

June 19, 2018

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

CARL EVERETT HOGAN,

Appellant.

No. 49910-0-II

Consolidated with

No. 49914-2-II

UNPUBLISHED OPINION

WORSWICK, J. — In this consolidated appeal, Carl Hogan appeals from his convictions of unlawful possession of a firearm (cause number 16-1-00047-1), and of unlawful possession of a stolen vehicle and bail jumping (cause number 15-1-05148-4). Hogan argues that (1) the trial court violated his constitutional rights by failing to order a competency evaluation, (2) insufficient evidence supports his unlawful possession of a firearm conviction, and (3) the trial court erred in using a prior felony conviction when calculating his offender score.<sup>1</sup>

The State concedes that Hogan is entitled to a sentencing evidentiary hearing. Because the trial court did not err when it refused to order a competency evaluation and because sufficient evidence supports Hogan’s conviction, we affirm Hogan’s convictions. However, we accept the State’s concession, reverse Hogan’s sentence, and remand for resentencing.

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<sup>1</sup> Hogan also raises multiple issues in a statement of additional grounds (SAG). These issues are discussed in detail in a separate section below. We determine that Hogan raises no issues requiring reversal in his SAG.

## FACTS

### I. BACKGROUND

#### A. *Stolen Vehicle and Bail Jumping Charges*

On December 22, 2015, Deputy Theron Hardesty from the Pierce County Sheriff's Department saw a suspected stolen vehicle being driven down a street. Deputy Hardesty ran the vehicle's license plate, determined that the vehicle was reported stolen, and stopped it. Hogan was in the driver's seat. Before Deputy Hardesty told Hogan the reason for the stop, Hogan stated that he had just purchased the car at a nearby hotel for \$50. Hogan told Deputy Hardesty that he purchased the vehicle from a person named "White Boy Ghost" and later identified the person as "Jason." Report of Proceedings (RP) (Dec. 6, 2016) at 30. Hogan did not provide Deputy Hardesty with a bill of sale or registration. Deputy Hardesty arrested Hogan.

On December 24, 2015, the State charged Hogan with unlawful possession of a stolen vehicle. On January 7, 2016, Hogan signed a scheduling order setting a hearing for January 28. On January 28, Hogan failed to appear at the hearing. The State then charged Hogan by amended information with bail jumping based on his failure to appear at the January 28 hearing.

#### B. *Unlawful Possession of a Firearm and Assault Charges*

On May 28, 2015, Hogan was at his home with his wife Rachel Hogan<sup>2</sup> and Rachel's mother Traci Johnson. Hogan and Rachel got into an argument outside and at some point Johnson saw Rachel nearly fall onto her lap as Johnson sat on the house's porch. Hogan then went into the home and began to move his belongings from his bedroom closet into his vehicle.

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<sup>2</sup> Because Carl and Rachel Hogan share the same last name, we use Carl's last name and Rachel's first name for clarity. We intend no disrespect.

Johnson saw Hogan carry a long object wrapped in a blanket toward his car. Rachel was able to take the object away from Hogan. Johnson called the police, and Rachel brought the object to the porch where Johnson discovered that it was a rifle.

On January 5, 2016, the State charged Hogan with unlawful possession of a firearm and fourth degree assault.

C. *Trials*

1. *Unlawful Possession of a Stolen Vehicle and Bail Jumping*

The trial court held consecutive bench trials. At the first trial for unlawful possession of a stolen vehicle and bail jumping, Deputy Hardesty testified to the facts discussed above. After being asked if he looked into the glove box for the vehicle registration, Deputy Hardesty testified that he did not because he believed that searching an unlocked glove box would be an improper search incident to arrest.

Hogan also testified at trial. Hogan testified that he was a medically discharged combat veteran and that he had prior felony convictions. Hogan testified that he paid \$250 for the vehicle in December of 2015 and that he told officers that there was a bill of sale in the glove box.

Hogan testified that Jason, the person he purchased the vehicle from, was currently in prison. Hogan presented a document at trial and stated that the document was the bill of sale for the vehicle. The document stated that Jason Shively was selling Hogan a vehicle for \$250. Hogan testified that after the car was returned to the rightful owner, Hogan's friend retrieved the bill of sale from the owner of the car.

Hogan also testified that he wanted to use the vehicle to attend his Veteran's Affairs (VA) appointments. Hogan stated that he had posttraumatic stress disorder, schizophrenia, and had "a lot of memory problems." RP (Dec. 12, 2016) at 165. Hogan also testified that he researched the vehicle identification number (VIN) on the internet and that the results "came up clean." RP (Dec. 12, 2016) at 148. Hogan additionally explained to the court the bail bonding process he underwent, and the process for scheduling medical appointments with the VA's office. Hogan testified that on January 28, 2016, the day he was to appear for a pretrial hearing, he was at a VA appointment.

On cross-examination, Hogan answered questions from the State about his previous crimes. Hogan also explained the circumstances of his arrest and detailed that he had a payee for his VA funds. The trial court also asked Hogan questions on multiple topics during trial and Hogan responded to the court's questions.

Lisa Fuerbach, a representative from the criminal history unit at the prosecutor's office also testified at trial. Fuerbach stated that she conducted a search for "Jason Shively" through the criminal history database and that she was unable to find any information on a person named "Jason Shively." RP (Dec. 12, 2016) at 217.

Before closing arguments, defense counsel informed the court that Hogan had told him that he did not understand "what [was] going on here." RP (Dec. 12, 2016) at 220. The following exchange then took place:

[HOGAN]: I'm saying that I don't remember—I don't remember a lot of it. It has been so long ago.

[COUNSEL]: I'm not asking you. You were just telling me you don't know what is going on here, correct?

[HOGAN]: I can't—I'm not following. I'm not I, I mean, I can't follow.

THE COURT: Are you asking me to do anything?

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[HOGAN]: That's all I'm saying. I can't follow—I keep my memory—I can't remember sh- - .

RP (Dec. 12, 2016) at 220-221. Defense counsel then requested a continuance so that Hogan could be mentally evaluated. The court then took a short recess and on return from recess, defense counsel stated, “I have serious questions as to whether [Hogan] is competent to stand trial. I know it's very, very late in the game; however, I didn't know certain things.” RP (Dec. 12, 2016) at 221. However, counsel then stated that Hogan thought that he was competent. The court then stated:

In this case, it does appear that Mr. Hogan has a factual understanding of the charges against him. He has an understanding generally of what the criminal process is. I think that he understood his obligations to testify—under oath, to testify truthfully. His testimony—he had some moments where he seemed to say things that were conflicting, but that isn't uncommon for many witnesses. He didn't seem to have a problem with providing a factual account of what occurred and a timeframe for that. In other words, he seemed to have a fair memory at least of the events that are surrounding the allegations here.

RP (Dec. 12, 2016) at 223-24. The court added that Hogan was able to communicate with counsel and able to identify witnesses. The court also stated that based on Hogan's testimony that morning at trial, the court felt “actually quite confident” that Hogan was competent to stand trial.

The trial proceeded to closing argument. The court then entered a guilty verdict as to the charge of unlawful possession of a stolen vehicle and the charge of bail jumping. After the court gave its ruling, defense counsel again voiced concerns about Hogan's competence and stated:

Your Honor, as to Count I, I think Mr. Hogan has some serious mental problems, and it affects his memory. Throughout my defense of him, we keep trying to schedule appointments. He doesn't remember these things. The witness list—you wouldn't believe how many times we tried to get it from him. We had Scott show up the day of the trial.

RP (Dec. 12, 2016) at 271. In response, the court stated “That could be, but I don’t know that it rises to a level of competence.” RP (Dec. 12, 2016) at 272. Defense counsel went on to say that he did not “think [Hogan] remembers anything day-to-day. I think he has serious memory problems.” RP (Dec. 12, 2016) at 273. The court then stated, “I don’t know. I don’t have any medical testimony about that,” to which defense counsel responded, “No. I think we probably should get some.” RP (Dec. 12, 2016) at 273.

The court then again commented on Hogan’s presentation at trial and stated:

I certainly noted that—just in seeing Mr. Hogan, there was a certain—I mean, I thought that he was capable of responding to questions, being articulate enough to know what we were asking him, to be actually fairly dextrous in changing his story to accommodate inconsistencies, which showed a certain intelligence and awareness of what is going on here.

RP (Dec. 12, 2016) at 274. The court held the unlawful possession of a firearm and assault trial the next day.

## *2. Unlawful Possession of a Firearm and Fourth Degree Assault*

At the next trial, Traci Johnson testified. Johnson testified that Hogan lived with Rachel in the Hogan home at the time of the incident. Johnson also testified that on the night of the incident, Rachel and Hogan got into an argument. Johnson testified that the couple scuffled on the porch and that she was not sure how the scuffle occurred, but that Rachel nearly fell in her lap.

Johnson testified that after the scuffle, Hogan went into the home and collected items and moved them to his car. Johnson testified that she saw Hogan carry “something long that was wrapped in a kid’s blanket.” RP (Dec. 13, 2016) at 54. Johnson saw Hogan take the item to the vehicle. Johnson then testified, “Rachel went after him and started scuffling and wrestling with

him trying to take it away from him. [The item] never made it to the car.” RP (Dec. 13, 2016) at 55. Johnson testified that Rachel yelled and told her to call the police and that Rachel set the long item on the porch at which time Johnson realized the item was a rifle.

Rachel also testified at trial. Rachel testified that on the night of the incident, Hogan was removing his belongings from the home. Rachel testified that she did not recall being pushed by Hogan. During Rachel’s testimony, defense counsel introduced a statement written by Rachel that she gave to police officers that said that Hogan pushed her and that he put the rifle into his vehicle.<sup>3</sup> Rachel testified that she falsified her written statement because, at the time, she wanted to get Hogan in trouble. Rachel further testified that Hogan never had a gun in his possession and that after Hogan left on the night of the incident, she found the gun in the bedroom closet. Rachel then testified that the gun likely belonged to her stepson or her stepson’s friend.

Hogan also testified at trial. The trial court asked Hogan questions, and he answered the court’s various questions and explained why the couple had been arguing, where he kept his belongings in the house, and other details about the circumstances surrounding the incident. Hogan testified that he gathered his belongings from the couple’s home and put them in his vehicle. Hogan described the home and the location of his closet in detail.

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<sup>3</sup> The parties dispute our use of Rachel’s statement to police. At trial, Hogan moved to admit Rachel’s statement. But the trial court considered Rachel’s statement solely for impeachment purposes. On appeal, the State asserts that we can consider Rachel’s statement as substantive evidence because it was a prior inconsistent statement and because the trial court did not limit its use. We disagree. Because it is clear from the record that the trial court considered the statement only for impeachment, we do not consider Rachel’s statement as substantive evidence on appeal.

After Hogan's testimony, both sides rested, and the court rendered its decision. The court determined that Hogan was guilty of unlawful possession of a firearm but not guilty of fourth degree assault.

D. *Sentencing*

On January 13, 2017, the court held a sentencing hearing on both cases. During sentencing, defense counsel informed the court that he believed that Hogan was "unable to properly assist his attorney in his defense" and that Hogan "has severe mental problems." RP (Jan. 13, 2017) at 13. Counsel also stated that Hogan was not competent to stand trial.

Counsel asserted that he had only recently obtained Hogan's VA records and discovered that Hogan had a payee on his benefits from the VA. Counsel stated that the VA determined Hogan not competent to handle his own financial affairs. Defense counsel argued that based on this information, he thought that it was "imperative" that Hogan undergo a mental evaluation prior to any sentencing. RP (Jan. 13, 2017) at 14.

The trial court then asked if there was something new about Hogan's situation and defense counsel responded that the fact that Hogan had a payee was new information. The court disagreed and stated that was not "something that is different from at the time that [Hogan] was in trial." RP (Jan. 13, 2017) at 14. The court then noted that Hogan's responses were "cogent" and "responsive" during trial. RP (Jan. 13, 2017) at 15. The court further stated that Hogan presented events in chronological order and that Hogan did not appear as "having lost touch with reality." RP (Jan. 13, 2017) at 15. The court also stated that Hogan was "consciously aware of what his legal perils were and was attempting to evade them." RP (Jan. 13, 2017) at 15.



The court further stated that the issue of Hogan’s competency had “no merit” unless something had changed. RP (Jan. 13, 2017) at 16. The court noted that the VA documents were “history” and further stated:

If I had known that at the time that we did the trial — and I don't know what those contents are, but I did observe him. I was able to see firsthand and at close range how he was able to—what his cognition was, what his memory was, what his ability was to relate information, his ability to hear a question and respond to it in a cogent way. All of those things suggested that he was not in any way mentally impaired for purposes of all of this. People may have various gradations of mental health problems sufficient that they may be disabled from employment, for instance, which is why he had received—that may be part of the reason why he was issued VA benefits, but that has no—or because—whatever issues that he has got or service-connected. That in and of itself does not establish that he is incompetent for all time and all purposes. I’m not seeing or hearing anything new. Mr. Hogan today is obviously aware of what is going on.

RP (Jan. 13, 2017) at 16-17.

Defense counsel again reiterated that Hogan had a payee and that the VA “determined that he was not competent to handle his own financial affairs.” RP (Jan. 13, 2017) at 18. Hogan also added that his wife was his “Guardian ad Litem [(GAL)].” RP (Jan. 13, 2017) at 18.

The trial court proceeded with sentencing. The State presented a statement of prior record and offender score. The statement included Hogan’s prior federal conviction for use of telephone to facilitate the distribution of cocaine. The conviction carried a score of one point. During sentencing, the court asked defense counsel if he agreed with the offender score calculation and defense counsel affirmed that he did.

The court then asked Hogan if he had anything to say regarding his sentencing. Hogan discussed the sentence with the court and made several comments about going to mental health court. The court stated that “to some extent you are exaggerating what your situation is. I was here for trial. I saw you every day for several days.” RP (Jan. 13, 2017) at 35. The court further

noted that Hogan “functioned very well during the course of the trial” and that Hogan understood what the court was saying. RP (Jan. 13, 2017) at 37. Hogan affirmed and stated that he was functioning well and that he understood what the court was saying. The court then told Hogan about his sentence and Hogan thanked the court and affirmed that he made “a lot of bad choices.” RP (Jan. 13, 2017) at 37.

The court sentenced Hogan to a total of 43 months in confinement for the unlawful possession of a stolen vehicle and bail jumping convictions. The court also sentenced Hogan to 68 months in confinement for the unlawful possession of a firearm conviction. The State then asked if Hogan was going to sign his criminal history stipulation. Hogan stated that the criminal history was not accurate. The court stated that no one showed that the history was inaccurate and defense counsel also stated that he was not aware of any inaccuracies. Hogan then stated that his defense counsel told him “that the things on here is [sic] not on here because they washed off. How do I have eight points? I don’t get it. What just happened? What happened? 75 months, right, all together?” RP (Jan. 13, 2017) at 38.

The court then entered the following relevant findings of fact and conclusions of law:

#### FINDINGS OF FACT

....

#### XIII.

Traci Johnson testified that the barrel of a gun was visible when defendant carried it out of the house and that she knew it was a gun. It is not reasonable to believe that Rachel did not know defendant was carrying a gun out of the house as she would not bother to struggle over the gun if she did not know it was a gun. Rachel Hogan therefore knew that the item defendant was carrying out of the house was a gun.

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XV.

At the time defendant carried the gun from the bedroom and out of the house, it was in his hands and therefore in his actual possession. Defendant attempted to put the gun in his car because he was trying to secure his possession, including the firearm.

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CONCLUSIONS OF LAW

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III.

That defendant, Carl Everett Hogan, is guilty beyond a reasonable doubt of the crime of Unlawful Possession of a Firearm in the First Degree, in that, on May 28, 2015, defendant knowingly had in his possession or under his control a firearm after having been previously convicted of Burglary in the Second Degree, a serious offense.

Clerk's Papers (Mar. 28, 2017) at 24-26.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Hogan argues that the trial court erred in concluding that the State sufficiently proved Hogan was guilty of the crime of unlawful possession of a firearm. We disagree.

A. *Legal Principles*

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Following a bench trial, our review is limited to determining whether

substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

“Substantial evidence” is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Stevenson*, 128 Wn. App. at 193. We treat unchallenged findings of fact as verities on appeal. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). We review challenges to a trial court’s conclusions of law de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

In claiming insufficient evidence, a defendant necessarily admits the truth of the State’s evidence and all reasonable inferences that can be drawn from it. *Homan*, 181 Wn.2d at 106. (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Further, we defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the evidence’s persuasiveness. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). We do not disturb the trial court’s credibility determinations on appeal. *State v. Piatnitsky*, 170 Wn. App. 195, 222, 282 P.3d 1184 (2012), *aff’d* 180 Wn.2d 407, 325 P.3d 167 (2014).

B. *Sufficient Evidence Supports Conviction*

Hogan does not challenge the court’s finding that he had the gun in his hands, but only challenges the court’s conclusion that he was in actual possession of the gun.<sup>4</sup> Hogan claims that

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<sup>4</sup> Hogan appears to challenge the trial court’s findings of fact 8 and 15. However, Hogan does not explicitly argue that the findings are not supported by substantial evidence, but instead generally argues that the trial court’s conclusion regarding actual possession is incorrect. The only specific argument regarding the trial court’s findings of fact is to finding of fact 13. Hogan claims that the finding is “inaccurate” because it improperly describes when Johnson saw the barrel of the gun. However, Hogan concedes that this inaccuracy is not germane to the sufficiency of evidence analysis on appeal.

because he had only passing control of the gun, he did not have actual possession of it. We disagree.

A person commits the crime of first degree unlawful possession of a firearm by having in his possession or his control any firearm after having previously been convicted of any serious offense. RCW 9.41.040(1)(a). Here, the record is clear that Hogan has been previously convicted of a serious offense prohibiting his possession of firearms, and neither party disputes this fact. Therefore, the only challenged element on appeal is the element of possession.

The State may prove the possession element by showing a defendant had actual or constructive possession of a firearm. *State v. Manion*, 173 Wn. App. 610, 634, 295 P.3d 270, 281 (2013). Constructive possession can be established by showing the defendant had “dominion and control” over the firearm or over the premises where the firearm was found. *Manion*, 173 Wn. App. at 634. Actual possession means that the person charged with possession had “personal custody” or “actual physical possession.” *Manion*, 173 Wn. App. at 634. (quoting *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); *State v. Spruell*, 57 Wn. App. 383, 385, 788 P.2d 21 (1990)).

To establish possession the prosecution must prove “more than a passing control; it must prove actual control.” *Staley*, 123 Wn.2d at 801. The length of time of possession is only one factor we consider in determining whether control has been established. *Staley*, 123 Wn.2d at 801. Our focus is not on the length of the possession but on the quality and nature of that possession. *Staley*, 123 Wn.2d at 801. A defendant’s momentary handling of an item, along with other sufficient indicia of control, can support a finding of possession when the totality of

the circumstances determines possession. *State v. George*, 146 Wn. App. 906, 920-21, 193 P.3d 693 (2008).

Hogan asserts that he did not possess the firearm because the evidence shows that he did not own the firearm and that he only attempted to secure possession but failed when Rachel took the gun. Hogan also argues that the findings do not specify how long Hogan had the gun in his hands.

Hogan cites to *State v. Davis*, 182 Wn.2d 222, 340 P.3d 820(2014) (plurality opinion) to support his argument that because he had only passing possession, and did not control, or therefore possess, the gun. In *Davis*, the court found passing possession where the defendants placed a firearm in a shopping bag in order to give the gun to its owner. 182 Wn.2d at 227-228. The *Davis* court noted that the firearm was brought into the defendants' home without their permission, that the situation was chaotic, and that the defendants never attempted or intended to secure possession of the gun. *Davis*, 182 Wn.2d at 235 (Stephens, J., dissenting).

*Davis* is of no support to Hogan. Hogan's case differs from *Davis*, because Hogan carried the gun out of his home and to his car with the intent to take it with him. The court found Johnson's testimony credible and found that Hogan had brought the gun from the home and carried it to his car. Additionally, Hogan's control was interrupted by Rachel's forceful taking of the gun.

The totality of the circumstances support the trial court's conclusion that Hogan had possession of the firearm. Although Hogan may not have owned the gun, he took the gun from his home toward his car with the intent to remove the firearm from the premises. The court, as the trier of fact, resolved any conflicting evidence against Hogan to conclude that Hogan had

control over the gun. Accordingly, Hogan's claim that the State failed to prove that he committed unlawful possession of a firearm fails.

## II. COMPETENCY

Hogan argues that he was denied due process of law when the trial court failed to order a competency evaluation. Hogan argues that the trial court abused its discretion by not recognizing that sufficient facts showed a reason to doubt his competency. We disagree.

Criminal defendants have a fundamental right not to be tried while incompetent. *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). RCW 10.77.050 codifies this right by preventing an incompetent person from being tried, convicted, or sentenced so long as the incapacity continues. A defendant is incompetent if he or she "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15). Thus, the test has two parts: (1) whether the defendant understands the nature of the charges and (2) whether he is capable of assisting in his defense. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001). Further, the mere existence of a mental disorder or the existence of delusions does not prevent a defendant from being competent. *See State v. Smith*, 74 Wn. App. 844, 850, 875 P.2d 1249 (1994).

Before a trial court is required to order a competency evaluation, it must make the threshold determination that there is reason to doubt a defendant's competency. *City of Seattle v. Gordon*, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). We review a trial court's decision on whether to order a competency examination for an abuse of discretion. *Fleming*, 142 Wn.2d at 863. The trial court abuses its discretion when its decision is manifestly unreasonable or

exercised on untenable grounds or for untenable reasons. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

In evaluating the need for a competency evaluation, the trial court may consider the statements of counsel, medical and psychiatric reports, personal and family history, and the defendant's appearance, demeanor, conduct, and past behavior. *Fleming*, 142 Wn.2d at 863. The trial court should also give considerable weight to the defense counsel's opinion regarding a defendant's competency. *State v. Heddrick*, 166 Wn.2d 898, 908, 215 P.3d 201 (2009). Although counsel's opinion is one factor a court need consider when determining whether a defendant should undergo a competency evaluation, it is not the only factor a court can consider. *Fleming*, 142 Wn.2d at 863. Courts also look at the defendant's apparent understanding of the charges and consequences of conviction, his apparent understanding of the facts giving rise to the charge, and his ability to relate those facts to his attorney in order to help prepare the defense. *City of Seattle*, 39 Wn. App. at 441.

Hogan first argues the trial court failed to give considerable weight to his counsel's opinion about Hogan's competency. However, contrary to Hogan's argument, the record reveals that the trial court adequately considered counsel's concerns and provided reasoned analysis of why the court did not think a competency evaluation was warranted. Each time counsel brought up the issue of competency, the trial court either engaged counsel in questions about any new information regarding Hogan's competency or provided a detailed response, based on its observations, as to why it did not have reason to doubt Hogan's competency. It is apparent that the trial court gave appropriate weight to counsel's opinion.



Hogan also argues that the trial court failed to take into account facts supporting the opinion that he was incompetent. Hogan asserts that the court knew that Hogan was schizophrenic, had a payee and guardian ad litem, had severe mental health problems that affected his memory, and knew that Hogan reported to not understand what was going on. These facts do not show that the trial court abused its discretion by not finding a reason to doubt Hogan's competency.

Here the court observed Hogan's appearance, conduct, and demeanor over the course of the two trials. The court examined Hogan and directly conversed with him at length during trial. The record shows that Hogan was able to respond to the court's and to counsel's questions with detailed responses. Also, Hogan explained processes and procedures for obtaining a bail bond and making a VA appointment. Under these circumstances we cannot say the trial court abused its discretion by denying counsel's requests to evaluate Hogan's competency.

Similarly, Hogan's personal history of having a payee and guardian ad litem to manage his financial affairs does not support the need for an evaluation. Hogan does not argue or explain how having a payee and GAL for VA matters creates a reason to doubt competency in a criminal trial.

Because the trial court had no reason to doubt Hogan's competency, the court did not abuse its discretion by failing to order a competency evaluation at any time during trial or sentencing. Accordingly, we reject Hogan's argument that the trial court violated Hogan's due process rights.

### III. SENTENCING ERROR

Hogan argues that the trial court erred by using his federal conviction in its sentencing calculation. The State concedes that because Hogan disagreed with his offender score, this court should remand for resentencing. We accept the State's concession and remand for resentencing.

A defendant's criminal history or offender score affects the sentencing range and is generally calculated by adding together the defendant's current offenses and prior convictions. *State v. Hunley*, 175 Wn.2d 901, 908-09, 287 P.3d 584 (2012). At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *State v. Cobos*, 178 Wn. App. 692, 698, 315 P.3d 600 (2013), *aff'd* 182 Wn.2d 12, 338 P.3d 283 (2014).

The State may be relieved of its evidentiary burden if the defendant affirmatively acknowledges their proffered criminal history. *See Hunley*, 175 Wn.2d at 912. A sentencing court must conduct an evidentiary hearing when a defendant disputes facts material to his sentencing, even if that defendant's counsel agrees with the State's offender score calculation. *Cobos*, 178 Wn. App. 697, 698.

Here, the State presented no proof regarding Hogan's prior convictions, but instead submitted an unsigned statement of prior record and offender score summarizing Hogan's prior convictions. Hogan did not affirm that the proffered criminal history was correct and did not stipulate to any prior convictions. Instead, Hogan stated that his offender score was "not accurate" and stated that some of his convictions should wash out. RP (Jan. 13, 2017) at 38.

The State concedes that the trial court should have conducted an evidentiary hearing on Hogan's convictions. We agree and accept the State's concession.

## STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds (SAG), Hogan states that his trial counsel provided inefficient assistance, the State committed prosecutorial or governmental misconduct, the trial court erred in failing to order a competency evaluation and in admitting evidence, and that he should receive sentencing credit. We review each claim in turn and determine that Hogan's SAG contentions fail.

### I. INEFFECTIVE ASSISTANCE OF COUNSEL

Hogan appears to claim that his trial counsel provided inefficient assistance, by failing to (1) obtain internet search records of Hogan's VIN number search, (2) timely provide documents, (3) interview witnesses prior to trial, (4) procure the arrest inventory of the vehicle (5) assert issues of competency during the bail jumping portion of trial, (6) raise an uncontrollable circumstances defense for the bail jumping charge, (7) properly impeach witnesses, (8) obtain fingerprints from the gun, and (9) examine Deputy Hardesty's trial testimony about Hogan requesting the glove box to be searched. We disagree.

#### A. *Legal Principles*

In order to show that he received ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *State v. Johnston*, 143 Wn. App. 1, 16, 177 P.3d 1127 (2007). Trial strategy and tactics cannot form the basis of a finding of deficient performance. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). Prejudice can be

shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. *Johnston*, 143 Wn. App. at 16.

B. *Internet Search Records, Document Disclosure, Witness Interviews, and Inventory*

Hogan asserts that his counsel provided ineffective assistance by failing to (1) obtain records of his internet search of the stolen VIN, (2) provide all discovery to Hogan's counsel for the consolidated trials, (3) interview witnesses prior to trial, and (4) procure the arrest inventory of the vehicle.

All of these arguments rely on matters outside the record which we cannot address on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Accordingly, we are unable to consider these claims. Hogan's argument is more appropriate for a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

C. *Competency*

Hogan asserts that his trial counsel failed to raise the issue of competency during the bail jumping portion of the trial. However, Hogan raised the competency issue in his brief and is fully addressed above.

D. *Uncontrollable Circumstances*

Hogan also argues that his counsel provided ineffective assistance by failing to raise an uncontrollable circumstances defense for the bail jumping charge. We disagree.

It is an "affirmative defense" to a bail jumping charge when "uncontrollable circumstances prevented the [defendant] from appearing or surrendering" if the defendant later "appeared or surrendered as soon as such circumstances ceased to exist." RCW 9A.76.170(2). "Uncontrollable circumstances" include "a medical condition that requires immediate

hospitalization or treatment.” RCW 9A.76.010(4). Merely being ill is not an “uncontrollable circumstance” as contemplated by RCW 9A.76.010(4). *State v. Fredrick*, 123 Wn. App. 347, 352-53, 97 P.3d 47 (2004). The defendant must demonstrate that his illness required “immediate hospitalization or treatment.” RCW 9A.76.010(4).

Hogan fails to meet his burden. The evidence merely shows that Hogan had a prescheduled VA appointment on the day of his court appearance. Hogan fails to show that his absence at trial was based on an immediate hospitalization and, therefore, he was not entitled to assert an uncontrollable circumstances defense. Because he was not entitled to an uncontrollable circumstances defense, his counsel did not provide ineffective assistance by failing to raise it.

E. *Failure To Impeach*

Hogan argues that his trial counsel was ineffective for failing to impeach Rachel and Johnson. We do not consider this claim because it is inadequately described in his SAG.

RAP 10.10 does not require a criminal defendant’s SAG to reference the record or cite to legal authority. However, a SAG must “inform the court of the nature and occurrence of alleged errors,” and this court is not “obligated to search the record in support of claims made” in a SAG. RAP 10.10(c).

Here, Hogan merely states that his counsel was ineffective for failing to impeach Rachel and Johnson. Hogan does not identify any specific impeachment evidence or other information to support his claim. Because Hogan has not sufficiently informed this court of the nature of alleged errors related to this issue, we do not address this claim.

F. *Failure To Obtain Fingerprints*

Hogan argues that his trial counsel provided ineffective assistance for failing to obtain fingerprints from the gun. Hogan asserts that had fingerprints been taken, the results would have shown that Hogan did not touch the gun. However, Hogan fails to show how his counsel's failure to retrieve fingerprints from the gun was not a tactical decision.

Trial strategy and tactics cannot form the basis of a finding of deficient performance. *Cienfuegos*, 144 Wn.2d at 227. Here, the State provided eyewitness evidence that Hogan carried the gun from the house toward his car. Defense counsel in this case could have known that testing for fingerprints may have undermined Hogan's trial strategy that he did not possess the gun. Counsel's decision therefore can be classified as a tactical decision and therefore not ineffective performance.

G. *Failure To Examine Deputy Hardesty's Contradictions*

Hogan argues that his defense counsel did not examine the contradictions in Deputy Hardesty's testimony regarding searching the glove box.

The extent of cross-examination is a matter of judgment and strategy. *State v. Jonhston*, 143 Wn. App. at 20. We will not find trial counsel to be ineffective based on trial counsel's decisions during cross-examination if counsel's performance fell "within the range of reasonable representation." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). Moreover, in order to establish prejudice for the failure to effectively cross-examine a witness, the defendant must show that the testimony that would have been elicited on cross-examination could have overcome the evidence against the defendant. *Davis*, 152 Wn.2d at 720.

Hogan argues that his counsel failed to examine the contradiction in Deputy Hardesty's testimony about the glove box search. This assertion is not enough to show deficient performance on cross-examination as the decision not to question Deputy Hardesty regarding his search of the glove box was well within the range of reasonable representation. Also, Hogan has not shown that any testimony elicited from Deputy Hardesty regarding the failure to search the glove box could have overcome the other evidence against him at trial. Accordingly, Hogan's ineffective assistance of counsel claim on this ground fails.

## II. PROSECUTORIAL AND GOVERNMENTAL MISCONDUCT

Hogan argues that the State had the duty to search for Jason Shively. Hogan also argues that the prosecutor committed misconduct by charging Hogan for bail jumping after he refused to plead guilty and by charging Hogan with the incorrect crime. We disagree.

### A. *Duty To Search*

Hogan argues that the State failed to adequately search for Jason Shively. Hogan argues that the State had a duty to search "all possibilities" regarding Shively's identity. We disagree.

The scope of the duty to disclose evidence includes the individual prosecutor's "duty to learn of any favorable evidence known to the others acting on the government's behalf . . . including the police." *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 486, 276 P.3d 286 (2012) (alteration in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). And the State has no duty to search for exculpatory evidence. *State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373 (2017).

Here, the State was under no obligation to search for Jason Shively or any other exculpatory information. Accordingly, Hogan's argument fails.

B. *Charge of Bail Jumping*

Hogan appears to argue that the prosecution charged him with bail jumping in retaliation for not accepting a plea agreement. This argument is not adequately briefed to merit review and also pertains to matters outside the record. RAP 10.10. Accordingly, this argument is more appropriate for a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

C. *Incorrect Crime*

Hogan also argues that the State charged him with the wrong crime. Hogan asserts that the State was required to charge him with the crime that most specifically suits the parameters of the allegations, which was something other than unlawful possession of a firearm.

The State has discretion to charge a crime for which statutory proof exists. *State v. Finch*, 137 Wn.2d 792, 809, 975 P.2d 967 (plurality opinion), *cert. denied*, 528 U.S. 922, 120 S. Ct. 284, 145 L. Ed. 2d 238 (1999). However, as addressed above, the trial court sufficiently found that Hogan possessed the gun and the court's decision is supported by substantial evidence. Accordingly, Hogan's argument fails.

D. *Failure To Conduct Inventory Search*

Hogan also argues that Deputy Hardesty breached his duty as a law enforcement officer by refusing to conduct an inventory search of the vehicle following an arrest for possession of a stolen vehicle. There is no evidence in the record about the inventory search of the vehicle and whether Deputy Hardesty was required to conduct such a search. Therefore Hogan's claim is based on matters outside the record on appeal and is more appropriate for a personal restraint petition. *McFarland*, 127 Wn.2d at 335.



### III. TRIAL COURT ERROR

Hogan argues that the trial court erred by allowing him to testify while incompetent and by making evidentiary errors. We disagree.

#### A. *Competence*

Hogan asserts that the trial court erred by allowing him to testify when he was not competent. However, Hogan raised the issue of his competency in his brief and is fully addressed above. Accordingly, we do not address this SAG claim.

#### B. *Evidentiary Issues*

Hogan also asserts that the trial court erred by admitting and considering faulty evidence. However, Hogan does not explain what evidence he claims was faulty. Therefore his argument is not adequately briefed to merit review and we do not review this claim. RAP 10.10(c).

### IV. SENTENCING

Hogan argues that he should receive credit for the time he served in inpatient care. He asserts that he spent 30 days in an inpatient program and that he was led to believe that his plea agreement would lead to less than a year of confinement.

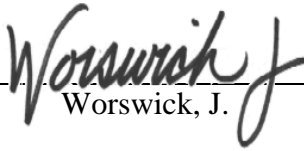
The record on appeal does not contain any information related to this claim. Moreover, because Hogan will be resentenced, he will have the opportunity to raise this issue in the trial court.

### CONCLUSION

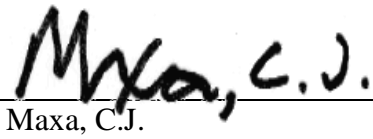
We affirm Hogan's convictions. However, we reverse Hogan's sentence and remand to the trial court with instructions to conduct a sentencing evidentiary hearing and to thereafter resentence Hogan.

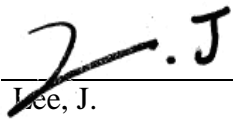
No. 49910-0-II  
Cons. No. 49914-2-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
Worswick, J.

We concur:

  
Maxa, C.J.

  
Lee, J.