No. 44258-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

MARTIN IVIE, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay, Judge

No. 12-1-00064-6

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. The totality of the circumstances shows that Ivie's statement to police investigators was properly admitted at trial because Ivie gave the statement voluntarily.

2. There was no juror misconduct in this case, and because the actions of the jury alleged by Ivie on appeal are matters inhering in the verdict of the jury, Ivie's allegations are not grounds to override the jury's verdict.

3. The State alleged at sentencing that Ivie had a prior felony conviction that contributed one point to his offender score. The State did not present extrinsic proof of Ivie's prior conviction, but Ivie did not dispute his prior conviction and did not object to the calculation of his offender score. Because Ivie did not object or dispute his criminal history, the proper remedy is remand to the trial court, permitting the State to present additional evidence to prove the criminal history.

4. The trial court held a CrR 3.5 hearing to determine the admissibility of Ivie's statement to police. The court made oral findings and conclusions and ruled the statement admissible, but the court did not enter required written findings. Because the record is sufficient to allow appellate review, however, the failure to enter written findings on the facts of the instant case is harmless.

5. The evidence at trial was sufficient to sustain the jury's findings that Ivie intentionally assaulted the victims in each of the counts of assault for which the jury returned guilty verdicts.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

6. The charging document and jury instructions in this case specifically stated that the crime of theft in the second degree occurred on or about February 9, 2012. The State presented evidence that Ivie was observed stealing wood on February 9, 2012. Therefore, even though Ivie testified that he had also taken a wood a week before February 9, 2012, he was not denied a unanimous jury verdict when the jury found him guilty of stealing wood on February 9, 2012.

B. FACTS

February 9, 2012, Deputy Reed had contact with Martin Ivie. I RP 64. Reed saw Ivie on property that belonged to a man by the name of Mr. Franks. I RP 65. Deputy Reed was working a 10 hour swing shift, from 2:00 p.m. until midnight, in the Lake Cushman area. I RP 68. In January, Reed had heard chain saws during the night up on Dow Mountain, so he was suspicious that there was someone stealing wood during the night. I RP 68. On February 8th, he heard the chainsaws during the night again. I RP 68.

On February 9th, a citizen told Reed about a place in the woods where he had found a freshly cut maple tree. I RP 70. The wood was music wood and was valued at more than $4,000.00. I RP 172-73. Deputy Reed went to the lot just before dark, at about 5:45 p.m. I RP 71.

Deputy Reed found a freshly cut maple tree that was partially cut up to be used as "music wood." I RP 72. Suspecting that the thief would return to the site during the night to finish the job, Deputy Reed set up surveillance and watched the site through night vision goggles. I RP 73.

At a few minutes after 8:00 p.m., Deputy Reed saw the headlights of a small pickup as it pulled into the site and backed up to the partially cut maple tree and music wood. I RP 75. Deputy Reed radioed dispatch and asked for additional officers, and he then hid in the woods and watched the site as he waited for help. I RP 75. Deputy Reed watched as the suspect removed tools from his pickup truck and began to remove the bark from the music wood. I RP 77.

While waiting for help to arrive, Deputy Reed watched the suspect for about 25 minutes while the suspect busily worked the music wood. I RP 77. When Deputy Reed saw the headlights of Sergeant Adams's patrol vehicle as it approached the scene, he then stepped out and confronted the suspect. I RP 77-79. Ivie looked up and faced Deputy Reed. I RP 80. Deputy Reed immediately recognized the suspect as Martin Ivie. I RP 79. Ivie was wearing a headlamp, and when he looked at Deputy Reed his

headlamp illuminated Deputy Reed, who was wearing a sheriff's uniform. I RP 80.

Deputy Reed drew his duty weapon (a pistol), pointed a flashlight at Ivie, and commanded him to show his hands and to get on the ground. I RP 81. Ivie, defying Deputy Reed's commands, threw down his hatchet and stomped back and forth, saying he doesn't get on the ground for any man, and then sat down on a stump. I RP 81. Ivie became agitated and began flopping his arms around and saying "you finally caught me." I RP 81.

While Deputy Reed was still squared off alone with him, Ivie jumped in his truck and fled the scene, nearly running over Deputy Reed's feet as he sped away. I RP 83. Deputy Reed could still see the headlights of Sergeant Adams's approaching vehicle, so he radioed to Sergeant Adams and let him know that Ivie was heading toward him. I RP 83.

As Ivie fled the scene, he drove toward Sergeant Adams's approaching vehicle, but when he was confronted by the vehicle, he turned around and drove back in the direction of Deputy Reed. I RP 87; II RP 293-97. As Sergeant Adams, with his emergency lights activated, pursued Ivie, Deputy Reed stood on the road with his flashlight illuminated in an

attempt to stop Ivie, but Ivie, refusing to stop, drove straight at Deputy Reed, and Deputy Reed had to dive away to avoid being run over by Ivie. I RP 88-93.

From this point on, as deputies chased Ivie around the dark mountain, an escalating series of events took place that culminated with Ivie getting shot. I RP 102. At one point during the chase, Ivie intentionally accelerated in reverse, driving his pickup into Sergeant Adams's pursuing patrol vehicle, and then put his pickup back into forward gear and continued to flee. II RP 302-04.

Eventually both Ivie and Sergeant Adams arrived at a dead end up the side of the mountain; so, Sergeant Adams got out of his patrol vehicle and took up a defensive position. II RP 305-07. Ivie looked at Sergeant Adams and accelerated straight toward him. II RP 307, 312. In reaction, Sergeant Adams fled for cover while firing several rounds from his rifle. II RP 314-21. Ivie was shot several times. II RP 321. Sergeant Adams immediately performed first aid and saved Ivie's life. II RP 324.

Based upon these events, the State charged Ivie with several crimes, including theft in the second degree, attempting to elude a pursuing police vehicle, two counts of assault in the first degree, two

counts of assault in the second degree, and one count of assault in the third degree. CP 87-90. The jury returned guilty verdicts to each of the charges. CP 38-47.

C. ARGUMENT

1. The totality of the circumstances shows that Ivie's statement to police investigators was properly admitted at trial because Ivie gave the statement voluntarily.

About 16 hours after the shooting detectives contacted Ivie at the hospital, where he was recovering. II RP 347, III RP 502. Detectives asked Ivie to give a statement about the incident. III RP 504. Detectives read *Miranda* warnings to Ivie. III RP 504-05. Ivie asked for an attorney. III RP 506, 529. Detectives ended the statement and began to leave the room. III RP 506-07, 529.

As the detectives were leaving the room, Ivie yelled at them to come back. III RP 507, 529. As they were walking down the hall, Ivie called them back into the room and said that he'd changed his mind and wanted to give a statement. III RP 508, 529. He said that "he disliked cops, but hated attorneys even more." III RP 508. The detectives

reentered the room and began the interview again. III RP 509. The only reason detectives reentered the room is because Ivie called them back. III RP 540.

Before contacting Ivie, the detectives checked with hospital staff to make sure that Ivie could speak with them. III RP 527-28. Throughout the interview, Ivie was awake and alert. III RP 503, 513, 532. His answers to questions were responsive. III RP 511, 532, 540. Ivie at no point expressed any confusion or inability to understand. III RP 511, 532-33, 540. He did not appear to be under the influence of any drug. III RP 511, 513, 533-34. No one made any threats or promises to Ivie or took other action to coerce him to speak. III RP 512, 531.

At trial, the prosecution offered Ivie's statement as impeachment evidence to impeach his trial testimony. III RP 491-500; Ex. 96. The court held a hearing to determine whether Ivie's statement was voluntarily given. III RP 500-565. At the end of the hearing, the court ruled in an oral ruling that Ivie's statement was voluntarily given and that it was admissible for impeachment purposes. III RP 565-69.

When delivering its ruling, the court clarified that the issue it was deciding was whether Ivie's statement was coerced and whether he was

unable to understand what he was saying or doing when he gave the statement. III RP 566. The court found that: 1) the detectives checked with hospital staff and obtained clearance from them before interviewing Ivie; 2) Ivie initiated the interview by calling the detectives back into the room after they had left the room and were leaving because Ivie had told them that he wanted an attorney; 3) there was no evidence about the time or duration of surgery, but Ivie was up and walking when the detectives interviewed him; 4) Ivie slurred his words initially, but as the interview continued his voice became normal, and his responses and explanations appeared coherent; 5) Ivie "was able to understand the process and add his own thoughts to" the interview; 6) although Ivie testified that he was in and out of consciousness, the court's review of the audio tape of the interview does not support his testimony; 7) while Ivie may have been under the influence of some drug for pain, it was not the kind of influence that affected his ability to understand the detectives' questions or to give appropriately responsive answers, and his will was not overborne; and, 8) there was no testimony or other evidence to support an assertion that his will was overborne or coerced. III RP 566-69. Based upon the evidence, the court found that Ivie's statement was voluntary. III RP 569.

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

After Ivie testified on direct examination, the prosecution on cross examination used Ivie's statement to the detectives (introduced as Exhibit 96) for impeachment. IV RP 601-03, 608 (referring to exhibit 4 of 19, but meaning page 4 of 19 pages), 613, 625-27, 629, 634-35, 639-42, 654-56.

The test for whether defendant's statement was voluntary for due process purposes is to determine whether the defendant's free will was overcome due to the conduct of law enforcement officers. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991). The trial court's findings in this regard are verities and will not be disturbed on appeal if those findings are supported by substantial evidence in the record. *State v. Broadaway,* 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Whether a confession is voluntary depends on the totality of the circumstances under which it was made. *State v. Aten,* 130 Wn.2d 640, 663–64, 927 P.2d 210 (1996). This examination includes considerations of the location, length, and continuity of the interrogation; the defendant's maturity, education, physical condition, and mental health; and whether

the police advised the defendant of his or her *Miranda* rights. *State v. Unga,* 165 Wn.2d 95, 101, 196 P.3d 645 (2008). If police tactics manipulated or prevented a defendant from making a rational, independent decision about giving a statement, the statement is inadmissible. *Unga,* 165 Wn.2d at 102.

There is no evidence in the instant case that detectives acted in any way inappropriately when contacting Ivie in the hospital. The evidence is substantial that Ivie's statement was an exercise of his own free will. Ivie was read *Miranda* rights at least twice. III RP 504-05, 509-10. Detectives left Ivie alone and were walking away when he yelled for them to come back because he wanted to give a statement. III RP 507, 529. Substantial evidence in the record shows that Ivie was alert, articulate, coherent, and in every way mentally capable of understanding what he was saying and doing and that he was fully capable of exercising his own free will. III RP 502-40.

Under the circumstances of the instant case, the trial court did not err when it allowed Ivie's statement to detectives to be used as impeachment evidence at trial. *State v. Aten,* 130 Wn.2d 640, 663–64, 927

P.2d 210 (1996); *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991).

2. There was no juror misconduct in this case, and because the actions of the jury alleged by Ivie on appeal are matters inhering in the verdict of the jury, Ivie's allegations are not grounds to override the jury's verdict.

"As a general rule, appellate courts are reluctant to inquire into how a jury arrives at its verdict." *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994), citing *State v. Gay,* 82 Wash. 423, 439, 144 P. 711 (1914). Therefore, "[a] strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994) (citations omitted).

In the instant case, the jury was polled and each juror individually and unanimously vouched for the verdicts. IV RP 791-94.

It is well established that matters inhering in a jury's verdict may not be used as a basis for granting a new trial. *State v. Jackman*, 113 Wn.2d 772, 777–78, 783 P.2d 580 (1989). See, e.g., *Id.*.at 777 (affidavit

suggesting jurors improperly shortened deliberations could not be used to impeach verdict); *State v. Standifer,* 48 Wn. App. 121, 737 P.2d 1308, *review denied,* 108 Wn.2d 1035 (1987) (trial court erred in granting new trial on basis of juror's letter expressing reasonable doubt about defendant's guilt); *State v. McKenzie,* 56 Wn.2d 897, 355 P.2d 834 (1960) (trial court erred in considering juror affidavit stating that one juror had argued law contrary to instructions); *State v. Young,* 48 Wn. App. 406, 739 P.2d 1170 (1987) (juror affidaits expressing confusion about meaning of court's instructions reflected thought process and could not be used to impeach verdict); *State v. Duhaime,* 29 Wn. App. 842, 631 P.2d 964, *review denied,* 97 Wn.2d 1009 (1981) (affidavit of juror who sought to rescind vote in guilt phase of death penalty case reflected thought process and therefore could not be used to impeach verdict); *State v. Whipple,* 124 Wash. 578, 215 P. 14 (1923) (affidavit indicating that 3 jurors misunderstood court's instructions and consented to verdict because of misunderstanding could not be used to impeach verdict).

3. The State alleged at sentencing that Ivie had a prior felony conviction that contributed one point to his offender score. The State did not present extrinsic proof of Ivie's prior conviction, but Ivie did not

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

> dispute his prior conviction and did not object to the calculation of his offender score. Because Ivie did not object or dispute his criminal history, the proper remedy is remand to the trial court, permitting the State to present additional evidence to prove the criminal history.

Following the jury's verdicts of guilty, the parties again appeared in court on November 13, 2012, for sentencing. At the sentencing hearing, the prosecutor informed the court that Ivie had...

> one prior felony conviction, which calculates as an offender point. And that is for a conviction for malicious mischief second degree out of this Court, committed on June 23, 2004 and sentenced on April the 11th, 2005.

IV RP 828. The judgment and sentence entered by the court shows this conviction. CP 6. No citation to the record was located where Ivie made any objection to calculation of his offender score or inclusion of his prior felony conviction. Neither was any citation to the record located where the State offered evidence to prove the prior conviction.

"The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence." *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007), citing *In re Pers. Restraint of Cadwallader,* 155 Wn.2d 867, 876, 123 P.3d 456 (2005); *State v. Lopez,* 147 Wn.2d 515, 519, 55 P.3d 609 (2002). If the State does not present

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PO Box 639
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proof of an offender's prior conviction at sentence but the offender did not specifically object to calculation of his or her offender score at the time of sentencing, but instead raises the issue for the first time on appeal, the proper remedy is to remand the case to the trial court and allow the State to present new evidence to prove the conviction. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007), citing *State v. Ford,* 137 Wn.2d 472, 520, 973 P.2d 452 (1999).

4. The trial court held a CrR 3.5 hearing to determine the admissibility of Ivie's statement to police. The court made oral findings and conclusions and ruled the statement admissible, but the court did not enter required written findings. Because the record is sufficient to allow appellate review, however, the failure to enter written findings on the facts of the instant case is harmless.

Ivie's statement in the instant case was not offered as substantive evidence in the prosecution's case in chief. III RP 491-500. Instead, the statement was offered only as impeachment. III RP 491-500. But, irrespective of whether the statement is offered into evidence substantively or only for impeachment, before the statement is admitted into evidence the court is required to hold a hearing to determine whether the statement

is admissible. CrR 3.5(a). Following the hearing, the court is required to enter written findings. CrR 3.5(c).

In the instant case, it appears that the court's findings of fact and conclusions of law were not reduced to writing after the hearing. Instead, the court delivered an oral ruling, which was apparently never reduced to writing, except to the extent that it was transcribed as a part of the verbatim report on appeal. III RP 565-569. Ivie asserts that the court's failure to supplement its oral ruling with written findings is reversible error. Br. of Appellant at 16-18. But Ivie does not show that he has suffered any actual prejudice from this error or that the transcript of the court's oral ruling is inadequate for him to obtain appellate review of the court's ruling.

In the instant case, the court's oral findings are adequate for Ivie to obtain appellate review. III RP 565-569. "[F]ailure to enter findings required by CrR 3.5 is considered harmless error if the court's oral findings are sufficient to permit appellate review." *State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325 (2003), citing *State v. Smith,* 67 Wn. App. 81, 87, 834 P.2d 26 (1992), *aff'd,* 123 Wn.2d 51, 864 P.2d 1371 (1993); *State v. Bluehorse*, 159 Wn. App. 410, 422-23, 248 P.3d 537

(2011). Error arising from the failure to enter written findings in the instant case, therefore, is harmless. *Id.*

5. The evidence at trial was sufficient to sustain the jury's findings that Ivie intentionally assaulted the victims in each of the counts of assault for which the jury returned guilty verdicts.

On review, sufficiency of evidence claims are to be viewed in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Drum,* 168 Wn.2d 23, 34–35, 225 P.3d 237 (2010). An appellant who challenges the sufficiency of evidence necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Id.* at 35. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of "conflicting testimony, credibility of witnesses, and persuasiveness of the evidence." *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated*

in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The jury, as the finder of fact in the instant case, was entitled to discard the inferences to be drawn from the evidence as urged by Ivie and to, instead, infer from the evidence that he in fact intentionally committed the acts of assault for which the jury returned guilty verdicts. *Thomas,* 150 Wn.2d at 874–75; *State v. Bencivenga*, 137 Wn.2d 703, 974 P.2d 832 (1999).

6. The charging document and jury instructions in this case specifically stated that the crime of theft in the second degree occurred on or about February 9, 2012. The State presented evidence that Ivie was observed stealing wood on February 9, 2012. Therefore, even though Ivie testified that he had also taken a wood a week before February 9, 2012, he was not denied a unanimous jury verdict when the jury found him guilty of stealing wood on February 9, 2012.

The State charged Ivie in count I of the Third Amended Information, which was tried to the jury, with the crime of theft in the second degree for stealing music wood, which the State alleged occurred "on or about the 9th day of February, 2012." CP 87-88. The State

presented evidence that Deputy Reed observed Ivie in the act of stealing the music wood on February 9, 2012. I RP 64-81.

On appeal, Ivie contends that he was denied a unanimous jury verdict because he testified that he had also removed wood from the crime scene a week prior to February 9th, and that the jury, therefore, might not have been unanimous as to which theft had been proved. Br. of Appellant at 10-11. Ivie contends that the prosecution failed to elect which act it wished to rely upon when submitting the case to the jury. Br. of Appellant at 11.

But in Jury Instruction No. 24, the jury was instructed that to prove the crime of theft in the second degree the jury was required to find beyond a reasonable doubt that the crime occurred on or about February 9, 2012. CP 75. Jury Instruction No. 32 instructed the jury that their verdicts must be unanimous. CP 84.

Additionally, the State had the discretion to aggregate Ivie's ongoing theft as a single court of theft. *State v. Carosa*, 83 Wn. App. 380, 381, 921 P.2d 593 (1996).

D. CONCLUSION

For the reasons stated above, the State contends that Ivie's appeal should be denied and the jury's verdicts of guilty should be sustained.

DATED: November 6, 2013.

MICHAEL DORCY
Mason County
Prosecuting Attorney

Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON COUNTY PROSECUTOR

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