

NO. 41815-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN HENNIGAN,

Appellant.

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

The Honorable Linda CJ Lee, Judge

REPLY BRIEF OF APPELLANT

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 2. THE STATE FAILED TO PROVE THAT HENNIGAN’S PRIOR CLASS C FELONIES SHOULD BE INCLUDED IN HIS OFFENDER SCORE. 4

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT DENIED HENNIGAN A FAIR TRIAL BY ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE ABOUT OTHER FRAUDULENT TRANSACTIONS.

Hennigan was charged with identity theft and forgery involving a check written to a Les Schwab store on April 8, 2009. CP 11-12. The defense moved in limine to exclude evidence that the victim's credit cards and checks were used in numerous other transactions unconnected to Hennigan, but the court denied the motion. 1RP 18-24. Because evidence of the other uncharged fraudulent transactions did not relate to any fact of consequence in the case against Hennigan, admission of that evidence was error. See ER 401¹. Even if there is some minimal relevance to the other fraudulent transactions, the evidence should have been excluded under ER 403². That rule provides as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

The State argues in its brief that Hennigan has not preserved an objection to the uncharged transaction evidence under ER 403. Br. of

¹ See also Br. of App. at 8-10, for full argument on this issue.

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Resp. at 5-7. The State's argument is completely contradicted by the record.

The record shows that defense counsel moved in limine to exclude evidence of the uncharged transactions, arguing,

There's no connection to Mr. Hennigan, so it would just be these other bad things happened to this victim that would enflame the passions of the jury, be unduly prejudicial to Mr. Hennigan because there is no connection. I anticipate the State using the res gestae explanation or justification to get that information in, but that does not go to the res gestae of any acts alleged to have been done by Mr. Hennigan. It should be excluded under 404(b), and if there's a suspicion that Mr. Hennigan did it but there's no evidence to that, it should be excluded as irrelevant, as well as unduly prejudicial.

IRP 18-19. Counsel also argued that the jury should consider only evidence relating to the charged check. "Other stuff simply raises the jury's sympathy, and prejudices the defendant because the jury is more likely to convict if they feel bad for Mr. Malich, and there was a bunch of crimes committed." IRP 22.

While counsel did not specifically cite to ER 403 in his argument, if the grounds for objection are apparent from the context, the objection is sufficient to preserve the issue. See State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987). The record shows that the ER 403 issue was raised and fully considered by the trial court. Trial counsel's argument that the evidence was unduly prejudicial, even if some slight relevance existed,

made it clear to the court he was relying on ER 403, which requires exclusion of evidence “if its probative value is substantially outweighed by the danger of unfair prejudice[.]”

Moreover, the record demonstrates that the court understood ER 403 to be one of the bases for the defense motion. After finding the evidence relevant, the court stated,

However, the question remains as to whether it is – that relevance is substantially outweighed by danger of unfair prejudice, confusion of issues or misleading the jury, or considered undue delay, waste of time or cumulative evidence.

1RP 23. The court ruled that the defense had not met this standard and denied the motion. 1RP 24. It is apparent from this record that the court was responding to counsel’s ER 403 argument, as it denied the motion using the language of that rule. Given this record, the State’s argument that the defense failed to preserve an objection under ER 403 is nothing short of nonsensical.

The State also argues that most of the evidence regarding the uncharged transactions was admitted without defense objection. Br. of Resp. at 7-11. Again, this is simply false. The record shows that defense counsel moved in limine to exclude any reference to the uncharged transactions. 1RP 18-19, 21-22. The court denied that motion. 1RP 24. The purpose of a motion in limine is to avoid objections to contested

evidence offered at trial. Thus, the losing party is deemed to have a standing objection when the evidence is introduced. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). Because the court denied the defense motion in limine to exclude all evidence of the uncharged transactions, Hennigan was not required to object when that evidence was introduced at trial in order to preserve his objection. He had a standing objection to all evidence regarding the uncharged transactions on the grounds that it was irrelevant and unduly prejudicial. The State's argument to the contrary is completely unfounded and must be rejected.

2. THE STATE FAILED TO PROVE THAT HENNIGAN'S
PRIOR CLASS C FELONIES SHOULD BE INCLUDED
IN HIS OFFENDER SCORE.

Three of the convictions the State listed in Hennigan's criminal history are for class C felonies. CP 78. Under RCW 9.94A.525(2)(c), certain prior class C felonies are not included in the defendant's offender score if the defendant spent five consecutive years in the community without committing any crime that resulted in a conviction. Thus, if Hennigan spent five consecutive years after his last date of release from confinement for a felony conviction without committing any crime that resulted in a conviction, those class C offenses should not have been included in his offender score.

The exhibits presented by the State at sentencing indicate a work release date of January 23, 2004. Sentencing Exhibit 1, at 2 of 11. The next conviction proved by the State was for an offense committed on March 11, 2009, more than five years after the work release date. CP 78. The State's information does not indicate whether January 23, 2004, was the date Hennigan was discharged from work release and transferred to the community, or if it was the date he began work release. If it was the date of discharge from work release, then from the evidence presented, Hennigan spent five crime free years in the community, and his prior class C felonies should have washed out. Even if it was the date he began work release, however, it is possible his class C felonies washed out, if he completed work release prior to March 11, 2004.

In its brief, the State argues that nothing in the record suggests that the trial court miscalculated Hennigan's offender score. Br. of Resp. at 22. What the State overlooks is that with the ambiguous reference to Hennigan's work release date, it is not clear that the class C felonies were properly included in the offender score. It is the State's obligation to assure that the record before the court supports the criminal history determination. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). The State bears the burden of proving not only the existence of prior

convictions but also any facts necessary to determine whether the prior convictions should be included in the offender score. Ford, 137 Wn.2d at 480. Thus, the State is required to prove facts relevant to determining whether prior offenses have washed out. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); Ford, 137 Wn.2d at 480.

Next, the State suggests that Hennigan conceded the accuracy of the offender score calculation by not objecting at sentencing. Br. of Resp. at 22. Again, the State ignores established case law on this issue. Because the State has the burden of proof at sentencing, it must come forward with evidence of the necessary facts, even if the defendant fails to object to inclusion of prior offenses in the offender score. Cadwallader, 155 Wn.2d at 876-78. Waiver may be found where a defendant stipulates to incorrect facts, or where a determination is based on trial court discretion. In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). But here, Hennigan did not stipulate to his criminal history as presented by the State, and the court has no discretion in determining whether prior offenses wash out. 7RP 2; RCW 9.94A.525(2).

Where the State does not allege, or the defendant does not agree to, the facts necessary to determine washout, a defendant who fails to challenge the State's calculation of the offender score does not waive his

right to raise the issue of washout on appeal. Cadwallader, 155 Wn.2d at 874-75. Consequently, this Court may review Hennigan's challenge to the inclusion of his prior class C felonies in his offender score, even though he did not raise that issue below.

The State argues that because Hennigan did not claim at sentencing that any prior convictions had washed out, the record is devoid of evidence establishing five crime free years in community. Br. of Resp. at 22. Again, it is the State's duty to prove any facts necessary to determine whether the prior convictions should be included in the offender score. Ford, 137 Wn.2d at 480. The State proved that a work release date of January 23, 2004, was associated with Hennigan, and it proved he committed another offense which resulted in a conviction on March 11, 2009. But the State did not prove that Hennigan was discharged from work release into the community less than five years before committing the March 2009 offense, and it offered no evidence of any other convictions in the intervening years. Under the record established by the State, Hennigan's class C felonies therefore should not have been included in his offender score. Because the trial court exceeded its statutory authority in imposing a sentence based on an incorrect offender score, Hennigan is must be resentenced.

At resentencing, the State should be allowed to present evidence to clarify the meaning of the notation regarding work release and establish the date of Hennigan's discharge into the community. See Mendoza, 165 Wn.2d at 930 (where there was no objection at sentencing, State may present additional evidence at resentencing). But since Hennigan specifically noted that he was not stipulating to the criminal history presented by the State, no evidence of other convictions not previously proved, if any, should be allowed. See Cadwallader, 155 Wn.2d at 878 (where State did not allege conviction necessary to show that prior offense did not wash out, not permitted to present such evidence at resentencing).

B. CONCLUSION

For the reasons stated above and in the opening and supplemental briefs, this Court should remand for a new trial and resentencing.

DATED this 21st day of November, 2011.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I deposited in the US Mail a properly stamped and addressed envelope containing a copy of the Reply Brief of Appellant in *State v. Benjamin Hennigan*, Cause No. 41815-1-II, directed to:

Benjamin Hennigan, DOC# 830617
8-B-13
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

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



Catherine E. Glinski
Done in Port Orchard, WA
November 21, 2011

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



Catherine E. Glinski
Done in Port Orchard, WA
November 21, 2011

GLINSKI LAW OFFICE

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Statement of Additional Authorities

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