FILED
SEPTEMBER 17, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. ERIK N. SKAU, Appellant.	)))))))))	No. 39289-9-III UNPUBLISHED OPINION

PENNELL, J. — Erik Skau appeals 17 felony convictions stemming from the burglary of a home in Grand Coulee, Washington. We affirm his convictions but, as the parties agree, remand for resentencing.

FACTS

Arthur Kuehn splits his time between a home in Grand Coulee and one in western Washington. On the morning of November 4, 2021, Mr. Kuehn left Grand Coulee for his other residence. Approximately 48 hours later, a neighbor heard an all-terrain vehicle fire up and take off from the Grand Coulee residence. Further investigation revealed Mr. Kuehn's Grand Coulee home had been burglarized. Law enforcement discovered several signs of forced entry and a sledgehammer lying on the floor of the home.

Mr. Kuehn returned to Grand Coulee and documented numerous missing items. These included 12 firearms, a fishing boat, two ATVs, a weed eater, a compressor, two downriggers, and some fishing poles. Mr. Kuehn informed law enforcement that the sledgehammer discovered in the residence did not belong to him.

Law enforcement seized the sledgehammer and sent it to the state crime lab for analysis. Months later, a forensic examiner recovered DNA from the sledgehammer's handle. Analysis of the DNA profile showed three contributors, with Erik Skau contributing 84 percent of the profile.

Law enforcement began investigating Mr. Skau and discovered he lived in Yelm, Washington. An officer drove by Mr. Skau's residence and observed Mr. Kuehn's boat stored on the driveway. Armed with the DNA evidence and observation of the boat, law enforcement obtained a warrant to search Mr. Skau's property. During execution of the warrant, officers located Mr. Kuehn's boat and his stolen weed eater. The remaining property was never recovered.

Mr. Skau spoke with law enforcement and initially told them he had purchased the boat from someone named "Kyler" or "Tyler." 1 Rep. of Proc. (RP) (Oct. 13, 2022) at 189, 196-97. Weeks later, Mr. Skau changed his story, telling the authorities he bought the boat from someone named "Joseph Lewis," and showed police a handwritten note that

he claimed to be a bill of sale from Mr. Lewis. *Id*. at 190, 197. Law enforcement were not able to find anyone named Joseph Lewis living near the Grand Coulee area. The investigation did turn up a person named Joseph Busker, who had previously used the alias "Joseph Lewis," who was now living in Spokane while participating in a work release program *Id.* at 190-91, 193-94. An officer found a phone number for Joseph Busker and left a voicemail, but did not reach anyone.

The State charged Mr. Skau with 17 crimes: 1 count each of first degree burglary, first degree malicious mischief, and first degree theft; 12 counts of theft of a firearm; and 2 counts of theft of a motor vehicle.

Mr. Skau testified on his own behalf at trial. Mr. Skau conceded the boat discovered on his property had been stolen from Mr. Kuehn; his defense rested on his claim that he was not involved in any burglary or theft. In his testimony, Mr. Skau stated he saw the boat listed for sale sometime between November 1 and November 3, on a website the name of which he could not remember. According to Mr. Skau, the seller agreed to sell him the boat for $1,200. Mr. Skau testified he then rented a car trailer from U-Haul so he could transport the boat back to his home in Yelm. He claimed he rented a car trailer, rather than a boat trailer, because he could not find a place that rented boat trailers.

During direct examination of Mr. Skau, defense counsel handed the trial prosecutor a document he sought to admit: a copy of a towing receipt from U-Haul. The prosecutor immediately objected: "I have never seen this before. This was not provided to me in discovery." *Id.* at 271. After conferring with counsel, the trial court ultimately excluded the U-Haul receipt, based on a violation of the court's omnibus discovery order. The court also noted that the receipt had not been authenticated.

Mr. Skau continued his testimony, explaining that he drove from Yelm to Lincoln County on November 4, towing the car trailer, to pick up the boat. Mr. Skau claimed he drove over with a friend, Woody Madsen.[1] According to Mr. Skau, he and Mr. Madsen traveled to eastern Washington from Yelm in the dead of night to pick up the boat.

Mr. Skau testified that he and the seller had agreed to meet at a rest area near Grand Coulee in the middle of the night, and that once they met, he followed the seller to a rural residence to retrieve the boat. Mr. Skau claimed that he gave the seller cash, and that the seller then drew up a handwritten bill of sale and gave it to him. The bill of sale purportedly identified the seller as "Joseph Lewis." *Id.* at 279. Mr. Skau claimed he

[1] Mr. Skau called Mr. Madsen to testify as the only other defense witness. Mr. Madsen testified that he drank a half-gallon of vodka before leaving with Mr. Skau and that he passed out, sleeping for much of the journey. Mr. Madsen could not provide an answer to the question, "Why did you go on this trip?", could not recall the month or year of the trip, and failed to offer a meaningful or consistent description of where they went

looked at the seller's driver's license, which bore the name "Joseph Lewis." *Id.* at 324. Then, Mr. Skau claimed he loaded the boat into the car trailer he had rented, with Mr. Lewis's help, and drove home, not arriving back in Yelm until early the next morning, November 5.

Mr. Skau testified he had used a sledgehammer belonging to Mr. Lewis to hammer wood underneath the boat to help lift it into the car trailer, which was not an ideal vessel for transporting a boat. He claimed he bought a boat without a trailer because "it's cheaper that way." *Id.* at 285. He further claimed Mr. Kuehn's weed eater was found in his possession because it had been left behind in the boat. Mr. Skau claimed the boat's registration number was already scratched off when he bought the boat, but insisted that this did not concern him.

Defense counsel sought to admit a document purporting to be the handwritten bill of sale written by "Joseph Lewis." *Id.* at 278. The prosecutor objected, claiming the bill of sale had not been properly authenticated and it was hearsay. The court told Mr. Skau's counsel that the bill of sale was "a writing signed by someone other than your client offered for . . . the truth of the matter asserted. It's hearsay." *Id.* at 293. The court asked defense counsel if he could identify a hearsay exception that would allow the document's

---

or what they did. *Id.* at 244.

admission. Defense counsel was unable to cite an applicable rule. The court then excluded the proffered evidence.

On cross-examination, Mr. Skau admitted he had not tried to register Mr. Kuehn's boat—despite owning it for more than eight months—because he did not have the money to pay for registration. Mr. Skau conceded the car trailer he rented was not big enough to transport a boat, but claimed he was somehow able to make it work.

In the State's closing argument, the trial prosecutor argued Mr. Skau's proffered version of events was nonsensical: According to Mr. Skau, he saw the boat listed for sale online *before* the date of the theft. The prosecutor further pointed to the DNA Mr. Skau left on the handle of the sledgehammer found at Mr. Kuehn's home. The prosecutor inferred that it did not make sense to rent a car trailer to tow a boat over Snoqualmie Pass. The prosecutor conceded that Mr. Skau probably *did* rent a car trailer, because rental of a car trailer would have enabled Mr. Skau to transport two ATVs, which were also stolen. The State ended its summation by urging the jury to disbelieve Mr. Skau: "There was no sale of a boat." *Id.* at 391.

In the defense closing argument, Mr. Skau's attorney urged the jury to believe his client's testimony: "Mr. Skau told you how he bought and paid for the boat. And he conducted a transaction with somebody that was at least calling himself Joseph Lewis."

Id. at 397. Counsel went on, criticizing the quality of the police work, arguing that police acted with insufficient diligence in pursuing Mr. Lewis. Defense counsel implied that Mr. Lewis was possibly "a big fish" who might "inform on the rest of the gang." *Id.* at 402. Counsel posited that the police unwisely stopped investigating when they apprehended his client, and that if they had more robustly pursued Mr. Lewis, they might have recovered the rest of the stolen property. Defense counsel added that Mr. Skau had provided an explanation of how his DNA ended up on a sledgehammer; he had used it while moving the boat into his trailer at Mr. Lewis's residence.

During the State's rebuttal argument, the trial prosecutor noted, "[T]hey want you to infer that that sledgehammer somehow ended up back at the burglary scene *after* the boat had already been stolen. . . . [L]ook at these alternate scenarios. They make no sense." *Id.* at 412-13 (emphasis added). The trial prosecutor also responded to defense counsel's focus on Joseph Lewis, or Joseph Busker:

> This whole side point about this Joseph Busker, is just a distraction. It's a red herring. . . .
>
> There's absolutely no evidence that his [sic] Joseph Busker was involved in this at all. There is no Joseph Lewis that lives in the Grand Coulee area. [Law enforcement] couldn't find anybody that fit the description of what Mr. Skau claims is the person who sold him that boat. So, if Joseph Lewis is this key witness who sold him this boat, why isn't he here? Why wasn't Joseph Lewis testifying here today . . . ? Because he doesn't exist. He is a distraction. It didn't happen. This sale of the boat didn't happen. It's not reasonable to believe that that happened. What is

> reasonable to believe is that Mr. Skau traveled out to Grand Coulee to steal a whole bunch of things from this residence and then took it back to his house in Yelm. There was no legitimate sale. There was no sale legitimate or otherwise. It was all stolen.

Id. at 409-10.

The jury found Mr. Skau guilty as charged of all 17 crimes. For sentencing purposes, Mr. Skau had no countable prior felonies. The State calculated Mr. Skau's offender score for 15 of the crimes as "16," and for 2 of the crimes as "18,"[2] based entirely on treating his current convictions as prior offenses. 1 RP (Oct. 18, 2022) at 425-26; *see also* Clerk's Papers (CP) at 89-90. For Mr. Skau's most serious conviction—first degree burglary—the standard sentencing range for a maxed-out offender score of 9+ was 87 to 116 months. *See* RCW 9.94A.510; *see also* CP at 89-90.

The trial prosecutor sought an exceptional sentence of 218 months' confinement, citing the so-called "free-crimes aggravator," RCW 9.94A.535(2)(c). Mr. Skau's counsel offered no opposition to the State's calculation of Mr. Skau's offender score, and simply asked for "some mercy" and "the lowest possible range." 1 RP (Oct. 18, 2022) at 430.

[2] The additional points were included because, for each of Mr. Skau's two convictions for theft of a motor vehicle, the State counted the other theft of a motor vehicle conviction as three points rather than one. *See* RCW 9.94A.525(20).

The superior court declined to enter an exceptional sentence. Rather, the court imposed a standard-range term of confinement of 116 total months, representing the top of the uncontested standard range for Mr. Skau's most serious crime.

Mr. Skau timely appeals.

ANALYSIS

Mr. Skau makes three challenges to his convictions: (1) he was deprived of effective assistance of counsel when his attorney failed to object to hearsay evidence, (2) the prosecutor improperly shifted the burden of proof during summation, and (3) the trial court erroneously refused to admit Mr. Skau's trial exhibits. Mr. Skau also argues for resentencing, claiming the trial court improperly calculated his offender component of his guideline range by failing to consider whether his current offenses constituted the same criminal conduct. We address each claim in turn.

Failure to object to hearsay

Mr. Skau contends his trial attorney provided constitutionally ineffective representation when counsel failed to assert hearsay objections to law enforcement testimony identifying the boat found on his property as Mr. Kuehn's. We disagree.

Criminal defendants are guaranteed effective assistance of counsel by our federal and state constitutions. *See* U.S. CONST. amend. VI; WASH. CONST. art. I, § 22.

A defendant appealing a conviction on the basis of ineffective assistance of counsel bears the burden of showing both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Failure to meet either element is dispositive. *See In re Pers. Restraint of Pleasant*, 21 Wn. App. 2d 320, 326, 509 P.3d 295 (2022).

Our review of defense counsel's performance requires considerable deference. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment." *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993). "Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *McFarland*, 127 Wn.2d at 336.

Here, defense counsel's failure to object was reasonably strategic. Mr. Skau never disputed that the boat found on his property had belonged to Mr. Kuehn. To the contrary, he described the boat as "Mr. Kuehn's" on multiple occasions during his own testimony. 1 RP (Oct. 13, 2022) at 261. Given the nature of Mr. Skau's defense, little would have been served by objecting to hearsay statements regarding Mr. Kuehn's ownership of the boat. Furthermore, defense counsel likely surmised that if a hearsay objection had been

asserted, the State would have elicited the identification testimony from Mr. Kuehn. Counsel's failure to assert hearsay objections to law enforcement testimony did not deprive Mr. Skau of his right to effective assistance of counsel.

Shifting burden of proof during summation

Mr. Skau claims the prosecutor engaged in improper argument during rebuttal by asking why Joseph Lewis—the purported boat seller—had not testified at trial. According to Mr. Skau, this line of argument suggested the defense bore responsibility for calling Mr. Lewis as a witness and, as such, improperly shifted the burden of proof. We disagree.

The State bears the burden of proving its case beyond a reasonable doubt, and a defendant has no burden to present evidence at all. *See State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). It is misconduct for the State to suggest that the defense bears the burden of producing evidence in support of reasonable doubt. *See State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012). However, "it is not misconduct" for a prosecutor to "fairly respond to defense counsel's argument." *State v. Thorgerson*, 172 Wn.2d 438, 449, 258 P.3d 43 (2011).

Here, the prosecutor's rebuttal argument was not improper because it constituted a fair response to Mr. Skau's theory of the case. During the defense closing, Mr. Skau's

attorney criticized law enforcement for failing to adequately pursue Mr. Lewis. Mr. Skau's counsel speculated that if police had done a better job, they may have found the leader of a gang and recovered the rest of Mr. Kuehn's stolen property. The State's prosecutor appropriately responded that Mr. Skau's defense was implausible. For example, Mr. Skau claimed he saw a listing for the boat days *before* it was stolen. Given the implausibility of Mr. Skau's defense, the State merely argued that the reason Mr. Lewis had not testified was that he did not exist. Considered in context, the State's argument did not suggest that Mr. Skau had the burden of calling Mr. Lewis as a witness.

Exclusion of evidence

Mr. Skau contends the trial court erred by excluding two documents he sought to admit as evidence: a U-Haul towing reservation and a handwritten bill of sale. He further contends the exclusion of these documents violated his right to present a defense. We disagree.

We engage in a two-step process in assessing whether a trial court's evidentiary decision violated a defendant's constitutional right to present a defense. *State v. Broussard*, 25 Wn. App. 2d 781, 786, 525 P.3d 615 (2023). First, we review the merits of the evidentiary decision. *Id.* If the defendant can prevail on the merits, no further

analysis is necessary. But if the trial court's evidentiary decision was either not an abuse of discretion or harmless, we will proceed to a constitutional analysis. *Id.* at 786-87.

The trial court's evidentiary rulings pass the first part of the analysis. The court acted within its discretion in excluding the U-Haul receipt based on a violation of the court's omnibus order, requiring disclosure of exhibits. And the court properly excluded the bill of sale documents based on hearsay. Furthermore, the exclusion of both documents was harmless. Mr. Skau testified that he rented the U-Haul and that Mr. Lewis had provided him a bill of sale. The State never challenged the fact that Mr. Skau had rented the U-Haul trailer. After all, doing so would have facilitated his ability to purloin Mr. Kuehn's property. And there was no real dispute that Mr. Skau possessed a handwritten document that purported to be a bill of sale from Mr. Lewis. The State's argument was simply that the document was fake. Given the handwritten bill of sale was not a public record or otherwise authenticated, there is no suggestion that introduction of the document would have helped Mr. Skau show that the document came from Mr. Lewis.

Going to the second step of the analysis, we review de novo whether exclusion of the evidence violated Mr. Skau's right to present a defense. *See id*. This right is "'in essence, the right to a fair opportunity to defend against the State's accusations.'" *State v.*

Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). This right is not absolute, and the defendant's relative need for the information sought to be admitted must be weighed against the State's interest in excluding the evidence. *State v. Arndt*, 194 Wn.2d 784, 812, 453 P.3d 696 (2019).

The trial court did not violate Mr. Skau's constitutional right to present a defense. As noted above, neither piece of excluded evidence was materially helpful to Mr. Skau's case. Furthermore, the bill of sale was inadmissible as hearsay and Mr. Skau has never proffered any reason for holding that it did not qualify as hearsay. The right to present a defense does not encompass a right to present inadmissible evidence. *See State v. Goss*, 189 Wn. App. 571, 583, 358 P.3d 436 (2015). Mr. Skau has not identified a constitutional injury.

Offender score—"same criminal conduct"

Mr. Skau contends he is must be resentenced because his current convictions constituted the "same criminal conduct," and thus should have been counted as a single offense for purposes of calculating his offender score. RCW 9.94A.589(1)(a). The State agrees it is probable that some of Mr. Skau's convictions were for the "same criminal

conduct," and concedes remand is necessary. *Id.* We accept the State's concession and remand for resentencing.

Ordinarily, when a person is sentenced for multiple current offenses, the sentence range for each offense is determined by counting other current convictions "as if they were prior convictions." *Id.* There is an exception "if the court enters a finding that some or all of the current offenses encompass the *same criminal conduct*."[3] *Id.* (emphasis added). In that case, the current offenses constituting the "same criminal conduct" are "counted as one crime." *Id.* Same criminal conduct determinations are committed to the trial court's discretion. *See State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013).

The legislature defined "same criminal conduct" as "two or more crimes that [(1)] require the same criminal intent, are committed at [(2)] the same time and place, and [(3)] involve the same victim." RCW 9.94A.589(1)(a). This court will not find same criminal conduct if any of these elements are missing. *See State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). Mr. Skau's crimes were directed at the same victim: Mr. Kuehn. As charged and proved by the State, the crimes were also committed at the same place

[3] Same criminal conduct is analytically distinct from double jeopardy. *See State v. French*, 157 Wn.2d 593, 611-12, 141 P.3d 54 (2006). Two crimes might constitute same criminal conduct for sentencing purposes even where the multiple convictions do not violate the constitutional prohibition of double jeopardy. *See, e.g.*, *State v. Tili*, 139 Wn.2d 107, 110, 119-20, 985 P.2d 365 (1999).

and within a limited time period. Thus, the determinative question is whether each of Mr. Skau's crimes required the same "statutory intent" as set forth by the Supreme Court's recent decision in *State v. Westwood*, 2 Wn.3d 157, 166, 534 P.3d 1162 (2023).

Under *Westwood*, at least some of Mr. Skau's convictions plausibly constitute the same criminal conduct. All 12 of his convictions for theft of a firearm necessarily have the same "statutory intent" because they are all violations of the same statute. *Id.* at 167-68; *see* RCW 9A.56.300. And the convictions for first degree theft and theft of a motor vehicle have the same statutory intent as those crimes, too, because—like the theft of a firearm statute—those statutes both require proof of "theft" and its requisite mens rea. *See* RCW 9A.56.030 (requiring proof of "theft"); RCW 9A.56.065 (same); RCW 9A.56.300 (same); *see also* RCW 9A.56.020(1)(a) (defining "theft" as requiring an "intent to deprive" the rightful owner of their property). Because the "statutory intent element[s]" are "the same or similar," this court may "look at whether the crimes furthered each other" and whether "the nature of the crime did not change significantly throughout." *Westwood*, 2 Wn.3d at 168. And as proved by the State, all of these theft crimes were committed as part of an overarching robbery of Mr. Kuehn's home. As such, there was a plausibly meritorious argument that at least 15 of Mr. Skau's crimes constituted the same criminal conduct and thus should have counted as one crime toward his offender score,

rather than being counted individually. RCW 9.94A.589(1)(a). With a lower offender score, Mr. Skau's sentencing range would have been much lower.

Based on the foregoing, we accept the State's concession and remand for a new sentencing hearing. Resentencing shall be de novo, with both parties able to argue for any lawful sentence.

CONCLUSION

The judgment of conviction is affirmed. This matter is remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.