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No. 71095-8-I
King County Superior Court No. 12-1-05650-8

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

STATE OF WASHINGTON,
Plaintiff-Respondent,
v.

MICHAEL WADE,
Defendant-Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

APPELLANT'S OPENING BRIEF

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1. Did the trial court err in admitting co-defendant Patterson's prior inconsistent statement as substantive evidence because it was not statement of "identification of a person made after perceiving the person" as required by ER 801(d)(1)(iii)?

2. Even if the trial court properly admitted co-defendant Patterson's statement for identification purposes, did the trial court exceed the bounds

of the rule when it permitted the investigating officer to repeat co-defendant Patterson's other statements detailing Wade's involvement beyond the "identification?"

3. Did the erroneous admission of Patterson's statement deny Wade a fundamentally fair trial?

4. Even with co-defendant Patterson's statement, was there sufficient evidence to convict Wade of anything other than trafficking in or possessing stolen property?

5. Where six guns were stolen from the same victim during the same burglary on the same day, were the six counts of theft of a firearm the same criminal conduct?

III.
STATEMENT OF THE CASE

A. PROCEDURAL FACTS

Michael Wade, Jr. was charged with 12 counts of criminal conduct: three counts of residential burglary, six counts of theft of a firearm, one count of second degree theft, one count of trafficking in stolen property, and one count of first degree unlawful possession of a firearm. CP 40-46, 141-147. He waived his right to a jury trial. CP 116. At the close of the bench trial, he was convicted of all 12 counts. 7/26/13 RP

1-20. The trial court sentenced Wade to 549 months in prison (45 years). CP 155-163. This timely appeal followed. CP 164-166.

B. SUBSTANTIVE FACTS

Wade initially had three co-defendants: Filmon Berhe, Cody Wade, and Christopher Patterson. Berhe entered a plea and was sentenced to 124 months. Cody Wade entered a plea and was sentenced to 89 months. Patterson entered a plea and was sentenced to 84 months.

On October 5, 2012, Bellevue police officers were dispatched to Newport Shores to investigate "a suspicious vehicle." 7/10/13 RP 15. A caller had reported seeing a gold Toyota Camry "with suspicious males"[1] in it. The caller gave the police the license plate number. *Id.* No evidence of a crime was observed, however. *Id.* at 18.

On October 9, the Bellevue Police went to 7900 48th Avenue South, the address where the gold Camry was registered. 7/11/13 RP 15. They saw the car and followed it to a jewelry store. *Id.* at 19. Cody and Michael Wade, Patterson, and Berhe were all observed in the Camry. *Id.* at 65-69. Patterson and Cody got out at the jewelry store. *Id.* at 84.

Cody Wade and Patterson came out of the store. *Id.* at 20. Officers went into the jewelry store and photographed the items that Cody Wade

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[1] The occupants were described as "five youthful looking black males." CP 49.

and Patterson sold to the owner. *Id.* at 22-23. The jewelry was later identified as belonging to the victim of a burglary, Paul Wu. 7/11/13 RP 31.

Officers arrested Wade at the scene because he had an outstanding Department of Corrections' "no bail" arrest warrant. *Id.* at 70, 93. Officers saw gloves and two computers in the Camry in plain view. *Id.* at 94. During a subsequent search under a search warrant, the police found a good deal of stolen property in the Camry. *Id.* at 135-139. The police later determined this property belonged to homeowners Carl Reek, Paul Wu and Binh Vu.

Carl Reek testified that he lived in Kirkland. 7/10/13 RP 25-30. He had a collection of handguns and rifles. *Id.* at 32. His home was burglarized on October 9, 2012. *Id.* at 34. He stated that six of his guns, a Kodak camera, a pearl necklace, diamond earrings, some cash, and two computers were stolen. *Id.* at 43, 64, 72; State's Exhibit 17. A neighbor had seen a golden brown sedan near the Reek's home. A thin, brown skinned man was in the driver's seat. *Id.* at 108-09.

Paul Wu testified that his house was burglarized on October 9, 2012. *Id.* at 125-28. The intruder took a purse, two laptops, a camera, and jewelry. *Id.* at 128-29. A witness identified Filmon Berhe as a person she had seen near Wu's house. 7/11/13 RP 37.

Binh Vu testified that his house in Kenmore was burglarized on October 9, 2012. 7/16/13 RP 6-16, 55-73.

The police, however, found no independent forensic evidence at the scenes of the burglaries linking Wade to actual entry into the homes. Reek's guns were never recovered.

After Wade's arrest, the police located cellular phones in the Camry. The police obtained a search warrant for phone records relating to all of the co-defendants. Exhibit 55; 7/15/13 RP 21-57. From that data, the police could determine that on October 9, 2012, Wade's cell phone had contact with the cell phones registered to Berhe and Cody Wade. The calls were captured by cell towers near the site of the burglaries. *Id.* at 57-127

The police also obtained the recordings that Wade made from the King County Jail while he was incarcerated before trial. *Id.* at 134-162; State's Exhibit 68. In those calls Wade told others that he was in deep trouble. *Id.* He described his arrest and discussed "Barney", which the trial court later found to refer to a purple GMC Yukon associated with Cody Wade. Wade said that "Barney" had to be "clean and sober." The police had seized and searched that vehicle but nothing of evidentiary value was found in it. Wade also discussed the search of his grandmother's home.

Id. As to his co-defendants Wade described Berhe as "solid" but was "worried" about Patterson. *Id.*

The State also presented evidence that Wade had previously been convicted of a felony. 7/16/13 RP 74-79.

Finally, the State called co-defendant Christopher Patterson as a witness. Prior to trial, Patterson had given a statement implicating Wade in the crimes. CP 34-36. By the time of trial, however, the State well knew that Patterson would deny that Wade assisted him in committing the burglaries. Defense counsel objected and argued that the State could not call Patterson to impeach him. Defense counsel argued that Patterson's post-arrest statement, if admissible, would only be impeachment evidence. 7/17/13 RP 7-16.

The State argued that Patterson's post-arrest statement that Wade committed the burglary with him was admissible under ER 801(d)(1)(iii) as a statement of "identification of a person made after perceiving the person." The State argued Patterson was not being called solely for impeachment. Rather, the State said, he was being called to make him "available for cross examination." 7/17/13 RP 9. The State argued that under the decision in *State v. Grover*, 55 Wn. App. 923, 780 P.2d 901 (1989), *review denied by State v. Peeler*, 114 Wn.2d 1008, 790 P.2d 167 (1990), this was a permissible use of the rule. Eventually, the trial judge

agreed that the decision in *Grover* permitted the introduction of Patterson's pretrial statement as substantive evidence. 7/22/13 RP 1-12.[2]

Patterson initially stated that he would not answer the State's questions. Eventually, he testified that on October 9, 2012, he was driving the Camry. He said he committed two burglaries but denied that Michael Wade was involved. 7/17/13 RP 16-76. He stated that he had seen none of the guns alleged to have been stolen from the Reek residence. 7/17/13 RP 52.

After Patterson testified, Officer Smith testified that he had taken a statement from Patterson after his arrest on October 11, 2012. Smith said that Patterson admitted "culpability" in the burglaries and the theft of the firearms" and that he was "with" Wade "during that time." 7/22/13 RP 57. Officer Christianson also testified that Patterson identified Wade as "having committed the burglaries with him." *Id.* at 28. Christianson testified that he had first explained to Patterson how serious potential charges could be. *Id.*

State also asked Christianson:

> Q . [D]id Mr. Patterson provide details about the burglaries that you asked about?

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[2] The State also argued that they were calling Patterson to establish that the burglaries occurred. *Id.* at 12. The defense pointed out that Reek, Vu and Wu had all testified that they had been burglarized. *Id.*

A. Yes, he did.

Q. What about details about the firearms?

A. He did provide some details about the firearms, where he believed that they went immediately after the burglary once the four of them -- and when I say that, meaning the purposes that I just referenced, Christopher Patterson, Michael Wade, Cody Wade, and Filmon Berhe -- when they arrived back after the burglaries to Carol Anderson's residence, where he believed the firearms went at that point. And then subsequently where three of the six firearms were disbursed to or who they were disbursed to after that time.

Q. Did he give you an identification of the person who was handling the firearms after the burglaries?

A. Yes.

Q. Who was that?

A. Michael Wade.

7/22/13 RP at 24.

C. SENTENCING

At sentencing the State told the Court:

As the Court is aware, the defendant is being sentenced today for on six counts of theft of a firearm and one count of unlawful possession of a firearm in the first degree. Each of those standard ranges therefore would be served consecutively under the statute.

10/17/13 RP 5.

Defense counsel did not address this issue or argue that all six counts should be treated as the same criminal conduct.

IV.
ARGUMENT

A. THE TRIAL COURT'S ERRED IN ADMITTING CO-DEFENDANT PATTERSON'S PRIOR INCONSISTENT STATEMENT AS SUBSTANTIVE EVIDENCE BECAUSE IT WAS NOT A STATEMENT OF "IDENTIFICATION OF A PERSON MADE AFTER PERCEIVING THE PERSON." ER 801(D)(1)(III).

This court reviews whether a statement was hearsay de novo.

State v. Neal, 144 Wn.2d 600, 610, 30 P.3d 1255, 1261 (2001).

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

> Hearsay is generally inadmissible because the statement is inherently untrustworthy: the declarant may not have been under oath at the time of the statement, his or her credibility cannot be evaluated at trial, and he or she cannot be cross-examined.

ER 802.

Under ER 801, an out-of-court statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving that person. ER 801(d)(1)(iii). The out-of-court statement can be introduced by a witness other than the declarant. *Grover*, 55 Wn. App. at 932; *State v. Jenkins*, 53 Wn. App. 228, 233 n.3, 766 P.2d 499, *review denied*, 112 Wn.2d 1016 (1989).

The trial court admitted Patterson's statements under *Grover.* 7/28/08(II) RP 10-11. In *Grover*, an eyewitness to a robbery gave a statement to the police identifying the two robbers by name. *Id.* at 254. At trial, the witness denied any memory of the robbery or that she had identified the robbers by name. *Id.* at 255. The witness vaguely remembered giving a statement to the police. *Id.* The police officer who obtained the witness's statement was permitted to testify on the witness's prior identification of the robbers under ER 801(d)(1)(iii). *Id.* In a footnote, this Court rejected the defendant's additional argument that the rule should be limited to situations where the declarant is shown a person or photograph of a person and makes an identification because of that showing. *Grover,* 55 Wn. App. at 932, n.1.

But *Grover*'s rejection of the narrow interpretation suggested by the defendant does not undermine the basis for the rule. The basis of the rule is that courtroom identifications are often made after the passage of time but identifications made closer to the crime, under less suggestive conditions, are more reliable. Comment, Fed. Rule Evid. 801. The State's tactic, while it might fit with the most literal interpretation of the rule, was beyond the rule's meaning and purpose.

First, *Grover* did not involve the use of ER 801(d)(1)(iii) to admit the post-arrest statement of a defendant identifying his co-participants in a

crime as substantive evidence. Counsel can locate no case where ER 801(d)(1)(iii) was a vehicle for admitting a co-defendant's statement. The reason for that is clear. At the time of the arrest, the co-defendant has an enormous incentive to identify and blame others in order to mitigate his responsibility or to curry favor with the police. "Civilian" witnesses do not have these same motivations.

That is exactly what happened here. Upon arrest, Patterson was told that he was in very serious trouble and that statement implied that by cooperating, he might avoid a far longer sentence. But at trial, now represented by counsel, having accurate information about the potential sentence, having admitted the crime and having received a sentence, Patterson, may well have felt the obligation and the freedom to tell the truth.

And, even if Patterson's statement were admissible, it was limited to the statement that Michael Wade was with him on October 9, 2012. Any other details regarding Wade's actions during the crimes fall outside the narrow information from Patterson that is substantive, non-hearsay. The mere fact that Wade was with Patterson on October 9, 2012, is insufficient to support the conclusion that Wade entered the residences, stole the weapons or had a weapon in his possession.

The admission of this error was not harmless. An error is not harmless unless it was an "error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). The error thus requires reversal where there is a reasonable probability the error affected the verdict. *State v. McKinsey*, 116 Wn.2d 911, 914, 810 P.2d 907 (1991); *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). While the trial judge expressed doubts about Patterson's testimony, he clearly used that testimony to bolster other far less incriminating circumstances (see arguments below) to find Wade guilty. Absent Patterson's testimony, the only competent evidence is that Wade was an accomplice to the trafficking in the stolen property.

B. EVEN IF THE TRIAL COURT PROPERLY ADMITTED CO-DEFENDANT PATTERSON'S STATEMENT FOR IDENTIFICATION PURPOSES, THE TRIAL COURT EXCEEDED THE BOUNDS OF THE RULE WHEN IT PERMITTED THE INVESTIGATING OFFICER TO REPEAT CO-DEFENDANT PATTERSON'S OTHER STATEMENTS DETAILING WADE'S INVOLVEMENT BEYOND THE "IDENTIFICATION."

In a prosecution for unlawful possession, the State must prove knowing possession of the firearm. *State v. Anderson*, 141 Wn.2d 357, 359, 366, 5 P.3d 1247 (2000). "Possession may be actual or constructive,

and 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." *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). But proximity alone cannot establish constructive possession. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). A defendant with prior felony convictions does not violate the law by being near a firearm if he or she has not exercised dominion or control over the weapon or premises where the weapon is found.

The trial judge made no factual findings relating to when or where Wade had actual or constructive possession of any firearm in his written or oral findings.[3] And, the only evidence in this case that Wade had actual or constructive possession of any firearm is the statement by Detective Christianson that Patterson told him that Wade handled and disbursed the weapons after the burglaries. But in his oral ruling the trial court found that Patterson's statement, even combined with the cell tower evidence, was insufficient for conviction.

And, had the trial judge given any credence to Patterson's statement that Wade handled the guns, it was hearsay and useful only as impeachment. The State also offered this as a statement of identification

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[3] The judge did not find Wade guilty as an "accomplice" to the felon in possession charges against Behre, Patterson or Cody Wade in Counts 13, 14 or 15.

of a person after perceiving the person. But, as argued above, that rule is limited by its plain language. Officer Christianson's recitation of Patterson's statement about the weapons had nothing to do with identification. Rather – if true – it was a conclusive statement that "Wade committed the crime." At most, the non-hearsay portion of Patterson's statement was limited to the fact that Wade was with Patterson on October 9, 2012. As argued above, using Patterson's statement as the sole proof that not only was Wade with him but that Wade handled firearms or disposed of them, extends the rule beyond its plain terms and far, far beyond its proper interpretation and application.

C. THE ADMISSION OF PATTERSON'S STATEMENT DENIED WADE A FUNDAMENTALLY FAIR TRIAL

The Sixth and Fourteenth Amendments guarantee Wade a fair trial. Principles of due process entitle an accused person to a fair trial, and only a fair trial is a constitutional trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The erroneous admission or misuse of evidence may deny an accused person a fair trial. *Dudley v. Duckworth*, 854 F.2d 967, 970 (7th Cir. 1988), *cert. denied*, 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989); *see also Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

Here the State misused ER 801(d)(1)(iii). As argued above, the rule insures that the witness's most timely identification of a person is admissible. It is not a tool to seek the admission of a co-defendant's post-arrest efforts to blame his criminal conduct on someone else.

D. THERE IS INSUFFICIENT EVIDENCE TO FIND WADE GUILTY OF ANY CRIME OTHER THAN TRAFFICKING IN STOLEN PROPERTY OR POSSESSION OF STOLEN PROPERTY

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888, *review denied*, 95 Wn.2d 1021 (1981); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The trial court stated in its oral ruling that if the only evidence before him were Patterson's post-arrest statement and the cell phone tower evidence, "I would find that evidence insufficient to convict." 7/26/13 RP

10-11. But the Court found several other pieces of evidence that, in his view, tipped the balance. The judge concluded that Wade was acting in a suspicious way when near the Camry, there were gloves and broken glass in the Camry,[4] that after his arrest Wade made calls to his brother in a "poorly disguised request to destroy or hide evidence," that he worried that Patterson would talk and that Wade gave a "semi-confession" by stating that he hurt no one. 7/26/13 RP 14-16.

From this evidence, the Court concluded that Wade's behavior showed knowledge and complicity in criminal activity. But the question remains, knowledge and complicity in *what* crime? Wade could have been very concerned that items of stolen property were in the car and the prospect he might be convicted of possession or trafficking in stolen property. In *State v. Mace*, 97 Wn.2d 840, 842-43, 650 P.2d 217 (1982), the State charged Mace with burglary for entering a home and stealing bank cards. The State presented evidence that police found a receipt and bag that bore Mace's fingerprints near a cash machine where the stolen bank cards were used, but no evidence connected Mace to the burgled

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[4] The fact that gloves are located in a vehicle is hardly evidence that the driver is a burglar. Gloves are ubiquitous in vehicles because drivers need them if their car breaks down or in case of inclement weather. *Brooks v. State*, 23 So.3d 1227, 1229 (Fla. Dist. Ct. App. 2009) (items of personal apparel, such as common gloves, are not burglary tools).

home. While this evidence likely showed receipt of stolen property, the court held it could not support the burglary conviction, noting "[t]here was no direct evidence, only inferences, that he had committed second degree burglary by entering the premises in Richland." *Mace*, 97 Wn.2d at 843. *See also State v. Q.D.*, 102 Wn.2d 19, 28, 685 P.2d 557, 562-63 (1984).

Here, apart from Wade's association with the Camry and the co-defendants, there is no other corroborative evidence he committed the residential burglaries and thefts. Some of this might implicate Wade in ***some*** crime, such as possession of stolen property, but none of it establishes that Wade was present at the burglaries, entered or assisted in entering a dwelling or stole anything or was an accomplice to his co-defendants' actions in that regard.

E. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE SIX COUNTS OF THEFT OF A FIREARM WERE THE SAME CRIMINAL CONDUCT

Offender score computations are reviewed de novo. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). "It is axiomatic that a sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score." *Id.* A challenge to an offender score calculation is a sentencing error that may be raised for the first time on appeal. *Id.* at 513, 878 P.2d 497; *State v. Anderson*, 92 Wn.

App. 54, 61, 960 P.2d 975 (1998), *review denied*, 137 Wn.2d 1016, 978 P.2d 1099 (1999).

When imposing a sentence for multiple current offenses, the sentencing court determines the offender score by considering all other current and prior convictions as if they were prior convictions. RCW 9.94A.589(1)(a). However, if the sentencing court finds that some or all of the current convictions encompass the same criminal conduct, then those offenses are counted as a single crime. RCW 9.94A.589(1)(a). Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). In construing the intent element, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). The defendant bears the burden of production and persuasion on same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013).

RCW 9.41.040(7), which provides that each firearm owned or possessed is a separate offense, does not override the Sentencing Reform Act (SRA) requirements for calculating offender scores. *State v. Murphy*, 98 Wn. App 42, 51, 988 P.2d 1018 (1999), *review denied*, 140 Wn.2d 1018, 5 P.3d 10 (2000); *State v. Simonson*, 91 Wn. App. 874, 885-86, 960

P.2d 955 (1998), *review denied*, 137 Wn.2d 1016, 978 P.2d 1098 (1999). Although the presence of multiple firearms constitutes separate offenses for charging purposes, the SRA's "same criminal conduct" provision applies to calculate the offender score. *Murphy*, 98 Wn. App. at 51.

The same is true for multiple counts of theft of a firearm. *State v. Tresenriter*, 101 Wn. App. 486, 4 P.3d 145 (2000), *opinion amended on reconsideration*, 14 P.3d 788 (Wash. Ct. App. 2000), *review denied*, 143 Wn.2d 1010, 21 P.3d 292 (2001). In *Tresenriter* the victim's home was burglarized and nine firearms were taken. Tresenriter was charged with nine counts of theft of a firearm. The State contended that all nine counts were to be counted separately. The appellate court found that all the counts were the same criminal conduct because each was committed at the same time and place. The weapons were taken from the same victim. And, each involved the same intent to deprive the rightful owner of his property. The court remanded for re-computation of the correct offender score. *See also State v. Roose*, 90 Wn. App. 513, 957 P.2d 232 (1998).

This case is identical to the facts in *Tresenriter.* Accepting all of the State's evidence as true, the six counts of theft of a firearm are the same criminal conduct. All six weapons were stolen from Carl Reek on October 9, 2012.

V.
CONCLUSION

For the reasons stated above, this Court should reverse and remand Wade's convictions.

DATED this 24 day of June, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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