

COURT OF APPEALS
DIVISION II

NO. 36107-8-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

vs.

JERALD L. McCOWAN,

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable James B. Sawyer II, Judge
Cause No. 06-1-00490-6

BRIEF OF APPELLANT

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RM 9-15-07

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count VI, attempted theft in the first degree, from the jury for lack of sufficiency of the evidence that the value of the property exceeded \$1,500.00.
02. The trial court erred in not dismissing count II, theft in the second degree, because the State failed to establish the corpus delicti for the offense independent of McCowan's admissions to the police.
03. The trial court erred in not dismissing count IV, theft in the second degree, because the State failed to establish the corpus delicti for the offense independent of McCowan's admissions to the police.
04. The trial court erred in permitting McCowan to be represented by counsel who provided ineffective assistance by failing to raise the issue regarding the lack or corpus delicti for count II, theft in the second degree.
05. The trial court erred in permitting McCowan to be represented by counsel who provided ineffective assistance by failing to raise the issue regarding the lack or corpus delicti for count IV, theft in the second degree.
06. The trial court erred in calculating McCowan's offender score when it included his alleged prior criminal VUCSA conviction in determining his offender score.

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that the value of the property in count VI exceeded \$1,500.00 to uphold McCowan's criminal conviction for attempted theft in the first degree? [Assignment of Error No. 1].
02. Whether the State failed to establish the corpus delicti for the offense of theft in the second degree in count II independent of McCowan's admissions to the police? [Assignment of Error No. 2].
03. Whether the State failed to establish the corpus delicti for the offense of theft in the second degree in count IV independent of McCowan's admissions to the police? [Assignment of Error No. 3].
04. Whether the trial court erred in permitting McCowan to be represented by counsel who provided ineffective assistance by failing to raise the issue regarding the lack of corpus delicti for count II, theft in the second degree? [Assignment of Error No. 4].
05. Whether the trial court erred in permitting McCowan to be represented by counsel who provided ineffective assistance by failing to raise the issue regarding the lack of corpus delicti for count IV, theft in the second degree? [Assignment of Error No. 5].
06. Whether the trial court erred in calculating McCowan's offender score when it included his alleged prior criminal VUCSA conviction in determining his offender score? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Jerald L. McCowan (McCowan) was charged by second amended information filed in Mason County Superior Court on January 30, 2007, with burglary in the second degree, count I, theft in the second degree, count II, burglary in the second degree, count III, theft in the second degree, count IV, burglary in the second degree, count V, attempted theft in the first degree, count VI, and unlawful possession of a controlled substance, count VII, contrary to RCWs 9A.52.030, 9A.56.040, 9A.28.020 and 69.50.4013(1). [CP 99-102].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [RP 1]. Trial to a jury commenced on January 30, the Honorable James B. Sawyer II presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 101].

The jury returned verdicts of guilty as charged, McCowan was given a DOSA sentence of half of the midpoint of his standard range and timely notice of this appeal followed. [CP 2, 4-21, 55-61].

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02. Substantive Facts¹

02.1 Second Degree Burglary: Count V
(November 12, 2006)

On November 12, 2006, McCowan and his brother, Richard Long, were arrested in a private building closed to the public while using a ratchet to pull something out of the wall. [RP 19-20, 23-25, 32, 58]. There were “numerous tools on the floor: a hammer, a come-along. And they were attempting to remove some copper wiring from the building.” [RP 33]. McCowan admitted that at the time they were arrested, he and Long had pulled out about 40 feet of wire that was probably 80 feet long. [State’s Exhibit 50 at 3]. According to David Kamin, the co-owner of the building, the copper wire they were attempting to pull out of the conduit “is about \$8.00 a foot to replace.” [RP 86].

02.2 Attempted First Degree Theft: Count VI
(November 12, 2006)

The wire they were attempting to remove in
count V.

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¹ The counts are presented in nonsequential order for the purpose of simplifying the presentation of the case.

02.3 Possession Controlled Substance: Count VII
(November 12, 2006)

A black jacket was seized inside the building when McCowan was arrested on November 12th. His ID was inside the jacket along with a pouch containing drug paraphernalia and a white crystal substance that subsequently tested positive for methamphetamine. [RP 34, 43-45, 47]. McCowan admitted that the jacket and methamphetamine were his. [RP 62; State's Exhibit 50 at 13-14].

02.4 Second Degree Burglary: Count III
(November 9, 2006)

After he was arrested on November 12th, McCowan admitted to the police that he had gone into the building the previous November 9th and removed some brass fittings and copper wiring that he later sold for about \$260.00, the scrap value. [RP 60-62; State's Exhibit 50 at 8].

On November 9th, Kamin had reported to the police that some "vandalism had been done to the inside of the building)" over the past several days. [RP 89].

02.5 Second Degree Theft: Count IV
(November 9, 2006)

The items referred to in count III.

02.6 Second Degree Burglary: Count I
(November 7, 2006)

After he was arrested on November 12th, McCowan admitted to the police that he had gone into the building the previous November 7th and removed some brass fittings and copper wiring that he later sold for about \$300.00. [RP 60-61; State's Exhibit 50 at 5-6].

02.7 Second Degree Theft: Count II
(November 7, 2006)

The items referred to in count I. A receipt, dated November 8th, from a local recycling business in the amount of \$210.20, which indicated the scrap value for metals exchanged for cash, was found in the vehicle owned by McCowan's stepfather that had been seized at the scene of the building where McCowan was arrested on November 12th. [RP 64-66].

David Kamin testified that the \$210.20 listed in the receipt would not come close to the cost to replace the items. "It wouldn't even put a dent in it. I mean, you couldn't hardly get a guy to show up for \$210.00 nowadays, let alone start fixing anything." [RP 78]. "Not even a fraction of the market value." [RP 78].

On November 9th, Kamin reported to the police that some "vandalism had been done to the inside of the building)" over the past several days. [RP 89].

02.8 Defense Case

McCowan rested without presenting evidence [RP 100].

D. ARGUMENT

01. THERE IS INSUFFICIENT EVIDENCE TO UPHOLD McCOWAN'S CRIMINAL CONVICTION IN COUNT VI FOR ATTEMPTED THEFT IN THE FIRST DEGREE WHERE THE WHERE THE EVIDENCE FAILED TO ESTABLISH THAT THE VALUE OF THE PROPERTY EXCEEDED \$1,500.00.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. Salinas, at 201; Craven, at 928.

To convict McCowan of attempted theft in the first degree under RCW 9A.56.030 and RCW 9A.56.020, as charged in count VI, the State had to prove beyond a reasonable doubt that the value of the property exceeded \$1,500.00. The primary evidence presented on this issue came from McCowan, who admitted to attempting to pull out about 80 feet of copper wire [State's Exhibit 50 at 3], which would have had to be disconnected on the other end given that McCowan and his brother had pulled out about 40 feet at the time they were arrested, and from Kamin, who testified that the wire "is about \$8.00 a foot to replace." [RP 86]. Simple math: \$8.00 x 80 feet = \$640.00.

McCowan's conviction for attempted theft must be reversed and dismissed.

02. McCOWAN'S TWO CONVICTIONS FOR THEFT IN THE SECOND DEGREE, COUNTS II AND IV, MUST BE REVERSED AND DISMISSED BECAUSE THE STATE FAILED TO ESTABLISH THE CORPUS DELICTI FOR EACH COUNT INDEPENDENT OF McCOWAN'S ADMISSIONS TO THE POLICE.

Under the corpus delicti rule, a jury may not convict a defendant of a crime based on his or her confession alone. State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). The rule requires evidence,

independent of a criminal defendant's statements, "that a crime was committed by someone." City of Bremerton v. Corbett, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986). The basis for this is that a defendant's statements, standing alone, are insufficient to support an inference that the admitted crime was committed. State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). There must be prima facie evidence of the charged offense independent of the defendant's admissions. State v. Aten, 130 Wn.2d at 656. "'Prima facie' in this context means there is 'evidence of sufficient circumstances which would support a logical and reasonable inference' of the facts sought to be proved." Id. (quoting State v. Vangerpen, 125 Wn.2d at 796). The State bears the burden of producing evidence sufficient to satisfy the corpus delicti rule. State v. Riley, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993). When reviewing the sufficiency of the evidence in considering whether the State has met this burden, a court must take the evidence in the light most favorable to the State. State v. Pineda, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000).

McCowan was charged and convicted, in part, of two counts, II and IV, of theft in the second degree under RCW 9A.56.020(a) and RCW 9A.56.040(1)(a). [CP 59, 61, 100-01]. Under this authority, corroborating evidence of McCowan's admissions to the police must support a reasonable and logical inference that McCowan wrongfully obtained or

exerted unauthorized control over property of another in an amount exceeding \$250.00 in value with the intent to deprive the other person of the property. The State failed to do this for each count.

02.1 Count II: November 7, 2006

As previously set forth, McCowan admitted that the property at issue on this count was sold for about \$300.00. [RP 60-61; State's Exhibit 50 at 5-6]. Independent of this admission, the State presented a receipt, dated November 8th, from a local recycling business for \$210.20, which represented the scrap value for the property exchanged for cash, along with Kamin's testimony that this amount was not even a fraction of the market value of the property taken from his building and that his building had been vandalized during this time. [RP 78, 89]. However, given that Kamin admitted that he could not identify any of the items listed on the receipt as having come out of his building, that he had actually never seen any of these items and that they "could have came (sic) from anybody(,)" there was insufficient corroborating evidence of McCowan's admission to demonstrate that more than \$250.00 in property or any property had been taken by McCowan on November 7th.

02.2 Count IV: November 9, 2006

Again, as previously set forth, McCowan admitted that the property at issue on this count was sold for about

\$260.00, the scrap value. [RP 60-62; State's Exhibit 50 at 8].

Independent of this admission, the State presented only Kamin's testimony that his building had been vandalized during this time. As with count II, this was insufficient corroborating evidence of McCowan's admission to demonstrate that more than \$250.00 in property or any property had been taken by McCowan on November 9th.

02.3 Conclusion

McCowan's two convictions for theft in the second degree, counts II and IV, must be reversed and dismissed.

03. McCOWAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE LACK OF CORPUS DELICTI FOR COUNTS II AND IV, THEFT IN THE SECOND DEGREE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d

1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

It has been held that the corpus delicti rule “is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant must make a proper objection to the trial court to preserve the issue.” State v. Dodgen, 81 Wn. App. 487, 492, 915 P.2d 521 (1996); State v. C.D.W., 76 Wn. App. 761, 763-764, 887 P.2d 911 (1995). Should this court find that counsel waived the error claimed and argued in the preceding section of this brief by failing to raise the corpus delicti issue as to counts II and IV set forth therein, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to raise the issue presented with regard to the lack of corpus delicti as to Counts II and IV when this issue would have resulted in the dismissal of the charges for the reasons argued in the preceding section.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to raise the issue with regard to the lack of corpus delicti as to counts II and III for the reasons set forth in the preceding section, counts II and IV would have been reversed and dismissed.

Counsel's performance was deficient, which was highly prejudicial to McCowan, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal and dismissal of his two convictions for theft in the second degree in counts II and IV.

04. THE TRIAL COURT MISCALCULATED McCOWAN'S OFFENDER SCORE WHEN IT INCLUDED HIS ALLEGED PRIOR CRIMINAL VUCSA CONVICTION IN DETERMINING HIS OFFENDER SCORE.

Without objection or acknowledgment, the trial court included McCowan's alleged prior criminal VUCSA conviction in determining his offender score. [RP 142-47; CP 5-6].

One of the following must occur for a trial court to include prior convictions in a defendant's criminal history: (1) the State proves the prior convictions with the required evidence; (2) the defendant admits to the prior convictions; (3) the defendant acknowledges the prior convictions by failing to object to their inclusion in a presentence report. RCW 9.94A.500(1); RCW 9.94A.530(2).

Since none of the above happened during McCowan's sentencing [RP 142-47], the trial court erred in including the alleged prior criminal VUCSA conviction in determining his offender score. While issues not raised in the trial court may not generally be raised for the first time on appeal, State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996), illegal or erroneous computations of an offender score that alter the defendant's standard sentence range may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). If McCowan's alleged prior criminal VUCSA conviction were improperly included in his offender calculation, his standard range for each offense would drop by one point, which, correspondingly, would lower the range for his DOSA sentence under RCW 9.94A.660. [CP 6-9].

At sentencing, the State bears the burden of proving all prior convictions before those convictions can be used in an offender score or otherwise. See State v. Ford, 137 Wn.2d at 479-80. A defendant does not

acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d at 481-82.

McCowan's sentence should be remanded for resentencing under the general rule that the State is held to the existing record on remand. State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). At the sentencing hearing, given that the State presented no evidence to prove McCowan's alleged prior criminal VUCSA conviction, there was nothing to object to in this regard. Unlike the facts in State v. Ford, 137 Wn.2d at 485, where our Supreme Court remanded for an evidentiary hearing to permit the State to prove the disputed matters because "defense counsel has some obligation to bring deficiencies of the State's case to the attention of the sentencing court(,)" 137 Wn.2d at 485, here there was no "State's case." Nothing occurred that could possibly have warranted an objection from McCowan's counsel.

In In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), a three-strikes case where Cadwallader had failed to object to his criminal history at sentencing, and thereby failed to put the sentencing court on notice that one of his prior strike convictions had washed out, our Supreme Court ruled that the State would be held to the existing record on remand, stating, "(g)iven that Cadwallader had no obligation to disclose his criminal history, it follows that he had no

obligation to object to the State's failure to include the 1985 Kansas theft conviction in his criminal history." Id. at 876.

Here, because McCowan was under no obligation to prove his alleged prior criminal VUCSA conviction – that being the State's exclusive burden – he was under no obligation to object to the State's failure to present any evidence to establish this conviction. In short, since there was no "State's case" vis-à-vis this conviction, and thus nothing warranting an objection from McCowan, his sentencing on this issue should be remanded and the State held to the existing record.

E. CONCLUSION

Based on the above, McCowan respectfully requests this court to reverse and dismiss or to remand for resentencing consistent with the arguments presented herein.

DATED this 14th day of September 2007.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing same in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 15th day of September 2007.

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