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COURT OF APPEALS
DIVISION II

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No. 36006-3-II

STATE OF WASHINGTON
BY *Cym*
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALONZO W. BAGGETT.

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Richard D. Hicks , Judge
Cause No. 06-1-00881-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether it was error for the trial court to fail to give Baggett's requested jury instruction that intent to deliver cannot be inferred solely from possession of a large quantity of a controlled substance.

2. Whether the trial court miscalculated Baggett's offender score by including four prior criminal convictions, all of which occurred when Baggett was a juvenile.

B. STATEMENT OF THE CASE

The State accepts Baggett's statement of the case.

C. ARGUMENT

1. It was not error for the court to fail to give the defendant's requested instruction that the inference of intent to deliver required more than possession of a large quantity of a controlled substance.

A trial court's refusal to give a jury instruction based upon a ruling of law is reviewed de novo, while if the refusal is based upon a factual dispute, it is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 772-73, 966 P.2d 883 (1998). A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71

P.3d 638 (2003). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that “no reasonable person would take,” and arrives at a decision “outside the range of acceptable choices.” Id.

It is the role of the trial court to determine the law and explain the law to the jury. State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992) (citing State v. Shelton, 71 Wn.2d 838, 842, 431 P.2d 201 (1967)). Jury instructions are sufficient when they are not misleading, easily understood, and allow counsel to argue his or her theory of the case. Huckins, *supra*, at 217, State v. Morales-Ramirez, 49 Wn. App. 78, 87, 741 P.2d 1024 (1987). A trial court is not required to instruct the jury as to an incomplete statement of the law. See State v. Jones, 63 Wn. App. 703, 707, 821 P.2d 543 (1992).

An instruction is not incomplete, however, if it does not state all possible arguments or formulations of the law. In State v. Morales-Ramirez, the court instructed the jury as follows:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime, if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

1. solicits, commands, encourages, or requests another person to commit the crime; or
2. aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement or support. A person who is present at the scene and is ready to assist by his or her presence is aiding in the commission of the crime.

State v. Morales-Ramirez, *supra*, at 88. The defendant objected to the instruction as incomplete because the instruction failed to instruct the jury that a person’s mere presence at and knowledge of the crime are insufficient to convict. Id. at 88-89. Acknowledging that the defendant was correct in her additional statement of the law, the Court held that the instruction given was also a correct statement of the law. Id. at 89.

In Huckins, the defendant had been charged with four counts of possession of depictions of minors engaged in sexually explicit conduct. He proposed a jury instruction which read: “[d]epictions of nudity, without more, constitute a protected expression and the

law does not prohibit the possession of such depictions.” The trial court declined to give that instruction, saying that both parties could argue that proposition during closing. Huckins, *supra*, at 215.

In this case, the instructions as given embraced the concept that Huckins’ proposed instruction advanced. The “to convict” instructions clearly advised the jury that before it could convict Huckins of the counts charged, it first had to conclude that, for each count, Huckins knowingly possessed the named magazine and that that magazine depicted “a minor engaged in the exhibition of the genitals or unclothed public or rectal areas of any minor for the purpose of sexual stimulation of the viewer.” From these instructions, Huckins could argue that the possession of depictions of nudity, without more, does not violate RCW 9.68A.070. Consequently, the trial court did not err by refusing to instruct the jury according to Huckins’ proposed supplemental instruction or by permitting counsel to argue the proposition that that instructions advanced.

Id., at 217-18.

In Baggett’s case, the jury was given instruction No. 17:

To convict the defendant of the crime of possession with intent to deliver a controlled substance as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt.

(1) That on or about the 14th day of May, 2006, the defendant knowingly possessed a controlled substance, to-wit: Methamphetamine or Methylenedioxyamphetamine (aka MDMA/ecstasy);

(2) That the defendant possessed the substance with the intent to deliver a controlled substance; and

(3) That the acts occurred in the State of Washington.

[CP 68]

The trial court here found that the jury instructions as given (CP 49-85) allowed the defendant to argue his theory of the case. The defense counsel did so at some length. [RP Vol. III 279-282] Baggett quotes a section of the prosecutor's argument during which he discussed the detective's testimony regarding his experience investigating drug dealing. [Brief of Appellant 8] The prosecutor's closing argument, including rebuttal, however, included much more than that on the count of possession with intent to deliver. Besides the quantity of pills and the testimony of the detective, the prosecutor talked about the fact Baggett was armed with a firearm, he was at a party of young people which compared to a rave, [RP Vol. III 261-264] he had \$160 in cash on his person at the time, and the significance (or lack of significance) of the absence of packaging, ledger sheets, or cell phone. [RP Vol. III 301-305]

Baggett refers to the fact that Officer Brown's testimony changed regarding his finding the money on the defendant's person [RP Vol. I 74-75, RP Vol. II 147-150]. However, credibility determinations are for the trier of fact and cannot be reviewed on

appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The jury may have chosen to believe the officer honestly forgot about the money, disbelieved him, or they may have disregarded the testimony entirely. But it is not for this court to reverse a trial court's decision about jury instructions because there was conflicting testimony. There was evidence in the record which allowed both parties to argue their respective theories of the case, and the trial court did not err in declining to give Baggett's proposed jury instruction.

2. The trial court did not err by including Baggett's prior juvenile convictions in his offender score.

"Calculation of an offender score is reviewed de novo."
State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995).

Baggett concedes that one of his prior convictions should be considered in his offender score because he stipulated to it at trial. He argues that the remaining three should not count because the State did not provide independent proof of those convictions at sentencing, and asserts that the trial court considered these three convictions without objection or acknowledgement. That is not the

case. At the sentencing hearing, when defense counsel spoke on behalf of Baggett, he said:

It's true he does have a number of convictions in juvenile court, and *we stipulate that the four listed by the prosecutor do in fact comprise his criminal history.* I think that the huge increase in the amount of time that he will serve here has come as a bit of a shock to Mr. Baggett, and I can't help but think that the minimum of five years that he'll be spending at Department of Corrections will be some time for him to reflect on this and reflect on whether he wants to spend huge portions, 25, 50 percent of his life in the future at a shot, on new convictions. I would hope that—and I'm confident that that's not how he wishes to spend the remainder of his life.

[03-02-07 RP 7, emphasis added]

In October of 2007, the Washington Supreme Court decided State v. Bergstrom, Docket No. 78355-1, October 25, 2007. Bergstrom discusses the proper procedure when there is a post-sentencing challenge to the trial court's calculation of the offender score.

Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed.

....

Sentencing courts can rely on defense acknowledgment of prior convictions without further proof.

Id., *slip opinion* at 9-10. This holding is consistent with other Washington cases. “A sentencing court may rely on a stipulation or acknowledgment of prior convictions without further proof.” In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 873, 123 P.3d 456 (2005); “The State does not need to introduce copies of prior convictions or otherwise prove them by a preponderance of the evidence if the defendant stipulates to them.” (Cites omitted. State v. McCorkle, 85 Wn.App. 485, 494, f.n. 5, 945 P.2d 736 (1997); “Under the SRA, acknowledgment allows the judge to rely on unchallenged *facts and information* introduced for the purposes of sentencing.” (Emphasis in original.) State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999)

This result is not in any way unfair, particularly under the circumstances in this case. Defense counsel spoke for Baggett; that is what defense counsel does. He had clearly discussed this criminal history with Baggett: “we stipulate” certainly implies an agreement between him and his client. Counsel’s further discussion about Baggett’s shock at the length of his standard range sentence indicates that he realized the length depended in

part upon his prior history, and if it were incorrect he would not have stipulated to it.

The prosecutor presented to the court at the time of sentencing a document entitled "Office of the Prosecuting Attorney's Statement of Criminal History." [CP 108, 03-02-07 RP 3] In State v. Weaver, 140 Wn. App. 349, 166 P.3d 761 (2007). Division One has differed from this Division's holdings regarding what constitutes a presentence report, a subject which is not an issue here. However, this language from Weaver, is appropriate to Baggett's case:

The State's presentence statement is not the meanderings of a stranger to the case; it is part of the record. A defendant can put the State to its affirmative burden of proof merely by objecting either before or during the sentencing hearing. Absent objection, the facts are in the record, and the record satisfies the process.

The purpose of the acknowledgment statute is to focus time and effort on those occasions where the facts are disputed. . . . "Acknowledged' facts include all those facts presented or considered during sentencing that are not objected to by the parties."

Weaver, *supra*, at 356-57.

Even if Baggett had not affirmatively acknowledged his offender score, his failure to object at the sentencing hearing would permit the State to introduce new evidence if the case were

remanded for resentencing. Bergstrom, *supra*, at 8. See also State v. Ford, *supra*, at 475-76.

It is true that the State bears the burden of proving its case, both at trial, and at sentencing. However, the defendant can relieve the State of that burden by stipulation, as he did in the trial of this matter by stipulating that he had a prior felony conviction for a serious offense which prohibited him from possessing a firearm. [Vol. II RP 215, Exhibit 20] Similarly, by stipulating that the criminal history as provided by the prosecutor was correct, he relieved the State of proving that. The convictions were all in Washington; comparability analysis was not an issue. There is no authority for remanding for resentencing.

D. CONCLUSION.

The trial court did not err by failing to give Baggett's proposed jury instruction regarding the inference of intent based upon more than the possession of a large quantity of a controlled substance, nor by calculating his offender score by counting four prior juvenile convictions. The State respectfully asks this court to affirm the conviction and the sentence in the trial court.

Respectfully submitted this 13th of November, 2007.

Carol La Verne

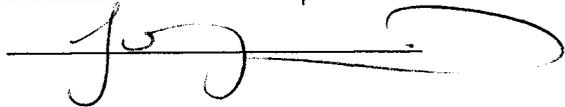
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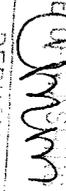
A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on 11/13/07, 2007.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: November 13, 2007

Signature: 

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