Supreme Court No. 92019-2
Court of Appeals No. 71095-8-I

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

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL WADE,
Petitioner.

PETITION FOR REVIEW

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

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

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 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 first explained to Patterson how serious the potential charges could be. *Id.*

The State also asked Christianson:

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

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 24.

The trial court entered findings of fact and conclusions of law. Wade was sentenced to 45.75 years in prison. He appealed. The Court of Appeals affirmed. The relevant portions of the Court of Appeals' opinion will be discussed below.

V.
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. THIS CASE PRESENTS A QUESTION OF FIRST IMPRESSION REGARDING THE USE OF ER 801(D)(1)(III) TO ADMIT THE POST-ARREST STATEMENT OF A DEFENDANT IDENTIFYING HIS CO-DEFENDANT IN A CRIME AS SUBSTANTIVE EVIDENCE. THIS IS QUESTION OF SUBSTANTIAL PUBLIC IMPORTANCE. RAP 13.4(B)(4).

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 the reasoning in *Grover*. 7/28/08(II) RP 10-11. The Court of Appeals said that the "dynamics of this case are strikingly similar to those in *Grover*." But they are not.

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 of 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.

Even if *Grover* supports the admission of Patterson's statement, this Court should disavow that decision. There is no case where ER 801(d)(1)(iii) was used as a vehicle for admitting a co-defendant's statement in order to implicate someone else in the crime. 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 own responsibility or to curry favor with the police. "Civilian" witnesses do not have these same motivations.

B. THIS CASE PRESENTS A QUESTION OF FIRST IMPRESSION REGARDING THE LIMITS OF TESTIMONY REGARDING "IDENTIFICATION" PURSUANT TO ER 801(D)(1)(III). THIS IS QUESTION OF SUBSTANTIAL PUBLIC IMPORTANCE. RAP 13.4(B)(4).

The Court of Appeals' conclusion that the trial judge used this additional evidence only for impeachment is not supported by anything in the record. In fact, the trial court admitted Patterson's statement in total.

In Finding of Fact 20, the trial court said: "Christopher Patterson said the defendant was involved." CP 170.

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. 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. Using Patterson's statement as the sole proof that Wade handled firearms or disposed of them extends the rule beyond its plain terms and far, far beyond its proper interpretation and application.

The State argued that Detective Christianson's testimony is proper under *State v. Stratton*, 139 Wn. App. 511, 517, 161 P.3d 448 (2007), *review denied*, 163 Wn.2d 1054, 187 P.3d 753 (2008). But in *Stratton* the issue was whether, considering ER 801(d), the trial court erred in allowing hearsay evidence of a witness's identification of Stratton as the person wearing the yellow t-shirt. Stratton contended that a description of clothing worn by a person is not a statement made in identification of a person. *Id.* at 516. But in *Stratton*, the witnesses did not know Stratton's

name. Thus, the court concluded that in that situation extrajudicial identifications would in that situation also relate to an extrajudicial description of clothing.

But the facts here are clearly distinguishable. Patterson knew who Wade was and the testimony given by Detective Christianson did not relate to a description of clothing. Instead, Detective Christianson's testimony exceeded the permissible bounds of identification and recounted facts that were not necessary to make an identification of Wade.

Other courts have recognized this limitation on ER 801(d)(1)(c) evidence.

> Although prior identifications are admissible under an exception to the hearsay rule, an account of the complaining witness' description of the offense itself is admissible under this exception only to the extent necessary to make the identification understandable to the jury.

Porter v. United States, 826 A.2d 398, 410 (D.C. 2003), *as amended on denial of reh'g* (Sept. 26, 2006). And testimony recounting details of the complainant's descriptions of the offense would not be admissible under the prior identification exception. *Battle v. United States*, 630 A.2d 211, 215 (D.C. 1993).

Thus, anything other than Patterson's statement that Wade was with him was inadmissible. The evidence that Patterson told the police that Wade was with him was completely understandable to the judge who tried

this case and, had there been a jury, it would have been understandable to a reasonable juror. This Court should impose significant limitations on the use of ER 801(d)(1)(iii) in order to prevent the State from circumventing the general prohibition regarding the admission of hearsay in this manner.

C. THE TRIAL COURT MADE NO FINDINGS TO SUPPORT ITS CONCLUSION THAT WADE WAS IN UNLAWFUL POSSESSION OF A FIREARM BECAUSE THE EVIDENCE WAS INSUFFCIENT FOR HIM TO DO SO. THE COURT OF APPEALS' CONCLUSION THAT WADE DID HAVE POSSESSION IS IN CONFLICT WITH THIS COURT'S DECISION IN *STATE V. DAVIS*.[1] RAP 13.4(B)(1).

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).

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[1] *State v. Davis*, 182 Wn.2d 222, 340 P.3d 820 (2014).

The 45 year sentence is this case is being driven by provisions of RCW 9.94A.589. That statute provides:

> If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

However, there is insufficient admissible evidence to find that Wade had actual or constructive possession of any firearm and the trial court failed to support the conviction with any findings of fact on this count. 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 trial 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, 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. But the trial judge made no

specific findings that Wade was in actual or construction possession of a firearm.

CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial. The purpose of CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal. *See City of Bremerton v. Fisk*, 4 Wn. App. 961, 962, 486 P.2d 294 (1971).

The Court of Appeals appears to admit that no findings were entered, but instead suggests that it was Wade's responsibility to return to the trial judge and point out that his findings did not support a guilty verdict on that count. In doing so, that court cites to *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187, 1190 (1998), but that case is distinguishable because there, the trial court failed to enter any findings of fact or conclusions of law. The Court also cites to *State v. Alvarez*, 128 Wn.2d 1, 19-22, 904 P.2d 754 (1995). But that case stands only for the proposition that remand is proper only where a trial court enters a conclusion of law finding a defendant guilty of a crime but omits a finding as to an essential element necessary to support that conclusion. If the omission of the finding was an inadvertent error rather than a determination that the State failed to meet its burden of proof on the element, the trial court has the discretion to supply the omitted finding.

Remand is allowed because the omission is inconsistent with the conclusion of guilt. *State v. A.M.,* 163 Wn. App. 414, 425-26, 260 P.3d 229, 235 (2011), *review denied* (Sep 07, 2012), and cases cited therein.

But here, the evidence was insufficient to support a conviction for unlawful possession of a firearm. First, the Court of Appeals says: "Wade stole the guns as a principal or an accomplice." *State v. Wade*, No. 71095-8-I, 2015 WL 4041143 at *9 (Wash. Ct. App. June 29, 2015). But he cannot be guilty of felon in possession of a firearm as an accomplice under RCW 9.41.040(1): "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted ... of any serious offense." Thus, in order to be guilty of the crime, Wade must have actual or constructive possession of the weapon.

Actual possession means physical custody of an item, but does not include "passing control which is only a momentary handling." *Davis*, 182 Wn.2d at 237.

> To determine constructive possession a court examines whether, under the totality of the circumstances, the defendant exercised dominion and control over the item in question. While the ability to immediately take actual possession of an item can establish dominion and control, mere proximity to the item by itself cannot. Factors supporting dominion and control include ownership of the item and, in some circumstances, ownership of the premises. But, having dominion and control over the premises containing the item does not, by itself, prove constructive possession.

Id. at 234.

This Court must keep in mind that the trial judge made no findings on these issues and for that reason alone, this count should be reversed. The Court of Appeals found that the trial judge did not rely on the statement by Patterson that Wade handled the guns. Thus, there is no actual possession in this case.

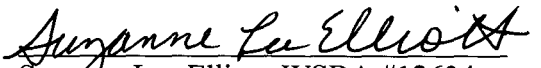
Rather, the Court's decision suggests that it would find that Wade had constructive possession of the guns. But that conclusion is based on the Court of Appeals' assumption that the guns (which were never recovered) were at some point in the Camry. The Court of Appeals actually states that the Camry was used to transport the guns even though no one testified to that fact. The Court of Appeals says: "Wade appeared to be in charge of the initial distribution of the stolen firearms." But no one testified to that. In short, the Court of Appeals made unreasonable factual findings of its own to affirm the conviction in the absence of any findings by the trial judge. Nothing in the court rules or case law permits the Court of Appeals to engage in its own fact findings or "inferences" in order to affirm a conviction so lacking in evidentiary support.

VI.
CONCLUSION

For these reasons, the Court should accept review and reverse the Court of Appeals.

DATED this 29th day of July, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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2015 WL 4041143
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,
v.
Michael Anthony **WADE**, Appellant.

No. 71095-8-I. | June 29, 2015.

Appeal from King County Superior Court; Hon. Jeffrey M. Ramsdell, J.

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UNPUBLISHED OPINION

APPELWICK, J.

***1** Michael **Wade** appeals 12 convictions in a bench trial arising from three residential burglaries. The admission of a co-participant's outof-court statement, as a statement of identification under ER 801(d)(1)(iii), implicating him in the crimes was not error. Sufficient evidence supports the convictions. Any error in failing to treat six counts of theft of a firearm as the same criminal conduct was waived by failing to object. We affirm.

FACTS

On a Tuesday afternoon, October 9, 2012, three homes in Seattle area suburban neighborhoods were burglarized within a three-hour time-span. The first burglary took place at the Kirkland home of Paul Wu. Wu's neighbor, Hana Trnka, was unloading groceries from her car at around noon, when she noticed a grayish sedan parked near her house in front of an empty lot. Trnka approached the car and asked the driver if he was lost or needed assistance. The sole occupant sitting in the driver's seat was a bald-headed thin man who appeared to be of Middle Eastern descent. The man was talking on a cell phone. He told Trnka he did not need help, but explained that he parked to avoid talking while driving.

Wu's wife returned home after lunch and discovered the break-inThe burglars had entered the home by shattering a sliding glass door at the back deck. The stolen items included laptop computers, a tablet, jewelry, a Pentax camera, handbags, and coins.

The second burglary occurred at a Kenmore home belonging to Binh Vu. The Vus returned home at approximately 2:00 p.m. and discovered their home had been ransacked and burglarized. The burglars again entered the home by breaking a glass door at the back of the house. The items taken from the home included numerous bottles of liquor, gold jewelry, and a tablet Vu recently purchased.

The third burglary occurred at the Kirkland home of Carl Reek. That afternoon, Reek's neighbor, Vanessa Simpson, walked her dog past the Reeks' house and noticed a golden brown sedan parked in front. A thin man with brown skin was sitting in the driver's seat and leaned back in his seat as Simpson passed. When Simpson passed the Reeks' home a second time about 10 minutes later, the car was gone and Reek's wife was standing at the front door.

It was shortly after 2:00 p.m. when Reek's wife returned home, thought she heard people inside the house, and then saw that the front door had been kicked in. Several upstairs rooms were visibly disturbed and plastic shopping bags normally stored in the bathroom were strewn around. Reek reported numerous missing items including six firearms, approximately $1,400 in cash, jewelry, laptops, a tablet, a Kodak camera, and a package of .38 caliber ammunition.

About a month before the burglaries, Reek answered a knock at the door and observed a thin African–American man on the doorstep. It was not clear what the man wanted. He backed off the porch when Reek opened the door and said something unintelligible about an "opportunity." Then, exactly two weeks before the burglaries, Reek answered another knock at the door and a different, larger African–American man was at the door. Reek communicated that he was occupied on the telephone and the man left. Also, in the weeks before the

burglary, Reek noticed a brownish gold Toyota Camry parked in different places in the neighborhood.

*2 A few days before the burglaries, a caller reported seeing a gold Camry parked in several different locations in an Eastside residential neighborhood. The caller provided a license plate number and said that at one point, the occupants got out of the car and walked around a house. A police officer went to investigate and saw the car as it passed him travelling in the opposite direction. There were at least three African–American males in the car. The officer was unable to catch up with the car.

On the date of the burglaries, Bellevue Police Detective Jeffrey Christiansen received the information about the gold Camry from a few days before, and without knowing the burglaries had just occurred, decided to investigate. Christiansen learned that the Camry was registered to Carol Anderson and associated with her grandson, Michael **Wade**. Christiansen and a surveillance team arrived at Anderson's home in South Seattle at approximately 3:30 p.m.

About 30 minutes later, the gold Camry arrived. There were four people in the car. **Wade** was driving the Camry and a person later identified as Filmon Berhe was in the front passenger's seat. After **Wade** parked, he went around to the back of the car and opened the trunk. One of the back seat passengers, later identified as **Wade's** brother Cody **Wade**, got out of the car and stood next to **Wade**. **Wade** appeared to be manipulating items in the trunk while Cody visually scanned the area. [1] About a minute later, as a parking enforcement vehicle drove by, Cody tugged at the back of **Wade's** shirt and **Wade** closed the lid of the trunk. [*Id.* at 78–79] **Wade** then reopened the trunk, Cody took a white plastic shopping bag and walked across the street with it and out of the detectives' view. The bag appeared to be weighed down by heavy objects.

Wade, Berhe, and the fourth person, later identified as Christopher Patterson, went toward Anderson's house. A few minutes later, all four returned to the car, **Wade** drove away from the house, and the officers followed. Eventually, the car stopped at a strip mall and Cody and Patterson got out of the car and carried a small bag into a jewelry store. **Wade** parked across the street.

At that point, Detective Christiansen was able to definitely confirm that **Wade** was the driver and decided to arrest him on an outstanding warrant. During the process of that arrest, police officers learned of another warrant for Berhe's arrest and arrested him at the same time. From outside the Camry, Detective Christiansen could see several cloth gloves and a partially obscured tablet inside the car.

While some officers arrested **Wade** and Berhe, other officers briefly detained Cody and Patterson. After the officers released Cody and **Wade**, the jewelry store owner confirmed that they had sold some jewelry and later, one of the homeowners confirmed that some of the jewelry belonged to him.

The police searched the Camry and found a substantial amount of property stolen from all three homes including tablets, computers belonging to Wu and Reek, Wu's Camera, and bottles of alcohol. The Camry also contained an extra-large jacket with glass shards in the pockets and several cell phones. However, the firearms taken from the Reek residence were not in the Camry. Seattle police officers eventually found one of the firearms missing from the Reek residence in a stolen car.

*3 Two days after arresting **Wade** and Berhe, police officers arrested Cody and Patterson. Patterson admitted that he committed the burglaries with **Wade**, Berhe, and Cody. Patterson specifically confirmed that the stolen property included firearms and said that **Wade** was the person who primarily handled the guns.

Within an hour of his arrest, **Wade** began making desperate telephone calls from the jail, telling Cody that if he ever wanted to see him and Berhe "alive" again, he must "immediately" get rid of the "dunt-dunt-da-dunt-dunt-dalas" that were located in "Barney the dinosaur" **Wade** stressed the urgency of this, repeatedly stating that the "dunt-dunt-da-dahs" must be "[o]ut of Barney" and that "Barney" had to be absolutely "clean and sober." **Wade** talked at length about the numerous potential firearms charges and sought assurance that the State would not be able to pursue those charges without finding the stolen firearms.

Police searched Anderson's home and a purple GMC Yukon vehicle associated with Cody parked across the street from Anderson's home, but found no evidence inside the home or the vehicle related to the burglaries. However, when the Yukon was towed, police found a white plastic shopping bag underneath the vehicle containing ammunition.

The State charged **Wade**, Berhe, Patterson, and Cody with three counts of residential burglary and two counts of theft of a firearm. The State later amended the information and charged each defendant with a total of 12 counts: three counts of residential burglary, six counts of theft of a firearm, one count of trafficking in stolen property, one count of theft in the second degree, and one count of unlawful possession of a firearm.[2] Berhe, Patterson, and Cody each entered guilty pleas and were sentenced prior to trial.[3] **Wade** waived his right to a jury and proceeded to a bench trial.

The State presented evidence of cell phone activity indicating that **Wade**, Berhe, and Cody were in cell phone contact with each other and were "in proximity to each house at the time of the burglaries." For instance, there was a 25 minute call between Berhe and Cody near the Wu home that started at approximately 11:45 am, encompassing the time that Trnka reported speaking to someone matching Berhe's description, who was talking on a cell phone.

Patterson reluctantly testified under a grant of immunity. Contrary to his statement at the time of his arrest, Patterson testified that he burglarized two houses by himself on October 9. He denied stealing any firearms. Patterson said that Cody and Berhe picked him up after the burglaries and he sold some stolen laptops while driving around with them. Patterson testified that **Wade** later joined the group, they switched cars to the Camry, and he put another stolen item, an iPad, in the trunk of the Camry and planned to sell it. Patterson claimed that the jewelry he sold belonged to his girlfriend.

Patterson testified that he never implicated the others or admitted to taking firearms. Patterson acknowledged that he signed a statement containing false information, but explained that the police forced him to sign and said they would help him. The State read some portions of Patterson's statement and asked whether or not those specific statements were true, including Patterson's statement that he "was with Mike and Cody **Wade** and Phil" on October 9, 2012 and his statement that **Wade** brought the guns into the house and that the six guns were together in one plastic shopping bag.

***4** Detective Christiansen described Patterson's arrest and recounted Patterson's postarrest statements that he committed the burglaries with **Wade**, Cody and Berhe and his statement that **Wade** was the person who handled the firearms after the burglaries.

Investigators did not find any fingerprint print evidence at the burglary scenes, suggesting that the suspects wore gloves. Police showed the Wus' neighbor, Trnka, a photo montage and she identified Berhe immediately as the man parked on the Wus' street at the time of the burglary.

The court entered findings of fact and conclusions of law and found **Wade** guilty of all twelve charges. At sentencing, the State conceded that theft in the second degree involving the property stolen from the Vu residence, amounted to the same criminal conduct as residential burglary of the Vu residence. The court did not include the theft conviction in the offender score calculation and did not impose a sentence on that count. Due to the operation of RCW 9.94A.589 (1)(c), which requires consecutive terms for the theft of firearm and unlawful possession of a firearm convictions, **Wade's** standard range was between 549 and 728 months. The court imposed 549 months. **Wade** appeals.

DISCUSSION

I. *Statement of Identification Under ER 801(d)(1)(iii)*

Wade challenges the trial court's determination that Patterson's statement implicating him in the October 2012 crimes was admissible as substantive evidence. He contends that statements of identification under ER 801(d)(1)(iii) do not encompass incriminating postarrest statements made by a former codefendant.

It was apparent before Patterson testified that he would not testify in accordance with his initial statement to the police. The court rejected **Wade's** argument that the State should not be able to call Patterson as a witness merely to impeach him. *See State v. Lavaris,* 106 Wn.2d 340, 344–45, 721 P.2d 515 (1986) (party may not call a witness for the primary purpose of impeachment with otherwise inadmissible evidence). Nevertheless, the trial court expressed concern as to whether Patterson's statement naming **Wade** as "the person I did the crime with" was truly a statement of identification within the meaning of ER 801(d)(1)(iii) and therefore admissible as substantive evidence. After considering briefing and argument, the court determined that Patterson's prior statement was admissible as substantive evidence based on this court's decision in *State v. Grover,* 55 Wn.App. 252, 256–57, 777 P.2d 22 (1989).

We review the trial court's interpretation of the rules of evidence de novo and its application of the rules to particular

facts for abuse of discretion. *State v. Sanchez–Guillen,* 135 Wn.App. 636, 642, 145 P.3d 406 (2006). "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). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. Under ER 801(d)(1), a statement is not hearsay if, "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is ... (iii) one of identification of a person made after perceiving the person."

***5** As the trial court observed, ER 801(d)(1)(iii) most commonly applies to admit a prior statement of identification after seeing the defendant's photograph or seeing the defendant in a line-up. *See e.g. State v. McDaniel,* 155 Wn.App. 829, 837–38, 877, 230 P.3d 245 (2010) (photomontage identification); [RP 7/17 at 13]. However, nothing in the language of the rule limits its scope to prior statements of visual identification.

As in *Grover,* this case involves a declarant who identified the defendant by name after visually perceiving him. 55 Wn.App. at 254. *Grover* involved a home invasion robbery. *Id.* Hughes was at home and her friend Price was out, when Price's step-children, Gardner and Parker, stopped by the house. *Id.* Two other men arrived shortly after and asked for Price's step-son, Parker. *Id.* Upon entering the house, one of the men pulled Hughes into a separate room, attacked her with a hatchet, threatened her, and demanded money. *Id.* When Price returned, the other man threatened him with a knife and demanded money. Parker told Hughes and Price to give the men their money. *Id.* Curiously, neither of the men robbed or attacked Parker or Gardner. *Id.* After the men left with money and property and the police arrived, Gardner gave a statement to the police. *Id.* She identified both assailants by name and said that Parker left to pursue them. When the police found Parker a short distance from the scene, the two individuals Gardner named and who also matched Hughes's descriptions were with him. *Id.* at 254–55.

After she was arrested on a material witness warrant, Gardner testified under a grant of immunity. *Id.* at 255. She said she could not remember the robbery, was intoxicated at the time, and only vaguely remembered giving a statement to the police. *Id.* She denied receiving any threats, but admitted her reluctance to testify. *Id.* One police officer testified that Gardener was not intoxicated at the time of the interview, and under ER 801(d)(1)(iii), the court permitted another officer to testify that Gardner identified Grover as one of the robbers. *Id.*

Grover appealed his robbery conviction. *Id.* This court rejected his argument that ER 801(d)(1)(iii) included only "statements of identification made by a witness during a lineup or upon viewing a photographic montage." *Id.* at 256. We concluded there was no basis to limit the rule to include visual, but exclude verbal, identifications. *Id.* at 257. In so holding, we noted that Oregon's comparable evidence rule includes official commentary stating that its rule is not "aimed at situations where, after an event, the declarant simply makes a statement which identifies the person involved ('X did it')." *Id.* at 257 n. 7. There is no similar commentary limiting Washington's rule. While **Wade** suggests that the result in *Grover* is inconsistent with the rule's purpose, he cites no authority that undermines our determination in *Grover* that Washington's rule encompasses verbal identifications.

***6 Wade** argues that the hearsay exception under ER 801(d)(1)(iii) does not apply if the declarant is a coparticipant in the crime, because unlike a civilian witness, a potential codefendant has "enormous incentive" to falsely implicate others. Nothing in *Grover* suggests such a limitation. In fact, the dynamics of this case are strikingly similar to those in *Grover.* The facts of *Grover* defeat **Wade's** argument. The circumstances clearly suggested Gardner's possible involvement in the crime when police initially questioned her. *See Grover.* 55 Wn.App. at 254. Gardner recanted her earlier identification. *Id.* at 255. Although she denied being threatened, it is reasonable to infer that she did so out of fear of retaliation. *Id.* Here, Patterson recanted his earlier statement to police, admitting he was involved and implicating the others. His testimony that he was labeled a "snitch" which put his life in "jeopardy" likewise supports the inference that he changed his story at trial out of fear.

For a declarant's statement to be admissible under ER 801(d)(1)(iii), the declarant must be available for cross-examination. Patterson, like Gardner, was available for cross-examination. **Wade** offers reasons to credit Patterson's trial testimony over his initial statement but there are equally compelling reasons to reach the opposite conclusion. Nothing in ER 801(d)(iii) or in the cases interpreting the rule suggests that a prior statement of identification is not admissible because it creates a conflict that the trier of fact must resolve. **Wade** had the opportunity to fully explore Patterson's motivations and the circumstances of his initial statement. In sum, the court

did not err in admitting Patterson's statement as substantive evidence under ER 801(d)(1)(iii).

Even if the statement that **Wade** was with Patterson on October 9, 2012 falls within the scope of ER 801(d)(1)(iii), **Wade** contends the rule does not apply to Patterson's additional statements that described the nature of his involvement in the crimes. But, in fact, the trial court decided the admissibility of only Patterson's statement that he was with **Wade** and the others under ER 801(d)(1)(iii). The record indicates that the court considered Patterson's additional statements only for purposes of impeachment.

II. ***Sufficiency of the Evidence***

Wade contends that, without considering Patterson's statement that he was the person who handled the firearms as substantive evidence, there is insufficient competent evidence to establish that he committed any of the charged crimes, apart from trafficking in stolen property. He thus challenges the sufficiency of the evidence supporting his convictions for residential burglary, theft of a firearm, unlawful possession of a firearm, and second degree theft.

According to **Wade**, the stolen property in the Camry and his connection to that car and the other codefendants was the only evidence connecting him to the crimes. **Wade** argues that the recorded jail telephone calls may reveal a general consciousness of guilt, but do not establish his participation in the burglaries or in the crimes involving firearms.

***7** To satisfy due process, the State must prove every element of a charged crime beyond a reasonable doubt. *In re Winship.* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When reviewing a challenge to the sufficiency of the evidence, this court considers the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Williams,* 137 Wn.App. 736, 743, 154 P.3d 322 (2007). The court draws all reasonable inferences from the evidence in the State's favor and interprets the evidence "most strongly against the defendant." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court considers both circumstantial and direct evidence as equally reliable and defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

To prove that **Wade** committed residential burglary, the State had to establish beyond a reasonable doubt that "with intent to commit a crime against a person or property therein" he entered or remained unlawfully in a dwelling other than a vehicle. RCW 9A.52.025. The court determined that **Wade** was acting in concert with and as an accomplice to Patterson, Berhe, and Cody during all the crimes that took place on October 9 and concluded that **Wade** or an accomplice entered and remained unlawfully in the three homes and stole property from each home.

Wade likens this case to *State v. Mace,* 97 Wn.2d 840, 842–43, 650 P.2d 217 (1982), where the only evidence connecting the defendant to the residential burglary was a bag and receipt bearing the defendant's fingerprints found near an ATM machine where stolen bank cards were used. The evidence here, however, was far more substantial. For instance, the evidence related to cell phones and cell towers indicated that **Wade** was in contact with the other participants and was in the area of each burglary at the time it occurred. **Wade** was arrested a short time after the burglaries driving a car registered to his grandmother and associated with him that contained property stolen from each residence, gloves, and a jacket that appeared to be his size containing shards of glass. The testimony of two eyewitnesses indicated that **Wade** was one of the group who entered the Reek and Wu residences. Finally, **Wade** acknowledged his involvement in the burglaries when he expressed his view that the potential punishment exceeded his culpability, because the group was merely "taking care of our folks" and no one was hurt. Sufficient evidence supports the court's determination that beyond a reasonable doubt **Wade** or an accomplice committed each of the burglaries.

RCW 9A.56.300 provides that a person "is guilty of theft of a firearm [when he] commits a theft of any firearm." With respect to each of the six firearms, the trial court concluded that **Wade** or an accomplice stole it from the Reek residence. It is undisputed that six firearms were missing from Reek's home after the burglary. Again, the cell tower evidence, eyewitness testimony, and Patterson's statement that he was with **Wade**, placed **Wade** and the Camry in proximity to the Reek home at the time of the burglary and indicated that **Wade** was one of the people inside the house removing property. The Camry contained other property taken from the Reeks' home. The testimony of eyewitnesses, including Detective Christiansen, established that **Wade** and the others stopped briefly at his grandmother's house shortly after the burglaries and removed some property from the Camry. All

of this evidence supports the court's determination that **Wade**, along with the others, took firearms from the Reek home.

***8** Here also, **Wade's** statements in the recorded jail telephone calls were damaging. It is true that **Wade** did not overtly admit to stealing firearms, nor expressly mention "guns" or "firearms." But, given the context of the conversations, it is clear that **Wade** was desperate to ensure that police would not locate the firearms taken from the Reek home or connect them to him.

Wade suggests a different interpretation and claims he was merely concerned about stolen property located in the Camry. But, **Wade** did not inquire about the Camry. He appeared to assume that it was in police custody. At certain points, **Wade** referred to the Camry as "the car," making no attempt to disguise the reference. **Wade** fails to explain why "Barney" refers to the Camry. **Wade** did not discuss the residential burglary, possession of stolen property, or any other charges that could result from the police finding stolen property in the Camry.

Wade was singularly focused on the charges stemming from the stolen firearms and whether those charges were viable if police did not locate the firearms. In one of the calls, **Wade** explained to Cody that he was specifically concerned after he learned that the police were watching when they stopped at Anderson's house and therefore likely knew that "Barney is involved." He therefore urged Cody to make sure the "dunt-dunt-da-dahs" were "[o]ut of Barney" and "further" away, "immediately." He expressed interest only in "Barney" or the "purple thing" and whether and to what extent it was "clean." The clear inference from the recorded jail calls is that **Wade** participated in stealing firearms from Reek's home. Even absent Patterson's statement that **Wade** primarily handled the firearms, there was sufficient evidence to establish that **Wade** committed theft of a firearm as a principal or an accomplice.

Under RCW 9.41.040(1) a person commits unlawful possession of a firearm "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted ... of any serious offense." **Wade** does not dispute that he was previously convicted of a serious offense. A person actually possesses something that is in his or her physical custody, and constructively possesses something that is not in his or her physical custody, but is still within his or her "dominion and control." *State v. Callahan,* 77 Wn.2d 27, 29, 459 P.2d 400 (1969). For either actual or constructive possession, the prosecution must prove more than a passing control. *State v. Staley,* 123 Wn.2d 794, 801, 872 P.2d 502 (1994). While the ability to immediately take actual possession of an item can establish dominion and control, mere proximity to the item by itself cannot. *Cf. State v. Jones,* 146 Wn.2d 328, 333, 45 P.3d 1062 (2002); *State v. Spruell,* 57 Wn.App. 383, 388, 788 P.2d 21 (1990). Factors supporting dominion and control include ownership of the item and, in some circumstances, ownership of the premises. *State v. Tadeo–Mares,* 86 Wn.App. 813, 816, 939 P.2d 220 (1997). Whether one has actual control over the item at issue depends on the totality of the circumstances. *Staley,* 123 Wn.2d at 802.

***9 Wade** claims there was no evidence that he exercised dominion and control over any firearm, and at most, the evidence indicated only proximity to the stolen guns. **Wade** relies on the Washington Supreme Court's recent decision in *State v. Davis,* 182 Wn.2d 222, 340 P.3d 820 (2014). In *Davis,* both defendants were convicted of rendering criminal assistance and firearm possession charges based on their actions following Maurice Clemmons's notorious shooting of four Lakewood, Washington police officers. *Id.* at 224. Clemmons sustained a gunshot injury and stole a firearm from one of the officers he shot and killed. *Id.* at 224–25. After the shooting, Eddie Lee Davis drove Clemmons to Letrecia Nelson's home. *Id.* at 225. After Nelson let the two men inside, Clemmons told Nelson about the shooting and the stolen firearm and requested clean clothes and assistance in treating his wound. *Id.* While another person helped Clemmons with the wound, Nelson put clothes and the stolen firearm in a shopping bag. *Id.* at 227–28. Clemmons stayed at Nelson's home for approximately 15 minutes. *Id.* at 228. Just before leaving, Clemmons asked Davis, " 'Where's the gun?' " *Id.* Davis responded that the gun was in a bag and handed the bag to Clemmons. *Id.*

A majority of the court determined that neither Nelson nor Davis exercised dominion and control over the firearm, because neither "asserted any interest" in the gun, but merely "briefly handled the item for Clemmons, the true possessor of the gun."[4] *Id.* at 235 (Stephens, J. dissenting). Critical to the court's conclusion were the circumstances of Clemmons's arrival and his tendency to control his family members. *Id.* While Clemmons was briefly distracted by other pressing issues while at Nelson's home and apparently did not know the gun had been placed in a bag, there was nothing to suggest he intended to transfer possession or control. *Id.* at 237. Nelson's and Davis's actions amounted to "mere proximity to and momentary handling" of the contraband. *Id.* at 235.

The evidence here does not suggest that **Wade** momentarily handled the guns on behalf of a true possessor or that he was merely proximate to stolen firearms. Unlike Nelson and Davis, **Wade** stole the guns as a principal or an accomplice. **Wade** was the driver and exercised control over the Camry, used to transport the guns. **Wade** was the person who opened the trunk and manipulated the property within it. **Wade's** attempt to conceal items as he stood behind the trunk suggests that the items he was handling would be readily recognized as contraband. **Wade** appeared to be in charge of the initial distribution of the stolen firearms. It is reasonable to infer from this evidence that **Wade** exercised dominion and control over the guns. **Wade** continued to exercise control over the firearms after he was arrested, by directing Cody's actions with respect to them. Thus, here also, even absent Patterson's statement that **Wade** was the person who handled the guns, the evidence is sufficient to support the trial court's determination that he exercised dominion and control and therefore committed the crime of unlawful possession of a firearm.[5]

***10** Finally, conviction for theft in the second degree requires proof that a person "commits theft of ... [p]roperty or services which exceed(s) seven hundred fifty dollars in value." RCW 9A.56.040(1)(a). As explained, the evidence is sufficient to establish that **Wade** participated in each of the residential burglaries. **Wade** does not challenge the sufficiency of the evidence to establish that the value of the items stolen from the Vu home was more than $750. Sufficient evidence supports the court's verdict.

III. ***Offender Score***

For the first time on appeal, **Wade** contends that the court erred when it failed to treat his six theft of a firearm convictions as the same criminal conduct for the purpose of calculating his offender score.

Although a criminal defendant may challenge an offender score for the first time on appeal, a defendant waives that right when the alleged error involves a factual dispute or trial court discretion. *State v. Jackson,* 150 Wn.App. 877, 892, 209 P.3d 553 (2009). Where a defendant is convicted of more than one crime, the sentencing court must make discretionary decisions in determining whether those crimes arose from the same criminal conduct. *State v.. Nitsch,* 100 Wn.App. 512, 523, 997 P.2d 1000 (2000). Thus, by failing to raise the issue of same criminal conduct at sentencing, a defendant waives the right to argue that issue on appeal. *State v.. Jackson,* 150 Wn.App. 877, 892, 209 P.3d 553 (2009). Because **Wade** did not argue at sentencing that his offenses constituted the same criminal conduct, he cannot raise this issue for the first time on appeal. We affirm.

WE CONCUR: DWYER, J. and SPEARMAN J.

All Citations

Not Reported in P.3d, 2015 WL 4041143

Footnotes

1 Because Cody and Michael **Wade** share the same last name, we refer to Cody **Wade** by his first name for clarity.

2 The court granted the State's motion to amend the information again just before trial to correct a scrivener's error with respect to the monetary amount required for theft in the second degree.

3 Patterson pleaded guilty to three counts of residential burglary, one count of unlawful possession of a firearm, and one count of theft of a firearm. According to the State's sentencing memorandum, the State made the same plea offer to **Wade** before trial and offered to recommend a low-end sentence of 164 months. After the State rested, the State made a second offer to dismiss four of the six theft of a firearm counts, which would have reduced the bottom of the range from 549 months to 241 months. The record does not include any information about the sentences of the other participants, but **Wade** indicates in his briefing that the sentences of Berhe, Cody, and Patterson were 124 months, 89 months, and 84 months, respectively.

4 The four justice concurrence agreed with the dissent on this point.

5 At oral argument, **Wade** suggested that his conviction for unlawful possession of a firearm should be reversed because the trial court failed to make a specific finding that **Wade** physically possessed any gun at a specific point in time. However, when the findings are unclear or fail to address an important point, the appropriate remedy is remand and **Wade** does not request this remedy. *See State v. Head,* 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (no findings prepared); *see also State v. Alvarez,* 128 Wn.2d 1, 19, 904 P.2d 754 (1995) (no bench trial findings on ultimate facts).