68613-5

68613-5

NO. 68613-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID OGDEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD D. EADIE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the record of an alleged evidentiary error is inadequate for review where the defense failed to inform the trial court of the specific nature of the evidence and the legal theory under which the offered evidence is admissible.

2. Whether remand for resentencing is required where the trial court miscalculated the defendant's offender score, imposed an incorrect community custody term and imposed a sentence that exceeded the statutory maximum.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, David Ogden, with first degree robbery and attempted first degree robbery[1] for two incidents that occurred on October 9, 2010, and one count of attempted second degree robbery for an incident that occurred on October 12, 2010.[2] CP 1-5, 165-70. A jury found Mr. Ogden guilty as charged. CP 55-57. The trial court imposed a standard range

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[1] The State amended the named victim for the attempted first degree robbery to comport with the evidence. Supp CP __ (sub no. 74, amended information); 12/14/11RP 337-41.

[2] The October 9 incidents were charged under a different cause number than the October 12 incident; the cases, however, were joined for trial. CP 173.

sentence on each count.[3] CP 145-53, 174-82. Mr. Ogden appeals. CP 155, 184.

2. SUBSTANTIVE FACTS

a. October 9, 2010.

i. Cathay Bank.

Around 11:30 A.M. a tall, skinny, Caucasian man, later identified as Mr. Ogden, walked into Seattle's International District's Cathay Bank lobby, grabbed a brochure and then left. 2RP 47-48, 57.[4] Mia Chong, a loan officer at the branch, thought Mr. Ogden's visit was odd because he was not of Asian descent, as were most of the bank's customers, and because he did not interact with any bank employee. 2RP 47, 52, 55. Teller Tiffany Lin noticed Mr. Ogden too. 2RP 59.

Less than an hour later, Mr. Ogden returned. 2RP 60. He wore the same clothes (a black tank top, a black jacket and jeans);

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[3] The trial court rejected Mr. Ogden's request, made pursuant to RCW 9.94A.535(1)(c), (e), for a downward departure from his standard range sentence on each count. 3/29/12RP at 17-20, 25-26. Mr. Ogden has challenged his sentences on multiple grounds. The State fully addresses the issues in Br. of Respondent, sections C.2.a-c, *infra*.

[4] The State adopts the appellant's designation of the verbatim report of proceedings. See Br. of Appellant at 2 n.1.

however, he had donned a white hat and a pair of sunglasses.[5] 2RP 61, 71. Mr. Ogden walked up to Ms. Lin, demanded money, and then handed her a note. 2RP 61. The note said, "This is a robbery," and "You have got 10 seconds." 2RP 61. Ms. Lin put approximately $250 from her cash drawer into the paper bag Mr. Ogden provided. 2RP 62; 3RP 91. As Mr. Ogden fled, he inadvertently dropped his demand note.[6] 2RP 62.

The bank's video cameras captured the robbery. The video was admitted into evidence and played at trial for the jury. 2RP 64-67.

ii. U.S. Bank.

About four hours after the Cathay Bank robbery and miles away, Karyssa Gibbs, a teller at a U.S. Bank located in an Albertson's grocery store, noticed a very nervous Caucasian man, later identified as Mr. Ogden, standing by the check-out line just outside the branch. 4RP 256-60; 5RP 513. Mr. Ogden wore "racer

[5] Pursuant to search warrants, the police seized the jacket and sunglasses. 4RP 352-57. At trial, Ms. Lin said that the black tank top shown in a photograph looked like the shirt worn by the robber. 2RP 73.

[6] The note was admitted at trial. 2RP 62. The parties stipulated that the fingerprints found on the note were not Mr. Ogden's fingerprints. CP 90; 4RP 343-44.

style" sunglasses and a dark "hoodie" with a backward baseball cap underneath. The cap had writing. 4RP 261, 287.

Mr. Ogden walked over to another teller, Tiffany Bell, and tried to stuff a 5-Star spiral notebook into the "bandit barrier" – a tray where customers generally put their transactions. 4RP 258-60, 284, 296. Mr. Ogden mumbled something to Ms. Bell, but she did not understand what he wanted. 4RP 283.

Mr. Ogden then slipped a demand note – written on a napkin in crayon or eyeliner – into the tray. 4RP 282. The note said, "This is a robbery." 4RP 282. Mr. Ogden withdrew the note and again tried to shove the notebook into the tray. 4RP 283. He told Ms. Bell to put the money into the notebook. 4RP 283-84.

Ms. Gibbs knew something was not right. 4RP 259. She heard Mr. Ogden mumbling, but did not hear specific words. 4RP 270-71. Ms. Gibbs asked Mr. Ogden to remove his sunglasses and hood. He said, "Yeah, right," and walked off with the notebook, but without any money.[7] 4RP 260, 286, 294.

The bank's video cameras captured the attempted robbery. The video was admitted into evidence and played at trial for the

[7] Pursuant to search warrants, the police seized the sunglasses, hoodie, napkin, baseball cap and notebook from Mr. Ogden's apartment and truck. Ms. Gibbs and Ms. Lin testified that the items seized looked similar to what they saw during the attempted robbery. 4RP 263-65, 287, 291-93, 352-60.

jury. 4RP 262-67. A video from Albertson's surveillance cameras captured Mr. Ogden getting into a white truck that he owned. 3RP 225; 4RP 275, 326, 380.

b. October 12, 2010 – Anthony's Fish Bar Restaurant.

At approximately 5:30 P.M. – after the restaurant closed, but before all of the diners had left – a man, later identified as Mr. Ogden, approached Haydee Ramon, the supervisor/cashier. 3RP 93-96. Mr. Ogden pushed a paper bag toward Ms. Ramon. 3RP 96. Ms. Ramon asked Mr. Ogden what he wanted. Mr. Ogden did not reply; he just pushed the bag toward her again. 3RP 97. Ms. Ramon refused to touch the bag. 3RP 97. Mr. Ogden then put his hand in the bag, told Ms. Ramon he had a gun, and ordered her to put money in the bag. 3RP 97.

Ms. Ramon did not believe that Mr. Ogden had a gun because she had not heard the sound of metal on the counter. 3RP 113. Ms. Ramon ran into the restaurant and screamed for help. 3RP 98, 112. Another employee, Antaurus Wilson, also known as Big Man[8], rushed to assist Ms. Ramon. 3RP 98, 128,

[8] Mr. Wilson is between 6'3" and 6'4" and weighs 345 pounds. 3RP 137.

137. Ms. Ramon told him to run after Mr. Ogden, who had fled across the street, then into a parking garage. 3RP 98-99.

Mr. Wilson momentarily lost sight of Mr. Ogden. 3RP 129. A repairman in the garage directed Mr. Wilson to the elevators, behind which Mr. Ogden tried to hide. 3RP 129, 138-40. At least twice Mr. Wilson told Mr. Ogden to stop, but he ignored him. 3RP 129, 142. After a very brief skirmish, Mr. Wilson walked back to the restaurant with Mr. Ogden in tow. 3RP 100, 130, 142. Mr. Ogden protested, "I didn't do nothing (*sic*)." 3RP 130. Mr. Ogden had ditched his glasses, a tobacco pouch and the paper bag, but he otherwise looked the same. 3RP 101.

Moments later the police arrived. 3RP 108-09. Mr. Ogden still claimed that some other man was the attempted robber. 3RP 103, 110. One police officer, accompanied by Mr. Wilson, returned to the parking garage. 3RP 157. They located the brown paper bag and Mr. Ogden's tobacco pouch next to the elevators.[9] 3RP 134-35, 157-60. Written on the bag was, "This is a robbery. Put the money in the bag. You have five seconds." 3RP 158.

[9] In a search incident to Mr. Ogden's arrest, the police found a hand-rolled cigarette that contained the same tobacco as was in the pouch and a pair of manicure scissors. 3RP 160, 170.

c. Identifying Ogden As The Robber.

Seattle Police Department Detective Frank Clark, who headed the investigation in the Cathay Bank and U.S. Bank robberies, heard the Port of Seattle dispatch regarding the attempted robbery at Anthony's Fish Bar. 3RP 220-22. He sent by e-mail two still photographs – one taken from each bank's surveillance video – to Port of Seattle Police Officer Anthony Ewald to determine whether his arrestee looked like the suspect in the bank incidents. 3RP 150, 161, 220-23. After it appeared that the suspects were the same, detectives from both agencies briefly interviewed Mr. Ogden.[10] 3RP 162, 222-28; 4RP 317-34.

On October 19, 2010, the police asked Ms. Lin and Ms. Chong (Cathay Bank) and Ms. Bell (U.S. Bank) to view a line-up; Mr. Ogden, however, refused to participate. 4RP 392-94. Instead, the police separately showed each witness a sequential photographic montage. 4RP 393-94. Ms. Lin correctly identified Mr. Ogden as the bank robber; neither Ms. Chong nor Ms. Bell could make a selection. 2RP 68-71; 4RP 299-300, 361-64. None

[10] During the interview, Mr. Ogden told police where he lived at where his white truck was located. 3RP 225. Police obtained search warrants for Mr. Ogden's apartment and truck and seized evidence connected to the bank robberies. 4RP 352-60, 379-84.

of the bank employees could identify Mr. Ogden in court.[11] 2RP 52, 74; 4RP 268, 295, 299-300, 364.

Ms. Ramon, Mr. Wilson and the garage repairman identified Mr. Ogden in court as the man who had attempted to rob Anthony's Fish Bar and then fled into the parking garage across the street. 3RP 103, 132, 143.

3. THE DEFENSE THEORY

Mr. Ogden presented a diminished capacity defense. 5RP 413-85, 489-542; 6RP 560-628.

Dr. Eusanio, a defense psychologist, opined that Mr. Ogden lacked the capacity to form intent to commit the charged crimes because of complex Post-Traumatic Stress Disorder (PTSD), Borderline Personality Disorder and "some medical disorders." 5RP 416, 419-21, 431-32; CP 17-34. Dr. Eusanio explained that the PTSD could have caused a dissociative state, such that Mr. Ogden might have experienced varying degrees of consciousness between October 9 and October 12. 5RP 442-43. In addition, Dr. Eusanio theorized that the combination of several

[11] During the robbery, Ms. Lin saw a dark tattoo of some shape on Mr. Ogden's upper left chest. 2RP 71. Post-arrest, a police officer took a photograph of the tattoo on Mr. Ogden's upper left chest, which was admitted at trial. 3RP 178-79.

prescribed medications may have caused a "substance-induced delirium." 5RP 433-44, 492.

However, based on the data from several diagnostic tests, Dr. Eusanio acknowledged the high probability that Mr. Ogden was "faking bad" or exaggerating symptoms, *i.e.,* malingering. 5RP 435-39. Dr. Eusanio conceded that Mr. Ogden had scored in the top one percent of malingerers, liars and fabricators. 5RP 462-67.

Another defense expert, Dr. Julien, a medical doctor with a Ph.D. in pharmacology, stated that Mr. Ogden had sufficient quantities of prescribed medications to cause drug-induced dementia or drug-induced amnesia.[12] 6RP 573-74. Dr. Julien said Mr. Ogden's medications, taken alone or in combination, are potent cognitive inhibitors that can cause amnesia, blackouts, delirium and poor cognition. 6RP 573-74. Dr. Julien opined that Mr. Ogden committed the crimes while in a state of diminished capacity. 6RP 573-74.

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[12] Mr. Ogden's prescribed medications included methadone, Ambien (known as a "knockout" sleeping pill that can cause blackouts), Robaxin (a sedative, marketed as a muscle relaxant), Clonazepam (like Valium and Ambien), Gabapentin (anti-epileptic), Hydroxyzine (antihistamine), Ditropan (generally used for gastric issues), Wellbutrin (anti-depressant) and Oxycodone (pain). 6RP 565-72.

Dr. Julien conceded, however, that although the list of Mr. Ogden's prescribed medications was consistent with an amnesic state, the validity of his opinion depended on which medicines Mr. Ogden actually ingested during the relevant times – an unknown factor. 6RP 580; see also CP 52-54.

A Western State Hospital neuropsychologist, Dr. Parmenter, examined Mr. Ogden as part of the State-requested forensic mental health evaluation. 6RP 658. Dr. Parmenter concluded that Mr. Ogden was exaggerating or inflating symptoms. 6RP 659. The test data established that Mr. Ogden was in the top one percent of individuals who feign symptoms. 6RP 660-63.

Dr. Hendrickson, the State's expert psychologist, who also evaluated Mr. Ogden, opined that Mr. Ogden appeared to be in full control of his faculties; *i.e.*, he exhibited "goal-directed and deliberate behaviors" and did not appear to suffer from substance induced delirium at the times of the charged crimes. 6RP 656-57, 666-70; CP 45-46. Additionally, Mr. Ogden's behavior on October 9 and October 12 did not support the diagnosis of dissociative state caused by PTSD. 6RP 664-70. Dr. Hendrickson said that even if Mr. Ogden had PTSD, it was not severe enough to impact his ability to form intent. 6RP 650-51. Rather, the banks' surveillance

videos and the eyewitness accounts that Dr. Hendrickson reviewed, demonstrated Mr. Ogden's goal-directed, purposeful behavior. 6RP 657, 704-05.

C. ARGUMENT

1. MR. OGDEN FAILED TO MAKE A RECORD OF THE ALLEGED EVIDENTIARY ERROR ADEQUATE FOR REVIEW.

Mr. Ogden claims that after the State theorized he was motivated to commit robberies to support his oxycodone addiction, the trial court erred by disallowing evidence that suggested he lacked a financial motive because he received disability income. Mr. Ogden frames his claim as a violation of his right to present a defense. The Court should reject this argument. For the first time on appeal, Mr. Ogden identifies the specific nature of the evidence and the legal theory underlying its admission. Mr. Ogden waived appellate review of the alleged evidentiary error because he failed to make an offer of proof.

a. Facts.

The defense was diminished capacity. As discussed above, Dr. Eunasio opined that it was possible Mr. Ogden was in a

dissociative state or a substance-induced delirium when he committed the charged crimes. 5RP 443, 492-93. Dr. Julien opined that Mr. Ogden may have experienced drug-induced dementia or drug-induced amnesia, caused by taking his prescribed medications. 6RP 574-75.

The State challenged the doctors' conclusions that Mr. Ogden's behavior resulted from some altered state of consciousness. The State asked Dr. Eunasio and Dr. Julien to consider evidence that Mr. Ogden used three different disguises, committed the October 9 crimes 4 hours and 130 miles apart and appeared to have "cased" the Cathay Bank before robbing it. 5RP 503-04, 513-15; 6RP 612-14. Dr. Eunasio conceded that Mr. Ogden's behavior appeared purposeful rather than behavior committed while in a dissociative state. 5RP 514. Dr. Julien conceded that Mr. Ogden's behavior, at times, was inconsistent with drug-induced dementia. 6RP 612-15.

Dr. Eunasio testified about Mr. Ogden's drug-seeking behavior. 5RP 476. He acknowledged that Mr. Ogden was addicted to opioids – heroin, methadone and oxycodone. 5RP 483-84. Dr. Eunasio said that after doctors refused to refill

Mr. Ogden's oxycodone prescription, he likely would have sought the drug elsewhere, including from the streets – where drugs cost more than those prescribed by a doctor.[13] 5RP 484-85, 499-500. The following exchange occurred:

> Q (by prosecutor). And a person who is seeking -- a person who is polysubstance dependent, in your experience, would you agree often commit (*sic*) crimes such as theft in order to get money to buy those drugs?
>
> A (by Dr. Eunasio). Yes.
>
> Q. And the defendant is a person with polysubstance abuse dependence, correct?
>
> A. Yes.
>
> Q. And he had been cut off from his supply of oxycodone as of September 27, 2010, would you agree?
>
> A. It seems like that, yes.
>
> Q. So, he would have the motivation, would you agree, to rob a bank or rob a restaurant?
>
> A. Yes.

[13] In August 2010, the Veteran's Administration (VA) prescribed oxycodone to Mr. Ogden for a shoulder injury. 5RP 484, 499. The VA records stated that Mr. Ogden's prescription had last been refilled on September 14, 2010; Mr. Ogden received a two-week supply. 5RP 494. On September 15, 2010, the police found Mr. Ogden in his car unresponsive. 5RP 498. Blood tests showed that Mr. Ogden had overdosed on oxycodone. 5RP 498. On September 27, 2010, the VA refused to refill Mr. Ogden's oxycodone prescription. 5RP 498; 6RP 624-25.

5RP 500. The defendant did not object to the prosecutor's questions.[14]

Later, the State asked Dr. Julien about his presumption that Mr. Ogden would have run out of oxycodone before October 9, if the VA hospital prescription was his only source. The following exchange occurred:

> Q (by prosecutor). You said something that is interesting right now. Presuming that was his only source, his only way to get it. There are other ways to get oxycodone, right?
>
> A (by Dr. Julien). I understand it's readily available.
>
> Q. On the street?
>
> A. Yes, ma'am.
>
> Q. And it cost (*sic*) money?
>
> A. Yes, ma'am.
>
> Q. And the defendant, you indicated is an indigent person, correct, not someone of means?
>
> A. He was sponsored by indigent defense.
>
> MR. WOLFE (defense counsel): Objection.
>
> THE COURT: Sustained.
>
> MR. WOLFE: Move to strike.
>
> THE COURT: Well, all right. Ladies and gentlemen, {I} will grant that motion and strike the reference to being represented by indigent defense.

[14] Just before the court took a recess, the prosecutor had attempted to question Dr. Eunasio along these same lines. The court sustained the defendant's objections based on lack of foundation. The defendant did not renew his objection after the State rephrased the questions, based on Dr. Eunasio's experience working with polysubstance dependents. 5RP 485-86.

You are not to consider that evidence in your deliberations.

Q. Based upon the reports that you read, the medical reports, he was living in a shelter?

A. Yes, ma'am.

Q. William Booth Center?

A. Yes. I do not know the place.

Q. You understood it was for indigent persons?

A. I understand that.

Q. So, you would agree that the defendant, on October 9, 2010, was staying at that time at the William Booth Center, is not a person of financial means?

A. I would presume not.

Q. And a way for him to get oxycodone would be first to get money, correct?

A. I presume that would be one way.

Q. And *one way* for him to get money would be to rob two banks and a restaurant, would you agree?

A. That could be *one way*.

6RP 625-26 (italics added).

During defense counsel's re-direct examination, the following exchange occurred:

Q. Based upon your review of the medical records, is Mr. Ogden disabled?

[PROSECUTOR]: Your Honor, I am going to object on the scope of cross.

THE COURT: I haven't gotten the question yet. Go ahead and ask the question.

MR. WOLFE: Your Honor the question was, based upon the doctor's review of the medical records, whether or not Mr. Ogden was disabled. It goes to the question of source of income, to the indigency issue raised by the State.

THE COURT: I am going to sustain.

MR. WOLFE: Nothing further.

6RP 628. Both sides then rested. 6RP 628.

b. The Defense Did Not Make An Adequate Offer Of Proof.

An error may not be predicated on a trial court's exclusion of evidence "unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." ER 103(a)(2). An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review. State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). Without an adequate offer of proof, the purported error is not preserved for appeal. See State v. Riker, 123 Wn.2d 351, 370, 869 P.2d 43 (1994).

Here, defense counsel did not make clear the specific nature of the evidence or the legal theory underlying its admissibility. Counsel said whether Mr. Ogden was disabled "goes to the question of source of income, to the indigency issue raised by the State." 6RP 628. He did not make an offer of proof regarding Dr. Julien's qualifications to render an opinion as to whether Mr. Ogden was legally – as opposed to clinically – disabled.[15] Even assuming Dr. Julien could opine that Mr. Ogden was disabled, counsel never said if, or how, Dr. Julien would know whether Mr. Ogden received disability income.

Moreover, the substance of the evidence was not apparent from the context within which the question was asked. See ER 103(a)(2). These questions and Dr. Julien's responses immediately preceded the question at issue here:

> Q. Based upon the medical records, Mr. Ogden was on more than just methadone when he was booked into the King County Jail?
>
> A. Yes, sir.
>
> Q. Doctor Julien, you reviewed how many pages of medical records before forming your opinion?
>
> A. I think it was near a thousand pages.

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[15] Given defense counsel's concern that the jury might give undue weight to Dr. Hendrickson's opinion (because Dr. Hendrickson has a Juris Doctorate in addition to his Ph.D.), it is unlikely that Dr. Julien (who does not have a Juris Doctorate) would be permitted to provide a legal opinion regarding disability. See generally 6RP 555-58.

Q. And you testified about whether or not he was characterized as safe?

A. Yes.

Q. And I believe your testimony was that he was relatively safe?

[PROSECUTOR]: I object as beyond the scope of recross.

THE COURT: Sustained.

6RP 627. Counsel's next question, a complete non-sequitur, was whether Mr. Ogden was disabled. 6RP 628.

Mr. Ogden also failed to clarify for the court that the "indigency issue" he sought to rebut was the financial motive to commit the crimes – not whether Mr. Ogden's income qualified him for indigent defense. See 6RP 625-26.[16] Given the court's prior admonition to the jury to disregard Dr. Julien's remark about Mr. Ogden being qualified for "indigent defense," it was incumbent upon defense counsel to clarify the "indigency issue," *i.e.*, income

[16] Q. And the defendant, you indicated is an indigent person, correct, not someone of means?

A. He was sponsored by indigent defense.

MR. WOLFE (defense counsel): Objection.

THE COURT: Sustained.

MR. WOLFE: Move to strike.

THE COURT: Well, all right. Ladies and gentlemen, will grant that motion and strike the reference to being represented by indigent defense. You are not to consider that evidence in your deliberations.

to buy street drugs not a lack of income that qualified him for indigent defense.

The Court should decline to review this alleged error because the record on review is inadequate. Mr. Ogden failed to make the requisite offer of proof.

c. Error, If Any, Was Harmless.

Because Mr. Ogden failed to make an offer of proof, he cannot demonstrate how the trial court's ruling harmed him. However, even if the Court reviews the evidentiary error, the error was harmless.

The exclusion of evidence regarding Mr. Ogden's other possible sources of income did not prevent him from presenting his defense. To the contrary, Mr. Ogden presented two expert witnesses in support of his diminished capacity theory. Thus, the non-constitutional harmless error standard applies. Non-constitutional error is harmless unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Anderson, 112 Wn. App. 828, 837, 51 P.2d 179 (2002).

"Motive" is not synonymous with "intent." State v. Tharp, 27 Wn. App. 198, 207-08, 616 P.2d 693 (1980). "Intent" is the "mental state with which the criminal act is committed." Id. at 208. "Motive" is an "inducement which tempts a mind to commit a crime." See State v. Boot, 89 Wn. App. 780, 789, 950 P.2d 964 (1998).

The issue in this case was whether Mr. Odgen had the *ability to form intent*. See CP 85 (jury instruction 19); CP 86 (jury instruction 20). The issue was not whether Mr. Ogden had a *motive* to commit the crimes. Were that the case, the defense would not have presented two expert witnesses to explain complex PTSD or "substance-induced delirium" or "drug-induced amnesia or "drug-induced dementia." Even if Mr. Ogden had "reliable income,"[17] that would not have informed the jury as to his mental state at the time he committed the charged crimes.

Contrary to Mr. Ogden's assertion, the State's argument concerning Mr. Ogden's financial motive to commit the crimes was not a "crucial component in rebutting [his] diminished capacity defense."[18] Rather, the State rebutted Mr. Ogden's diminished

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[17] Br. of Appellant at 13.

[18] See Br. of Appellant at 14 (citing to four pages from the complete trial record to support the assertion). The deputy prosecutor's question and Dr. Julien's answer merely acknowledged that robbery would be *one way* to get money to buy drugs. 6RP 626.

capacity defense by demonstrating again and again that he had engaged in purposeful or goal-directed behavior.

For example, when Mr. Ogden was arrested on October 12, his left arm was broken and in a cast. 3RP 211. While transporting Mr. Ogden to the precinct, the police officer braked suddenly and Mr. Ogden hit his head. 3RP 174. Emergency medical technicians evaluated Mr. Ogden, who told them that he had broken his arm earlier the same day and had been treated at Harborview Medical Center. 3RP 175, 211. The hospital discharged Mr. Ogden "*with some pain medication*" – evidence of his goal-directed behavior. 3RP 212. Moreover, since Mr. Ogden obtained pain medication from the hospital, he had no apparent motive to rob a bank to get money for street drugs.

In addition, the banks' surveillance videos, eyewitness testimony and evidence seized from Mr. Ogden's apartment and truck provided overwhelming evidence of his guilt.

The exclusion of evidence as to other potential sources of income did not materially affect the outcome of this case. Any error in excluding the evidence was harmless.

2. THE TRIAL COURT'S SENTENCE IS INCORRECT.

Mr. Ogden challenges his sentence on these separate bases. He claims that the trial court erred when it (1) included a non-comparable Colorado burglary conviction in his offender score, (2) imposed an excessive community custody term on the first degree robbery and attempted second degree robbery convictions, and (3) imposed a sentence that exceeded the statutory maximum for attempted first degree robbery. Mr. Ogden is correct on all three bases.[19] The Court should remand for re-sentencing.

a. The Colorado Burglary Conviction Should Not Count In Mr. Ogden's Offender Score.

Under the Sentencing Reform Act of 1981 (SRA), a foreign conviction is included in a defendant's offender score if it is comparable to a Washington felony. RCW 9.94A.030(11), .525(3). To determine comparability, the sentencing court must first compare the elements of the foreign offense to the elements of the Washington crime. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). If the elements are identical, the foreign conviction counts toward the offender score as if it were the Washington

[19] From the record of the sentencing hearing (8RP), it is easy to see how errors occurred. Throughout the hearing Mr. Ogden interrupted the proceedings. The parties and the court were unable to complete their thoughts or statements because of Mr. Ogden's unruly behavior, which included using profanity directed at the court.

offense. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are not identical, the court determines whether the offenses are factually comparable. The sentencing court may look at the facts underlying the prior conviction to determine if the defendant's conduct would have resulted in a Washington conviction. Lavery, 154 Wn.2d at 255-256. This factual examination is limited to facts admitted, stipulated to, or proven to a jury beyond a reasonable doubt. Id. at 258.

The State bears the burden of proving the existence and comparability of prior convictions. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). Without a comparability analysis, the foreign conviction cannot be used to increase a defendant's offender score. See Ford, 137 Wn.2d at 483 (stating that classification is a mandatory step in the sentencing process under the SRA) and quoting former RCW 9.94A.360(3)[20] ("Out-of-state convictions for offenses *shall* be classified according to the comparable offense definitions and sentences provided by Washington law.") (Emphasis added in Ford). This Court reviews de novo the sentencing court's calculation of the offender score. State v. Rivers, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

[20] Recodified as § 9.94A.525 by LAWS 2001, CH. 10, § 6.

The State argued in a presentence memorandum and at the sentencing hearing that Colorado's burglary statute was comparable to Washington's burglary statute.[21] CP 194-99; 8RP 6-7. The sentencing court determined that Mr. Ogden's offender score for each conviction was 9 based on only Washington convictions. 8RP 7-8, 11, 26. The court noted that Mr. Ogden's standard range would remain unchanged whether his offender score was 9 or 13 as calculated by the State. 8RP 7. The court said, "I'm going to find that a (*sic*) offender score of not less than 9 is established so that the sentencing range remains the same, 129 (indiscernible) months." 8RP 26.

After the court imposed sentence, the deputy prosecutor asked the court if it was finding an offender score of 13, as calculated by the State. 8RP 38. She said, "[I]s the court making a finding that the offender score is 13? I know the court said no less than 9, obviously, because it doesn't change the offender score (*sic*) [standard range]." 8RP 38. The court replied, "I'm finding that it is 13, and I did refer to it being 9 because it doesn't change the

[21] The State concedes that the Colorado burglary statute is broader than Washington's burglary statute, and that the record from the Colorado conviction is insufficient to determine factual comparability.

offender scoring, 9 being Washington state convictions *and not requiring a comparability analysis.* But I would find that it's 13."

Because the sentencing court did not conduct a comparability analysis, the Colorado conviction at issue here cannot be included in Mr. Ogden's criminal history. See Ford, 137 Wn.2d at 483; RCW 9.94A.525(3). The judgment and sentence should be amended to reflect an offender score of 12.[22]

b. The Court Imposed Incorrect Community Custody Terms On Counts One And Three.[23]

A trial court may impose a sentence only as authorized by statute. See In re Pers. Restraint of Tobin, 165 Wn.2d 172, 175, 196 P.3d 670 (2008). Statutory construction is a question of law reviewed de novo. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

The SRA requires the trial court to impose community custody on specified felonies for which the sentence is more than one year. RCW 9.94A.701. For "violent offenses," the court must impose community custody for eighteen months. RCW

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[22] Mr. Ogden has not challenged the comparability of the other three foreign convictions.

[23] Count one: first degree robbery. Count three: attempted second degree robbery.

9.94A.701(2). Any class A felony is a "violent offense." RCW 9.94A.030(54)(a)(i). First degree robbery is a class A felony. RCW 9A.56.200(2). Second degree robbery is also a "violent offense." RCW 9.94A.030(54)(a)(xi). Attempted second degree robbery, however is not a "violent offense." State v. Becker, 59 Wn. App. 848, 851-55, 801 P.2d 1015 (1990).

Here, the trial court ordered 36 months of community custody on count one after it incorrectly classified first degree robbery as a "*serious* violent offense." CP 178. First degree robbery is a "violent offense," but not a "serious violent offense." Compare RCW 9.94A.030(45) with RCW 9.94A.030(54). The term of community custody therefore exceeded the trial court's statutory authority. On remand, the court must impose 18 months of community custody. RCW 9.94A.701(2).

The trial court imposed 18 months community custody on count three after it incorrectly classified attempted second degree robbery as a "violent offense." CP 149. Here, too, the court exceeded its statutory authority. On remand, the court must strike the community custody term. See Becker, 59 Wn. App. at 851-55.

c. The Sentence On Count Two Exceeds The Statutory Maximum.

Mr. Ogden was convicted of attempted first degree robbery. CP 174.

The standard range sentence for attempted first degree robbery is 96.75 to 128.25 months. See RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (first degree robbery has a seriousness level of IX); RCW 9.94A.533(2) (standard range for criminal attempt is seventy-five percent of the standard range).

Whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime, the trial court must reduce the community custody term. RCW 9.94A.701(9). Attempted first degree robbery is a violent offense, with a community custody term of 18 months. RCW 9.94A.030(54)(a)(ii); RCW 9.94A.701(2). Attempted first degree robbery is a class B felony. RCW 9A.28.020(3)(b). The statutory maximum term of confinement for a class B felony is 120 months. RCW 9A.20.021(1)(b).

The trial court imposed 128 months of confinement, followed by 18 months community custody. The sentence exceeds the

statutory maximum. RCW 9A.20.021(1)(b). On remand, the court must impose a sentence that does not exceed 120 months.[24]

D. CONCLUSION

For the reasons stated above, the State respectfully asks the Court to affirm Mr. Ogden's convictions for first degree robbery, attempted first degree robbery and attempted second degree robbery. Then, for the reasons stated above, the case must be remanded for resentencing.

DATED this 14 day of January, 2013.

Respectfully submitted,

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[24] The court may impose any sentence within the standard range provided the term of confinement or confinement plus community custody does not exceed 120 months.

Certificate by Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of THE BRIEF OF RESPONDENT, in STATE V. DAVID OGDEN, Cause No. 68613-5 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 14 day of January, 2013

Name
Done in Seattle, Washington