

64407-6

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NO. 64407-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

RANDALL D. KNOWLES,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. A jury was properly instructed that knowledge was an element of possession of a stolen vehicle and that such knowledge could be inferred from facts. The prosecutor so stated in initial closing. In rebuttal, he argued that the jury should convict because the defendant was in possession of a stolen vehicle, without repeating the knowledge element. The defense did not object. Was this comment so flagrant that no instruction could have cured it, given overall argument and the jury's correct instructions?

2. The jury sent out a question and the judge replied that jurors should refer to instructions already given. The record is silent on whether counsel was contacted. Assuming they were not, is any error harmless, when the court conveyed no affirmative information and the defendant suffered no prejudice?

Can this matter be raised for the first time on appeal, when sufficient facts to adjudicate the claim of error are not of record?

3. Did the trial court abuse its discretion in declining to sentence the defendant under the Drug Offender Sentencing Alternative, when it based its decision on community safety and factors specific to the defendant, and the defendant had failed at prior treatment programs?

II. STATEMENT OF THE CASE

A. TRIAL TESTIMONY.

On the morning of June 5, 2009, arriving employees at Best Auto Parts, a wrecking yard and car lot in Lynnwood, noticed that one of their cars, a 1997 black Ford Mustang, was missing. It had been parked closest to the lot fence adjacent to the highway, and had been there the night before. 1 TRP 56-58, 154-55, 158. It did not have any plates on it. 1 TRP 62, 155. The manager, Michael Collins, called 9-1-1 to report a stolen vehicle. Police arrived and took statements. 1 TRP 60, 154-55.

The missing car was broadcast as stolen to several local police agencies. 1 TRP 162. Brier police responded that they had seen the vehicle driving through their jurisdiction. Lynnwood police surmised it might have ended up in Bothell, the city next door, so they also contacted Bothell police. 1 TRP 90, 162. Officer from several jurisdictions did an "area check." 1 TRP 90, 142-43, 162. Within a relatively short time police located the vehicle in Bothell. 1 TRP 90-92, 163-64. The VIN on that vehicle matched that given by the manager at Best Auto. 1 TRP 158, 166, 176.

Meanwhile, that same morning, Darren Holdt was working on his truck engine outside his Bothell home.1 TRP 71-72. He

noticed a black Mustang parked across the street that had not been there earlier that morning. 1 TRP 73. He saw a white male, about 6', 180", with "orangish scraggly hair," exit the vehicle and walk away carrying a red one-gallon gas can. 1 TRP 73-74. Sometime later he saw police arrive with guns drawn. He asked what was going on, and when told, said, "You just missed the guy." He gave officers a description of the man who had gotten out of the car. 1 TRP 74-75, 144, 164-65. That description included that the man was wearing a baseball cap and had a brown jacket. 1 TRP 99, 127-28.

One of the responding Bothell officers, Frank Havens, recalled seeing an individual matching that description – brown jacket, carrying a gas can – walking along a roadside less than a mile away. 1 TRP 144-45. This triggered a K-9 search, which, however, was unsuccessful. 1 TRP 95, 128, 145, 166.

Acting on Darren Holdt's and officer Haven's descriptions, officers then contacted local businesses and gas stations. 1 TRP 93-94. That same afternoon – still June 5 – a local Shell station reported somebody matching that description was sitting at a nearby Seven-Eleven. 1 TRP 95, 129, 147-48. Officers approached and encountered the defendant, a white male with

blondish red hair, sitting at a picnic table. He was wearing a baseball cap and had a small red gas can and a brown jacket beside him. 1 TRP 96-97, 100, 129-31. Asked who he was, the defendant gave officers an incorrect name. 1 TRP 97-98, 108, 111. Officers could see the defendant had a wallet. They asked if he had identification. He said no, and denied having a wallet when asked that, too. 1 TRP 98. Officers arrested the defendant and found his identification, with his real name, in his wallet. 1 TRP 99.

Police re-contacted Holdt and took him over to the Seven-Eleven for a field or “show up” identification. 1 TRP 76-78, 87, 104, 134, 169-72. Holdt identified the person they had detained – the defendant – as the same person who had gotten out of the stolen Mustang. 1 TRP 76-78, 87. He told officers the man looked like the same person especially due to the hair. 1 TRP 76-78. Holdt could not, however, give a positive identification in court – only that it was possibly the same man. 1 TRP 83, 88.

In the defendant’s brown jacket officers found a cell phone and a car key. 1 TRP 104, 132. The key said “Ford” on it, and was attached to an alarm “fob.” 1 TRP 132-33. Officers took the key to see if it would open and start the Mustang. It did. 1 TRP 174, 176-

77. It and its alarm “fob” also matched a duplicate set at the dealership. 1 TRP 176, 179.

The defendant did not testify. 2 TRP 204.

The defendant was charged with one count of possession of a stolen vehicle while on community custody. 1 CP 122-23. The community custody “point” was not before the jury because the defendant stipulated to it. 1 CP 102-03. The jury convicted on the underlying charge, 1 CP 80, and the defendant was sentenced within the standard range. 1 CP 19-31. This appeal followed.

B. JURY INSTRUCTIONS ON MENS REA.

The jury was instructed that knowledge that the vehicle was stolen was an element of the crime. 1 CP 92 (“to convict” instruction, court’s instruction no. 8). And the jury was given WPIC 10.02, the definition of “knowledge,” instructing them that such knowledge can be inferred. 1 CP 93 (court’s instruction no. 9).

C. CLOSING ARGUMENT.

Closing argument by both sides focused on the defendant’s possessing the key to the stolen Mustang, and what inferences could be drawn from his having it. 2 TRP 207-08, 2-10-11, 215-16 (prosecutor repeatedly stressed defendant’s having the key), 2 TRP 209-10 (having key plus false statements about identify show

consciousness of guilt), 2 TRP 217, 221-22 (defense argued because this was a normal rather than a “jiggle” key, no inference of guilty knowledge can be drawn, especially when car ignition wasn’t “punched”), 2 TRP 218, 220 (key indicates defendant likely possessed car, but merely driving stolen car not a crime). The prosecutor cited the knowledge element in the to-convict instruction and the knowledge definition instruction (Instruction #9), and that the latter permits drawing inferences of knowledge. 2 TRP 214-15. The defense for its part stressed that the State had to separately prove the defendant knew the car was stolen, 2 TRP 221, and while knowledge can be inferred from flight, the defendant didn’t flee, 2 TRP 223.

In rebuttal, the prosecutor stated:

My understanding from the Defense is that the Defendant is admitted [sic] to possessing the key and he was driving the vehicle. Well, then he’s committed the crime. He possessed a stolen vehicle. I’m not proving that he committed the theft. I’m proving that he possessed the stolen vehicle. So now we’re at the point where I’m at rebuttal and my understanding is that he’s admitted to the crime.

2 TRP 232-33. In his final remarks a short time later, the prosecutor simply stressed that the jury should find the defendant guilty since he had possession of a stolen vehicle. 2 TRP 234.

III. ARGUMENT

A. THE PROSECUTOR'S COMMENT IN CLOSING ARGUMENT WAS NOT FLAGRANT AND ILL-INTENTIONED. IN LIGHT OF THE BALANCE OF ARGUMENT AND THE INSTRUCTIONS GIVEN, IT DOES NOT MERIT REVERSAL.

The defendant argues that unobjected-to remarks in closing rebuttal rose to such a level of error that only a new trial can cure them. BOA 3-14. Specifically, he alleges that the remarks left out the mental state of knowledge. At least one comment, viewed in isolation, did so. But viewed in the context of the entire argument (including initial opening) and the correct instructions given, the defendant cannot show prejudice.

1. Elements Of Possession Of Stolen Property; Mental State Of Knowledge.

Possession of a stolen vehicle, a separate crime since 2007, is a class B felony regardless of the vehicle's value. RCW 9A.56.068; LAWS 2007 ch. 199 §§ 5, 7. The crime requires proof of two essential elements: (1) actual or constructive possession of the stolen property, and (2) actual or "constructive" knowledge that the property was stolen. State v. Jennings, 35 Wn. App. 216, 219, 666 P.2d 381 (1983) (citing RCW 9A.56.140(1)).

"Mere possession of stolen property does not create a presumption that the possession is larcenous[.]" State v. Hatch, 4

Wn. App. 691, 693, 483 P.2d 864 (1971). However, “[p]ossession is . . . a relevant circumstance to be considered with other evidence tending to prove the elements of the crime.” Hatch, 4 Wn. App. at 694. The State need not establish that a defendant had actual knowledge the property was stolen; it is enough to show that he or she had knowledge of facts sufficient to put him or her on notice that the property was stolen. State v. Rockett, 6 Wn. App. 399, 402, 493 P.2d 321 (1972) (actual knowledge not required, citing State v. Rye, 2 Wn. App. 920, 471 P.2d 96 (1970)); State v. Johnson, 119 Wn.2d 167, 829 P.2d 1082 (1992) (knowledge can be established through circumstantial evidence); WPIC 10.02 (same). “[S]light corroborative evidence of other inculpatory circumstances tending to show . . . guilt will support a conviction.” Hatch, 4 Wn. App. at 694. Possession of property recently stolen, along with slight corroboration, is sufficient to show knowledge. State v. Womble, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999) (citing State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967)), review denied, 138 Wn.2d 1009 (1999). There is no dispute in this appeal that knowledge is an element of the crime, and that it can be inferred.

2. The Prosecutor's Unobjected-To Comment In Rebuttal Was Not So Flagrant And Ill-Intentioned As To Merit Reversal.

Viewed in isolation, the two comments in rebuttal at 2 TRP 232-33 and 234 are an inaccurate statement of the law, in that they do not repeat the mental element. However, defense counsel did not object to it. *Id.* And the prosecutor, *at the same time*, had urged the jury to follow the "to-convict" instruction, 2 TRP 233, and, in response to the defense argument that the defendant "maybe . . . didn't know it was stolen," stressed that the defendant's giving police a false name showed guilty knowledge. 2 TRP 234.

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of establishing both the impropriety of the prosecutor's actions as well as their prejudicial effect, and he or she must do so in the context of the entire record. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995); State v. Schlichtmann, 114 Wn. App. 162, 167, 58 P.3d 901 (2002). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). The prosecutor's remarks must be viewed in context of the entire argument, the issues and evidence in the case, and the

instructions given. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006); State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Here, the prosecutor in initial closing had cited the knowledge element and argued that knowledge can be inferred, referencing the two relevant instructions. 2 TRP 214-15; see 1 CP 92 (court's instruction no. 8, "to convict"), 1 CP 93 (court's instruction no. 9, definition of "knowledge"). Defense counsel in her closing stressed that the State had to prove the defendant knew the vehicle was stolen, and that such knowledge should not be inferred since there was no flight from police, nor a shaved or "jiggle" key, nor a "punched" ignition. 2 TRP 217, 221-23. The prosecutor's comment in rebuttal was inartful, and by itself was legally incorrect; but it must be viewed in the context of the entire record and all of the argument. Stenson, 132 Wn.2d at 718; Gentry, 125 Wn.2d at 640; Schlichtmann, 114 Wn. App. at 167. A misstatement in rebuttal should not result in a new trial when it was preceded by proper argument in initial closing; when it was coupled with an exhortation to follow the "to-convict" instruction; and when the jury was properly and clearly instructed on the elements of the crime,

including the requisite mental element. See 1 CP 92 (court's instruction no. 8) and 1 CP 93 (court's instruction no. 9).

Moreover, the comment was not objected to. If a defendant fails to object to an allegedly improper remark, it is considered waived unless the remark is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Stenson, 132 Wn.2d at 718; Gentry, 125 Wn.2d at 596. This was not such a remark.

In Belgrade, the defendant had testified to some affiliation with the American Indian Movement ("AIM"). In closing the prosecutor characterized the AIM as "butchers" and a "deadly group of madmen." State v. Belgrade, 110 Wn.2d 504, 506-08, 755 P.2d 174 (1988). In Wilson, the prosecutor remarked that to call the defendant "a beast would insult the entire animal kingdom." State v. Wilson, 16 Wn. App. 348, 356-57, 555 P.2d 1375 (1976). In Rivers, the prosecutor described the defendant and his defense witnesses as "vicious rockers," "predators," "jackals," and "nothing more than hyenas," and referred to defendant's jailhouse witnesses as the "pajama crowd." State v. Rivers, 96 Wn. App. 672, 673-74, 981 P.2d 16 (1999). In Reed, the prosecutor mocked defense

counsel, repeatedly called the defendant a liar, and derided defense experts as city doctors driving fancy cars. State v. Reed, 102 Wn.2d 140, 143-44, 684 P.2d 699 (1984). These statements were identified by the appellate courts as truly flagrant and inflammatory. The statements here were not.

The defendant disagrees, arguing that the prosecutor's comment was flagrant in the sense that it relieved the State of proving one of the requisite elements, that of knowledge. But the jury instructions did not relieve the State of anything. And the jury is presumed to follow its instructions. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). These instructions were clear: While knowledge could be inferred, the State still had to prove it. 1 CP 92-93.

The defendant argues even correct instructions do not matter, because the alleged error in argument impinged upon a constitutional right: namely, that the State prove each element beyond a reasonable doubt. But the cases he cites do not support his broad claim that a comment in argument that fails to repeat an element somehow vitiates and trumps correct instructions.

In Easter, an officer improperly testified to a defendant's pre-arrest silence, and the prosecutor compounded the error by

commenting on this in closing, too. The Supreme Court held both were error, although, in granting a new trial, it focused primarily on the officer's improper testimony. State v. Easter, 130 Wn.2d 228, 238-42, 922 P.2d 1285 (1996). The prosecutor in Belgrade, in addition to his intemperate comments about the American Indian Movement ("AIM") and Wounded Knee, also commented on the defendant's post-arrest silence. Belgrade, 110 Wn.2d at 510-11. The Supreme Court held the comments violated due process, but declined to decide if the comments constituted harmless or prejudicial error, since it was reversing based on the AIM comments alone. Id. In Curtis, a prosecutor elicited testimony on direct that the defendant was read his Miranda rights and thereupon refused to speak to officers and demanded an attorney. State v. Curtis, 110 Wn. App. 6, 9, 37 P.3d 1274 (2002). While the prosecutor raised an inference in closing argument that "may well have added weight" to the improper testimony, Division Three reversed for the improper testimony. Curtis, 110 Wn. App. at 12-15.

In Davenport the prosecutor argued accomplice liability in rebuttal when no accomplice instruction had gone to the jury. A defense objection was overruled. State v. Davenport, 100 Wn.2d 757, 758-59, 675 P.2d 1213 (1984). The Supreme Court held this

deprived the defendant of a fair trial and reversed under the constitutional harmless error standard. Davenport, 100 Wn.2d at 761-65. But Davenport involved argument that unilaterally introduced an entirely new legal theory into the proceedings. Id. It involved improper argument in the *absence* of an applicable instruction, not argument *contrary to* applicable (and correct) instructions. And there, unlike here, an objection was raised.

French is somewhat closer to the facts here. In French, two consolidated cases, prosecutors in closing said, in one instance, that the defense had given the jury nothing to conclude the defendant hadn't committed the crime, and, in the second case, after the defense noted the absence of corroborating witnesses, that the defense could have called these witnesses as well as the government. State v. French, 101 Wn. App. 380, 384, 4 P.3d 857 (2000). In both cases defense counsel objected after the juries retired to deliberate, and sought mistrials. Id. Division Three concluded that the statements were improper, in that they could be perceived as attempting to shift the burden of proof. But this was not at all the same thing as commenting on the right to remain silent, and therefore the statements were analyzed under the non-constitutional "incurable prejudice" standard. French, 101 Wn. App.

at 387-90. In light of instructions on the burden of proof and the presumption of innocence, the appellate court held the defendants could not show that there was a substantial likelihood that the comments had affected the jury's verdict. To the extent the two comments in rebuttal here, viewed in isolation, are considered error like in French, the same result obtains.

The defendant disagrees, pointing to a question the jury sent out. The jury had sent out a question asking, "does the defendant have to knowingly know the vehicle was stolen or just be in possession [sic] of the vehicle . . . ?" 1 CP 81. The court responded that "the jury must render its verdict according to the instructions already given." Id. The defendant apparently argues that this establishes a substantial likelihood that the comment in rebuttal affected the verdict. See BOA 9-10. But the trial court gave a prompt and correct answer to the question – namely, that the jury should refer to instructions already given (which expressly included the element of knowledge). 1 CP 81. And speculating on how jury deliberations proceeded is improper: A court cannot review matters of the jury deliberation process that inhere in the verdict. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). The mental processes by which jurors reach their

conclusion are all factors inhering in the verdict.¹ State v. Havens, 70 Wn. App. 251, 255-56, 851 P.2d 1120 (1993); State v. Jackman, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989); State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988).

Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Roberts, 142 Wn.2d at 533. While the prosecutor's two statements in rebuttal, viewed in isolation, omitted the knowledge element, his argument overall did not. See 2 TRP 214-15. And the jury was properly instructed on knowledge as an element. 1 CP 92. On these facts, with these instructions, and given the comments in initial closing argument, the defendant cannot make the requisite showing of prejudice. Moreover, the comments were not objected to. That being so, they were not so flagrant that no instruction could have cured them: indeed, had there been an objection, all the court would have needed to do is refer the jury to instruction no. 8. The court would not have needed to give a new curative instruction,

¹ But see Davenport, 100 Wn.2d at 763-64, where the court included the fact of a jury question in its conclusion that improper argument on accomplice liability may have affected the verdict. But analysis was premised on the seriousness of the irregularity – arguing an entirely new legal theory on which the jury had not been instructed – and on the length of time – overnight – that it took the court to respond to the jury question. Id. Moreover, unlike here, the defense *objected* in Davenport, so analysis was not under the “flagrant and ill-intentioned” standard.

but simply refer to one already given. The defendant is not entitled to a new trial.

B. THE DEFENDANT CANNOT ESTABLISH, ON THIS RECORD, THAT THE MANNER OF THE COURT'S RESPONSE TO THE JURY QUESTION MERITS A NEW TRIAL. AND BECAUSE THE RECORD IS INSUFFICIENT TO ADJUDICATE THE CLAIMED ERROR, IT CANNOT BE HEARD FOR THE FIRST TIME ON APPEAL.

As indicated above, after deliberations began, the jury sent out a question. The defendant assigns error to the court's response being ex parte, without notice to or input from the litigants or in the presence of the defendant. BOA 1, 9-10. The record on review is silent on whether counsel was contacted, although twenty minutes had elapsed before the judge responded to the inquiry, and counsel previously had left phone contact information with the court. 1 CP 81; 2 TRP 235.

Generally, it is error for the court to have ex parte communications with the jury outside the defendant's presence, or at least without notice to counsel. State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997); CrR 6.15(f)(1) (the court "shall" notify the parties of the contents of the jury's questions and provide the parties an opportunity to comment upon an appropriate response); State v. Russell, 25 Wn. App. 933, 948, 611 P.2d 1320

(1980) (the appropriate practice is to communicate with a deliberating jury only with all counsel and the trial judge present). But some improper communication may be so inconsequential as to constitute harmless error. Bourgeois, 133 Wn.2d at 407; State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702, review denied, 110 Wn.2d 1024 (1988). Though the State ultimately bears the burden of proving the challenged communication was harmless beyond a reasonable doubt, the defendant must first establish the possibility of prejudice. Bourgeois, 133 Wn.2d at 407; State v. Caliguri, 99 Wn.2d 501, 508-09, 664 P.2d 466 (1983) (holding ex parte communication between judge and jury was error but overruling prior case law holding ex parte communications were conclusively presumed prejudicial). If the court's answer to a jury question is, as here, "negative in nature and conveys no affirmative information," the defendant suffers no prejudice and the error is harmless. Allen, 50 Wn. App. at 419 (quoting Russell, 25 Wn. App. at 948). Here, the court simply told the jury to refer to its instructions. Thus, any error – assuming this was even ex parte communication – is harmless.

Moreover, there is no indication that the manner in which the jury question was handled was ever objected to below. Errors not

challenged at trial may be reviewed on appeal only if they involve “manifest error affecting a constitutional right.” State v. Lynn, 67 Wn. App. 339, 345-46, 835 P.2d 251 (1992); RAP 2.5(a)(3). “An error is manifest when it has practical and identifiable consequences in the trial of the case.” State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). For the error to be “manifest,” the defendant must make a plausible showing that the error had “practical and identifiable consequences in the trial,” resulting in actual prejudice. State v. Lynn, 67 Wn. App. at 345-46; accord, State v. McNeal, 145 Wn.2d 352, 357, 37 P.3d 280 (2002); State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The error is considered “manifest” under RAP 2.5(a)(3) if the facts necessary to review the claim are in the record and the defendant shows actual prejudice. McFarland, 127 Wn.2d at 333.

Here, however, the facts necessary to adjudicate the claimed error are not of record on appeal. Thus, no actual prejudice can be shown and the error is not “manifest.” McFarland, 127 Wn.2d at 332-33; State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). This claim cannot be heard on direct appeal.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO GIVE THE DEFENDANT A LENIENT “DOSA” SENTENCE.

The defendant argues that the trial court abused its discretion when it declined to sentence him under the Drug Offender Sentencing Alternative (“DOSA”). BOA 14-23. Specifically, he argues that denying him the alternative based on his extensive criminal history is “legally untenable” when the sentence alternative is designed precisely for recidivists such as he. BOA 19-23.

1. Prison-Based DOSA Generally.

Under the prison-based alternative of the drug offender sentence alternative (DOSA), a sentencing court is authorized to sentence an eligible offender to a period of total confinement in a state facility for one-half of the midpoint of the standard range or twelve months, whichever is greater. RCW 9.94A.662(1)(a). The remainder of the midpoint of the standard range is served as a term of community custody. RCW 9.94A.662(1)(b). The latter term of community custody must include appropriate substance abuse treatment in a program approved by the Department of Social and Health Services. Id.

A DOSA is not available for violent offenses, sex offenses, nor felony DUI and physical control, nor for any offense accompanied by a deadly weapon enhancement. If the current offense is a drug offense, it must only have involved a "small quantity." The defendant cannot be subject to a deportation order, nor have received a prior DOSA more than once within the prior ten years. He cannot have any prior conviction for a sex offense, nor, within the last ten years, a prior conviction for a violent offense. Lastly, the standard range for the current offense must be greater than one year. RCW 9.94A.660(1).

Respondent agrees that the defendant was statutorily eligible for this sentencing alternative. But that is only the first step in the inquiry.

2. The Standard Of Review Is Abuse Of Discretion; When Discretion Can Be Abused.

Whether to grant or deny the DOSA sentencing alternative lies within a sentencing court's discretion. Thus, "[a]s a general rule, the trial judge's decision whether to grant a DOSA is not reviewable." State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005), citing RCW 9.94A.585(1) (standard-range sentence generally not subject to appeal). However, a trial court can abuse

its discretion if it generically refuses to seriously consider a DOSA sentence at all. Grayson, 154 Wn.2d at 338.

In Grayson, the defendant pled guilty to delivery of cocaine and possession of marijuana with intent to deliver. He was screened for a prison-based DOSA and found eligible. The prosecutor opposed the alternative based on the defendant's criminal history and the fact of other pending charges. These concerns were, in fact, supported by the record. Grayson, 154 Wn.2d at 336. But the sentencing judge, rather than focusing on the facts of the individual offender's crime and history, instead denied the motion for DOSA on generic, program-wide grounds:

The motion for a DOSA ... is going to be denied. And my main reason for denying [the DOSA] is because of the fact that the State no longer has money available to treat people who go through a DOSA program.

So I think in this case if I granted him a DOSA it would be merely to the effect of it cutting his sentence in half. I'm unwilling to do that for this purpose alone. There's no money available. He's not going to get any treatment; it's denied.

Id at 337. The Supreme Court reversed and remanded for a new sentencing hearing, following the line of cases holding that a failure to exercise any discretion is itself an abuse of discretion. While no defendant is entitled to the lenient sentencing alternative, "every defendant is entitled to ask the trial court to consider such a

sentence and to have the alternative actually considered.” Id. at 342. A categorical refusal to consider a DOSA under *any* circumstances, for *any* offender, was an abuse of discretion. Id. at 342, 343. In Grayson it was clear to the reviewing court that “the judge's belief that the DOSA program was underfunded was the primary reason the DOSA was denied.” Id. at 342.

But the Grayson court stressed that its holding did not mean there might not be any number of other valid, defendant-specific reasons to deny a DOSA. The defendant there was “facing significant time” for the crime; he had pending charges that might make him ineligible anyway; he had “an extensive and exclusively drug-based criminal history,” and had “continued to commit drug offenses even while on conditional release from other drug offenses.” Id. at 342-43. It left the consideration of these matters “in the able hands of the trial judge on remand[.]” Id.

Grayson establishes a straightforward rule: It is an abuse of discretion to decline categorically to consider a DOSA sentence because of dissatisfaction with the *program*. But it is not an abuse of discretion to decline to consider a DOSA sentence because of the deemed unsuitability of the *defendant*.

3. The Sentencing Hearings; DOSA Evaluation; Defendant's Criminal History; Prior Failure In Treatment.

At the original sentencing hearing, the defendant asked for a one-month continuance in order to get a DOSA evaluation. 9/3/09 Sent'g RP 4-7. The State had been prepared for sentencing, opposed any continuance, and opposed a DOSA sentence. Id. at 2-3, 4-5. The trial court responded:

Mr. Johnson [trial prosecutor], I do certainly understand your concern that somebody who decides to roll the dice should then have maybe a second chance at getting a reduced sentence. . . . But . . . it does seem to me that it may be possible to reach a result which will save the taxpayers some money if he does wind up being eligible for a DOSA. I don't expect you to like what I'm about to do, Mr. Johnson.

* * *

I don't see enough harm in granting his request, and I see a potential value in granting it, and so I will grant it.

9/3/09 7-8. The court went on to caution the defendant that just because he was getting a continuance for a DOSA evaluation did not ensure he was going to get a DOSA sentence. Id. at 9.

The defendant had an extensive felony criminal history reflecting drug possession, burglary, and assaults. 3 CP __ (sub 36, "Appendix A"). (There were also seventeen misdemeanors listed. Id.) The Department of Corrections' DOSA/Risk

Assessment Report concluded much of this was drug-related. 2

CP 133. It noted prior attempts at treatment had not worked out:

Mr. Knowles denies ever participating in substance abuse treatment. However, according to information contained in his 1997 Presentence Investigation Report, Mr. Knowles has had two previous admissions for residential substance abuse treatment. One was at Cedar Hills Treatment Center in King County and one was at a treatment facility in Grants Pass Oregon. It was reported that Mr. Knowles “walked away from both treatment programs before satisfactory completion.” When asked about these admissions, Mr. Knowles acknowledged, vaguely recalling the events. During his period of community custody supervision, it is noted that his Community Corrections Officers attempted to enroll Mr. Knowles into outpatient substance abuse treatment, but their efforts were thwarted by Mr. Knowles['] chronic failure to present for appointments and his numerous other violations of the conditions, requirements and instructions of his community custody supervision.

2 CP 133-34. Moreover, one of the defendant’s prior convictions, from 2003 in Pierce County, had involved a lenient disposition under that county’s “breaking the cycle” drug-treatment alternative sentencing program.² 1 CP 67-79 (in particular 1 CP 73, terms of partial confinement, and 1 CP 77, conditions, including drug treatment).

² “Breaking the cycle” or “BTC” is Pierce County’s community-based drug-treatment alternative sentence program under RCW 9.94A.680(3); see State v. Breshon, 115 Wn. App. 874, 876-77, 63 P.3d 871 (2003) (describing the program).

The evaluator recommended against a DOSA, based on, among other things, the defendant's lack of commitment to community and family; his minimizing of criminal activities; prior assaultive behavior; and "dismal" past compliance on community custody. 2 CP 134-35. A standard-range sentence was recommended instead, "in the interest of community safety." 2 CP 135.

At the second sentencing hearing, the State adhered to its prior position. 10/20/09 Sent'g RP 2-3. Defense counsel continued to ask for a DOSA, noting that "while I understand, to some degree, the rationale that the PSI writer used in not recommending a DOSA," that recommendation was based on criminal history, and drug-related criminal history ought to speak for a DOSA, rather than against one. Id. at 3-5. The defendant personally asked for the alternative sentence as well. Id. at 6.

The trial court declined to sentence the defendant under the DOSA alternative, finding the community too much at risk when the defendant was not incarcerated. Id. at 7-8. Instead, it imposed a standard-range sentence. Id.; see also 1 CP 19-31.

In his comments, the trial judge had noted that the defendant's testimony was different from what he told the evaluator.

10/20/09 Sent'g RP 7. When counsel reminded the court that the defendant had not testified at trial, the judge indicated he stood corrected, having confused argument with evidence. Id. at 9-10. "Nonetheless," the court concluded, "the evidence that did come out coupled with the presentence investigation report are my basis for the sentence I have imposed." Id. at 10.

4. The Trial Court Did Not Abuse Its Discretion When, Based On Factors Specific To The Offender, It Declined To Grant A DOSA Sentence.

As discussed above, whether to grant or deny a DOSA lies within a sentencing court's discretion, and thus, as a general rule, such a decision is not reviewable. State v. Grayson, 154 Wn.2d at 338; RCW 9.94A.585(1). It can be an abuse of discretion for a sentencing court to categorically refuse to consider a DOSA at all, based not on defendant-specific criteria, but on dissatisfaction with the program. Grayson, 154 Wn.2d at 338. The only basis for the trial court's rejection of a DOSA in that case was the court's belief that the program was underfunded. Grayson, 154 Wn.2d at 342-43.

Here, in contrast to Grayson, the court exercised its discretion and rejected the DOSA request because of the defendant's criminal history and community safety considerations. These concerns were amply supported by the record: The

defendant had a number of felony convictions, including for second- and third-degree assault, unlawful imprisonment, and first-degree burglary. 3 CP ___ (sub 36). His compliance on community custody had been poor. 2 CP 134-35. He had failed in prior treatment programs. 2 CP 133-34. And a prior community-based, treatment-focused, alternative sentence in 2003 had not changed the defendant's behavior. 1 CP 73, 77.

The Grayson court had stressed that defendant-specific criteria, such as "an extensive and exclusively drug-based criminal history," could (and even should) still be considered on remand. Grayson, 154 Wn.2d at 342-43. That is precisely what the trial court considered here. Moreover, the court had allowed the defendant the extra time to get a DOSA evaluation: Had the court been categorically opposed to the idea, it would hardly have granted the defendant the extra time in the first place. Once it got the evaluation, the court properly exercised its discretion. A court's decision, after due consideration, not to apply DOSA and impose a standard sentence range is not reviewable. State v. Conners, 90 Wn. App. 48, 53-54, 950 P.2d 519 (1998) (cannot review trial court's finding DOSA inappropriate based on facts of the crime).

This decision here is not reviewable. The defendant's argument fails.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on July 23, 2010.

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by: 

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