

May 12, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

AUSTEN M. CARTER,

Appellant.

No. 52569-1-II

(consolidated with)

Nos. 52572-1-II, 52579-8-II,
52582-8-II, 52592-5-II, 52602-6-II

UNPUBLISHED OPINION

GLASGOW, J.—After a bench trial on stipulated facts, Austen M. Carter was convicted of thirteen felonies from six separate cases. Relevant to this appeal, there were three separate underlying incidents. First, Carter was connected to the burglary of a home where police found heroin in a car parked in front of the home. Second, Carter attempted to elude a pursuing police vehicle. Third, Carter used a stolen credit card at a Walmart store, and the card was also used at other locations without authorization.

Carter appeals three of his convictions: one count of heroin possession, one count of attempting to elude a pursuing police vehicle, and one count of identity theft. He argues that the stipulated evidence was insufficient to prove those convictions. He contends there was no evidence linking him to the heroin confiscated by police and there was no evidence that the officer pursuing him was in uniform. He acknowledges there was sufficient evidence to support one count of identity theft, but not a second count, because there was evidence of only one instance of him using the victim's credit card without authorization. The State concedes on each of these challenges, but

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maintains that resentencing is unnecessary because Carter's presumptive standard sentencing range would remain unchanged.

We reverse and dismiss with prejudice each of the challenged convictions. We remand for correction of the offender score and resentencing.

FACTS

Carter entered drug court under six different superior court cause numbers, encompassing thirteen felony counts. In each case, Carter agreed that if he were terminated from the program, the trial court would determine his guilt on those charges solely based on the State's evidence, including police reports, declarations, and witness statements.

Carter later admitted that he used heroin while on work release, in violation of drug court rules. The trial court terminated his participation in drug court and, under the agreement, the case proceeded to a bench trial on stipulated facts.

The stipulated facts regarding three of Carter's convictions are relevant to this appeal. In the first relevant incident, police responded to reports of a burglary of an unoccupied home. Police found two women in a white Honda sedan parked in front of the home. Upon searching the car, the police found heroin, but ultimately could not link the heroin to any specific person. The police report of this incident does not mention Carter. The police learned later that Carter had participated in a separate burglary of the same home the day before.

In the second relevant incident, a police officer noticed a maroon Honda sedan parked outside a casino with its license plates covered with duct tape. Carter came out of the casino, removed the duct tape, and drove away. The officer followed him and turned on his vehicle's sirens and lights but Carter did not stop. The officer learned that the car was stolen. Carter eluded the

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officer when the officer lost control of his vehicle. The police later confirmed that it was in fact Carter who stole the car and eluded the officer. There was no mention in the police report of whether the officer was in uniform.

In the third relevant incident, the victim reported their truck stolen with a credit card inside. The credit card was later used at a Walmart store and other locations. The police obtained a surveillance video from Walmart to confirm that Carter had used the credit card there. However, the police were unable to uncover any further evidence of who made the unauthorized purchases at the other locations. Carter admitted that he borrowed the truck from the person who had stolen it and used the credit card at the Walmart. He then returned the truck to the person who had stolen it. These facts led to two charges of identity theft.

The trial court found Carter guilty of each of 13 charged counts. Carter's offender score on each count was 9 or higher. The trial court sentenced Carter to the middle of the standard range for each count, to be served concurrently. Carter's offender score on his most serious conviction, first degree theft of a motor vehicle, was 15, carrying a standard range of 72 to 96 months. The trial court sentenced him on this count to a total of 84 months in prison followed by 12 months of community custody. All of his other concurrent sentences were shorter than this one.

Carter appeals his convictions for one count of possession of heroin, one count of eluding a police vehicle, and one of the two counts of identity theft.

ANALYSIS

From the six underlying cases resulting in convictions against him, Carter challenges the three convictions listed above as unsupported by sufficient evidence. The State concedes and we agree.

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A. Test for Sufficiency of the Evidence

“The State has the burden of proving all of the elements of a crime beyond a reasonable doubt.” *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). When reviewing a claim of insufficient evidence, we ask whether a rational trier of fact could find that all of the crime’s essential elements were proved beyond a reasonable doubt. *Id.* We view all of the evidence in the light most favorable to the State. *Id.* And the defendant admits the truth of the State’s evidence and all reasonable inferences that arise therefrom. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265-66, 401 P.3d 19 (2017). When an appellate court determines that the defendant’s conviction is not supported by sufficient evidence, the proper remedy is to dismiss the conviction with prejudice. *State v. Batson*, 194 Wn. App. 326, 339, 377 P.3d 238 (2016).

B. Heroin Possession

Carter first argues there was insufficient evidence to convict him of heroin possession under Thurston County cause number 17-1-01497-34 because there was no evidence linking him to the heroin found in the white Honda. The State concedes that this conviction should be dismissed. We accept the State’s concession.

To convict Carter of heroin possession, the State had to prove that Carter was in possession of heroin. RCW 69.50.4013(1). “Possession can be actual or constructive.” *State v. Hathaway*, 161 Wn. App. 634, 646, 251 P.3d 253 (2011). “Actual possession occurs when a defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item.” *Id.*

The stipulated facts established that at the abandoned home where Carter was arrested for burglary, police officers found a white Honda sedan parked in the driveway with two women

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inside. The officers found heroin inside the car. At no point in the record did the police connect Carter to the heroin in the car or to the white Honda. Indeed, the officers could not determine to whom the heroin belonged and recommended that it be destroyed rather than used as a basis for charging a suspect. Police reports only linked Carter to the burglary of the house and stolen property taken from the house.

For these reasons, we agree with Carter and the State that there was insufficient evidence to prove that Carter possessed heroin under this cause number.

C. Attempting to Elude a Pursuing Police Vehicle

Carter next argues that there was insufficient evidence to convict him of attempting to elude a pursuing police vehicle under Thurston County cause no. 17-1-02212-34 because the stipulated facts did not establish that the pursuing officer was in uniform. The State concedes. We agree.

To convict Carter of attempting to elude a pursuing police vehicle, the State had to prove that Carter willfully failed or refused to stop and drove in a reckless manner while attempting to elude a pursuing police vehicle, after being given a signal to stop by an officer who is *in uniform* and whose vehicle is equipped with lights and sirens. RCW 46.61.024(1). Carter argues, and the State concedes, that the record contains no evidence that the pursuing officer was wearing a uniform during his pursuit of Carter.

“A conviction for attempting to elude a police vehicle requires the State to prove, beyond a reasonable doubt, that the defendant was signaled to stop by a uniformed police officer.” *State v. Connors*, 9 Wn. App. 2d 93, 95, 442 P.3d 20 (2019); *see also State v. Hudson*, 85 Wn. App. 401, 403, 932 P.2d 714 (1997) (“The eluding statute clearly requires evidence that the officer giving the signal to stop shall be in uniform.”). Even where the appellate court is applying a

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sufficiency of the evidence standard, “[e]vidence that the officers were in a marked vehicle and that [the defendant] probably knew they were police officers, without more, is insufficient to permit a rational trier of fact to infer beyond a reasonable doubt that [the] officers were in uniform.” *Hudson*, 85 Wn. App. at 405; *see also State v. Ritts*, 94 Wn. App. 784, 788, 973 P.2d 493 (1999) (“[The defendant’s] admission that he knew his pursuer was a law enforcement officer does not relieve the State of proving the elements of the eluding statute.”).

The police reports for this incident do not establish anywhere that the pursuing officer was in uniform. Without such evidence, a rational trier of fact could not infer beyond a reasonable doubt that the officer was in uniform. *Hudson*, 85 Wn. App. at 405. This is true regardless of the fact that the officer turned on his vehicle’s siren and the likelihood that Carter knew his pursuer was a law enforcement officer. *Ritts*, 94 Wn. App. at 788; *Hudson*, 85 Wn. App. at 404-05. Therefore, Carter’s conviction for attempting to elude a police vehicle was not supported by sufficient evidence.

D. Identity Theft

Finally, Carter argues that there was insufficient evidence to convict him only of one count of identity theft, not two, under Thurston County cause number 17-1-02257-34. The State concedes. We agree.

To convict Carter of identity theft, the State had to prove that he knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person with the intent to commit any crime. RCW 9.35.020(1).

The stipulated record showed that someone stole the victim’s truck, which contained his credit card. The credit card was subsequently used at several locations without the victim’s

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permission, including a Walmart store. Only the Walmart provided surveillance video establishing that Carter used the credit card without authorization. Carter admitted that he used the credit card at Walmart but did not admit to using it anywhere else. Carter said that he only used the truck for his trip to Walmart.

Viewed in the light most favorable to the State, the record established only one instance of Carter using or possessing this victim's credit card. Therefore, we accept the State's concession that the evidence was sufficient only to support one conviction of identity theft under this cause number.

E. Offender Score

Carter requests correction of his offender score and resentencing on his remaining convictions. The State responds that resentencing is unnecessary because even if each of the challenged convictions is dismissed, Carter's offender score will still be greater than nine on each of his remaining offenses, resulting in no change in his standard ranges. The court imposed an 84-month sentence for his most serious crime and all other sentences were to be served concurrently.

We have previously explained that "a *reduced standard range*, not a reduced offender score, requires resentencing on remand." *State v. Kilgore*, 141 Wn. App. 817, 824, 172 P.3d 373 (2007) (footnote omitted). Carter's offender score on his motor vehicle theft conviction, for which he received his 84-month sentence, was fifteen. Thus, even after vacating his three convictions for heroin possession, attempting to elude, and identity theft, Carter's offender score on the motor vehicle theft charge will still be greater than nine.

Nevertheless, we often also have considered whether the original sentence was at the bottom of the standard range, a fact not present here. Where the sentencing judge imposed a low-

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end sentence, reduction of the offender score could not result in a lower sentence within the standard range and it should not result in a higher sentence. *E.g., State v. Johnson*, 61 Wn. App. 539, 552, 811 P.2d 687 (1991). In contrast, here, the reduction in the offender score might impact whether the sentencing judge would impose a different sentence within the standard range. As a result, we remand for resentencing.

CONCLUSION

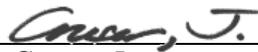
We reverse and dismiss with prejudice Carter's convictions for heroin possession, attempting to elude a pursuing police vehicle, and one count of identity theft. We remand for correction of the offender score and resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Glasgow, J.

We concur:


Maxa, P.J.


Cruser, J.