ford Expedition was reported stolen, so he looked at Mr. Hiatt's vehicle. RP (7/15/19) 19. The plate did not return as stolen, but Wilke looked for a VIN number as well. Because the window was fogged up, the officer couldn't make out the VIN number. RP (7/15/19) 19-20. The officer got back into his car and looked over again and noticed that the Ford Expedition was chained to a Honda, nose to nose. RP (7/15/19) 20-22.

The Honda Accord had been reported stolen. RP (7/15/19) 22, 71. He had another officer join him, and he knocked on the Ford Expedition and woke Mr. Hiatt. RP (7/15/19) 26-28. The officers got Mr. Hiatt out of the vehicle with their guns drawn. RP (7/15/19) 31. Mr. Hiatt had a warrant outstanding and was arrested. RP (7/15/19) 28. He didn't have the key to the padlock connecting the vehicles. RP (7/15/19) 43-44. Mr. Hiatt did have 3 shaved keys in his pocket. RP (7/15/19) 34-37.

Officer Wilke then confirmed that the Ford Expedition Mr. Hiatt was sleeping in was not the one that had been reported stolen. RP (7/15/19) 23-25, 39.

The state charged Mr. Hiatt with possession of a stolen motor vehicle (the Honda) and possession of motor vehicle theft tool (the shaved keys). CP 4.

Mr. Hiatt waived his right to a jury trial, and the case was tried to Judge Bjelkengren. CP 9. After the state rested, the defense moved to dismiss for insufficient evidence of possession of the stolen Honda. RP (7/15/19) 84-85. The court denied the motion, and convicted Mr. Hiatt as charged. RP (7/15/19) 88; RP (7/29/19) 101-112; Findings of Fact and Conclusions of Law on Verdict, Supp. CP.

At sentencing, Mr. Hiatt did not agree to the state's calculation of his offender score. RP (8/8/19) 115-117. He objected verbally and did not sign the proposed stipulation. RP (8/8/19) 115-118; CP 73-74. Even so, his attorney signed the stipulation, agreeing to the state's claims about the priors. CP 73-74. The defense attorney knew that Mr. Hiatt wished to contest the state's calculation of his score, but assented to it without demanding that the state present evidence to meet their burden:

MS. ABRAMS: And I have -- it's Mr. Hiatt's position that his crimes do wash, that is what he has asserted to me from the moment that I inherited his cases. That said, I've looked at his criminal history, and I've had multiple attorneys within my office look at his criminal history, and unfortunately we believe he is just outside that window.
RP (8/8/19) 117.

The court found that Mr. Hiatt had 16 points and sentenced him to 46 months.¹ CP 63; Findings of Fact and Conclusions of Law on Sentencing, Supp. CP.

Mr. Hiatt timely appealed. CP 75-76.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. HIATT POSSESSED THE HONDA ACCORD.

When arrested, Mr. Hiatt lived in a Ford Expedition that did not run. His friend had chained and locked a Honda Accord nose-to-nose to the Ford. Mr. Hiatt did not have a key to the padlock. Because of this, he was not in possession of the Honda. The State failed to prove that Mr. Hiatt possessed a stolen motor vehicle. His conviction must be reversed, and the charge dismissed with prejudice.

Due process requires the State to prove beyond a reasonable doubt all facts necessary for conviction. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). Here, the State did not prove the essential elements of the crime charged in count one.

Although a sufficiency challenge admits the truth of the State's evidence and all reasonable inferences that can be drawn from it,² the

¹ This included 90 days for a misdemeanor charge. CP 63.

² See *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 892 (2006). To prove even a *prima facie* case, the State’s evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *See State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (addressing *prima facie* evidence for *corpus delicti*).

In this case, the evidence was insufficient to prove that Mr. Hiatt possessed the Honda Accord. Constructive possession³ is established when a person “exercise[s] dominion and control over the item.” *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014) (Stephens, J., dissenting, for a majority of the court).

Although “the ability to immediately take actual possession of an item can establish dominion and control, mere proximity to the item by itself cannot.” *Id.* Even momentary handling of an item is insufficient to prove constructive possession. *Id.*

Davis involved two defendants charged with possessing a stolen firearm.⁴ *Id.*, at 225 (lead opinion). Following a shooting in which three

³ The court found that Mr. Hiatt constructively possessed the Honda. Findings of Fact and Conclusions of Law on Verdict p. 4, filed 9/10/19, Supp. CP. The court also found that he “had the ability to saw off the padlock or make the Ford Expedition operable; the Honda Accord would have then been in Mr. Hiatt’s actual possession. Findings of Fact and Conclusions of Law on Verdict p. 4, filed 9/10/19, Supp. CP.

⁴ One defendant was also charged with unlawful possession of a firearm. *Id.*, at 225.

police officers were killed, the shooter ended up at a house with both defendants. *Id.*, at 225 (lead opinion). One defendant placed the shooter's stolen gun in a shopping bag. *Id.* When the shooter asked where the gun was, the second defendant told him it was in the bag and handed it to him. *Id.*

Five justices agreed that the evidence was insufficient to prove that either defendant possessed the stolen firearm. *Id.*, at 232-241. The majority concluded that "no evidence showed that [either defendant] exercised sufficient control over the gun" to prove constructive possession.⁵ *Id.*, at 235 (Stephens, J., dissenting, for a majority of the court).

In this case, Mr. Hiatt did not constructively possess the Honda. He did not have the key to the padlock securing the Honda to the Ford Expedition. RP 43-44. There is no evidence that he helped his friend attach the chain. RP 30; Findings of Fact and Conclusions of Law on Verdict p. 4, filed 9/10/19, Supp. CP. He could not tow the Honda away, as the two vehicles were "nose to nose" and the Ford Expedition was broken down. RP 22, 57; Findings of Fact and Conclusions of Law on Verdict p. 4, filed 9/10/19, Supp. CP.

⁵ A majority of justices also agreed that the evidence was insufficient to prove actual possession. *Id.*, at 237 (Stephens, J., dissenting, for a majority of the court).

As in *Davis*, the evidence was insufficient to prove that Mr. Hiatt possessed the Honda. His conviction for possessing a stolen motor vehicle must be reversed, and the charge dismissed with prejudice. *Id.*

II. THE SENTENCING COURT ERRED BY FINDING THAT MR. HIATT HAD ANY PRIOR FELONIES.

A. The State failed to prove that Mr. Hiatt had any prior convictions.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn.App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). In determining the offender score, due process permits the court to rely only on what has been “admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). The burden is on the prosecution to establish the accused’s criminal history by a preponderance of the evidence. *Id.*

A prosecutor’s “bare assertions, unsupported by evidence do not satisfy the state’s burden to prove the existence of a prior conviction.” *Id.* at 910. The state must introduce “evidence of some kind to support the

alleged criminal history.” *Id.* This is true even when the defense does not object. *Id.* at 915.

Here, the state did not present any evidence regarding Mr. Hiatt’s criminal history. Instead, the prosecutor relied on a summary of Mr. Hiatt’s criminal history. CP 73. Mr. Hiatt explicitly objected to the summary.⁶ CP 74; RP (8/8/19) 117.

Despite the absence of any evidence showing any criminal history, the trial court adopted the summary and sentenced Mr. Hiatt with an offender score of 16. Findings of Fact and Conclusions of Law on Sentencing filed 9/10/19.

Because the state failed to prove that Mr. Hiatt had any criminal history, the court’s findings and offender score are not supported by the evidence. The sentence must be vacated, and the case remanded for a new sentencing hearing. *Id.*

B. Defense counsel lacked the authority to stipulate to Mr. Hiatt’s prior convictions over his objection.

An accused person has a constitutional right to autonomy regarding certain decisions.⁷ *McCoy v. Louisiana*, --- U.S. ---, ___, 138 S.

⁶ Inexplicably, his attorney signed the summary despite her disagreement with the prosecutor’s calculation of the offender score. CP 74; RP (8/8/19) 115-122.

⁷ The right stems from the Sixth and Fourteenth Amendments. *McCoy v. Louisiana*, --- U.S. ---, ___, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018) (citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)).

Ct. 1500, 200 L. Ed. 2d 821 (2018). When liberty is at stake, “it is the defendant's prerogative, not counsel's, to decide on the objective of his defense.” *Id.*, at ____.

In *McCoy*, the defendant was charged with murder and faced the death penalty. *Id.*, at _____. Over his client’s objection, defense counsel conceded guilt at trial and during the penalty phase. *Id.* Counsel believed this strategy provided the best option for avoiding the death penalty. *Id.*, at _____.

The Supreme Court reversed, holding that counsel’s refusal to follow his client’s wishes violated the defendant’s constitutional right to autonomy. *Id.*, at _____. The court opined that counsel’s decisions “[were] not strategic choices about how best to *achieve* a client's objectives; they [were] choices about what the client's objectives in fact *are*.” *Id.*, at _____ (emphasis in original).

In this case, Mr. Hiatt did not want to concede that he had the prior convictions alleged by the State. CP 74. Instead, he wished to put the State to its burden of proving his criminal history. CP 74; RP 98/8/19) 117.

By stipulating that Mr. Hiatt had 15 prior felony convictions, defense counsel interfered with her client’s autonomy. *Id.* The error is structural. *Id.*, at _____. Mr. Hiatt’s sentence must be vacated, and the case remanded for a new sentencing hearing. *Id.*, at _____.

C. If Mr. Hiatt's sentencing arguments are not preserved, he was denied the effective assistance of counsel.

An accused person is entitled to the effective assistance of counsel at sentencing. U.S. Const. Amend. VI, XIV; *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). To prevail on an ineffective assistance claim, the appellant must show deficient performance and prejudice. *State v. Phuong*, 174 Wn.App. 494, 548, 299 P.3d 37 (2013). If Mr. Hiatt's sentencing arguments are not preserved for review, then he was denied the effective assistance of counsel. *Id.*

Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *State v. Killo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Phuong*, 174 Wn.App. at 547.

Here, Mr. Hiatt specifically objected to the prosecutor's statement of his criminal history. CP 73-74. This should have placed the burden on the prosecutor to prove that he had prior offenses that should be included in the offender score. *Hunley*, 175 Wn.2d at 909.

Instead of requiring the State to meet its burden, defense counsel stipulated that Mr. Hiatt had 15 prior felonies and four prior

misdemeanors.⁸ CP 73-74. This infringed Mr. Hiatt's right to the effective assistance of counsel at sentencing. *Gardner*, 430 U.S. at 358.

As noted above, counsel did not have the authority to make this stipulation over her client's objection. *McCoy*, --- U.S. _____. Furthermore, counsel was clearly pursuing a strategy of limiting Mr. Hiatt's offender score; this is evident from her sentencing memorandum and her argument at sentencing. CP 41; RP (8/8/19) 115-122.

There is a reasonable probability that counsel's deficient performance affected the outcome of the sentencing proceeding. *Phuong*, 174 Wn.App. at 548. Confidence in the result is undermined. *Id.*, at 547. Mr. Hiatt's sentence must be vacated, and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

Mr. Hiatt was not in possession of the Honda Accord. He did not have the key to the padlock chaining it to his SUV. Nor could he tow the Honda away, as the two vehicles were nose-to-nose and his vehicle didn't run. His conviction for possessing a stolen motor vehicle must be reversed and the charge dismissed with prejudice.

⁸ Defense counsel also did not pursue a same criminal conduct finding, even though some of the prior felonies were committed on the same day, according to the prosecutor's summary. CP 73.

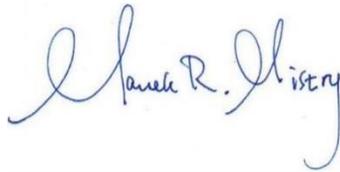
In the alternative, his sentence must be vacated, and the case remanded for a new sentencing hearing. The State failed to prove that he had any prior felonies. In addition, his attorney lacked the authority to stipulate to the State's summary of his criminal history over Mr. Hiatt's objection. The sentence cannot stand.

Respectfully submitted on February 21, 2020,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 21, 2020.



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