**NO. 45297-9-II**

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ARTHUR D. COOPER, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 13-1-01292-0

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# BRIEF OF RESPONDENT

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2. Did the State impermissibly comment on the defendant's right not to testify when the State made one statement that was in response to issues raised in defendant's closing?

3. Did defendant receive effective assistance of counsel?

4. Was the defendant precluded from presenting a meaningful defense when the court properly sustained an objection to defendant's out of court statements?

B. STATEMENT OF THE CASE.

1. Procedure

The defendant was arraigned on March 29, 2013 on three charges: burglary in the second degree, vehicle prowl in the second degree, and possession of stolen property in the second degree. CP 1-2. The charges are based upon the defendant's actions in the early morning hours of March 28, 2013.

On June 27, 2013 the State filed an amended information changing

the burglary to residential burglary. CP 8-9. The case was called for trial on July 11, 2013 by the Honorable Judge Ronald Culpepper. The State called eight witnesses and admitted 26 exhibits. CP 128, 129-30. The defendant did not testify or otherwise put on a case.

At the conclusion of the State's case, the defendant made a motion to dismiss all counts for insufficient evidence. 3 RP 325-28. The court granted his motion as to the charge of residential burglary, but allowed the count to be submitted to the jury on the lesser charge of burglary in the second degree. 3 RP 328-29. Defendant's motion as to the remaining counts was denied. 3 RP 328-29.

The defendant was sentenced on August 16, 2013 on the two felonies and the gross misdemeanor, vehicle prowl in the second degree. Because of the defendant's extensive record, 19 felonies, his offender score was "9+." The court sentenced the defendant to 55 months on Count I, the burglary, concurrent with 25 months, for the possession stolen property. CP 87-100. The defendant filed a *Notice of Appeal* August 30, 2013. This appeal is timely.

2. Facts

In the early morning hours of March 28, 2013 Veronica Dawkins (hereinafter "Dawkins") woke up and started downstairs of the home she shared with her boyfriend, John Gore ("Gore") at 4309 Tacoma Avenue South. She glanced out the upstairs window into their backyard. She saw someone in Gore's pickup truck. 2 RP 172. The truck was parked behind their house in an area surrounded by a chain-link fence. 2 RP 172.

Dawkins testified the person was leaning into the truck "rummaging through" the truck. The internal dome light was on, highlighting the person. 2 RP 175. She immediately woke up Gore and told him her observations. Gore jumped out of bed, only taking time to put on a pair of pants; he headed downstairs and out to his backyard. 2 RP 177. Dawkins testified she saw Gore run out the back door and saw the man in the truck "jump out." 2 RP 179. The person fled into the alley with Gore right behind. 2 RP 179. Dawkins testified she had never seen the man before. 2 RP 184. The man fled toward the back gate of their yard and to the alley. 2 RP 179. Both men headed into the alley and out of Dawkins' sight. 2 RP 186. When the man was finally apprehended, he was identified as the defendant, Arthur Cooper.

At the same time Dawkins saw a second person come out of their garage. 2 RP 186. The man was moving fast. She did not know this man either. 2 RP 186.

Gore testified after Dawkins woke him up, he headed for the backyard. He looked through the kitchen window and saw someone in his 2000 GMC Sierra pickup truck. 2RP 195, 191. He confirmed the truck was in his backyard surrounded by a fully enclosed fence. 2 RP 191. He saw the defendant "rummaging through [his] truck...about a half, two-thirds [in the truck]." 2 RP 196. Gore testified it looked as if the defendant was "moving stuff from inside my truck, just moving around inside my....truck." 2RP 197. Gore noted that there are several lights in the backyard and the alley that abuts his yard. He also commented that the dome light in his truck was on, further illuminating the defendant inside his truck. 2 RP 198.

As soon as Gore got outside, the defendant "jumped out of the truck and ran...tore down [his] gate and...down the alley." 2 RP 200. Gore yelled, "*Stop thief!*" 2 RP 202. Despite being barefooted, Gore chased the defendant many blocks; he estimated they did a "big figure 8 through the neighborhood," over several fences and through several backyards. 2 RP 206. At one point the defendant said "he was sorry, you know, for breaking into my car...." 2 RP 206. Gore testified that despite

the length of the chase, he never lost sight of the defendant from the time the defendant jumped out of his pickup. 2RP 204-5.

At one point, Gore chased the defendant through the front yard of a house. Walter Larson was a private security guard that worked in the area. 2 RP 237. He had responded to a call of a triggered alarm at an unrelated house. 2 RP 239. He was waiting outside the residence for the police to arrive. 2 RP 240. It was approximately 2:20-2:40 a.m. 2 RP 238.

Larson testified that he heard, "*Help, help, call the police*" yelled several times. Shortly thereafter he heard what sounded like the fence rattling, turned and saw two black men round the corner of the house. One man was chasing the other yelling "*Call the police!*" 2 RP 241-42. Larson had his spotlight on the first man, who stopped for a second and then brushed past Larson and kept running. 2 RP 243. Larson testified and identified the defendant as the first man he saw run by him. 2 RP 244.

Larson followed behind the defendant and Gore while calling 911. Shortly after the defendant and Gore encountered Larson, Tacoma Police Officer Maahs responded and saw the security officer, who pointed in the direction the two men ran. 2 RP 249. Officer Maahs headed in that direction and eventually found the defendant and Gore. 2 RP 249. The two men stopped and the defendant sat down on some nearby steps. The defendant appeared to be tired. 2 RP 250. At approximately 2:34 a.m.,

Mr. Cooper was arrested and escorted to the officer's patrol car. 2 RP 257. The defendant said, "*I was stupid, and I made a mistake.*" 2 RP 252. At this time, the defendant was identified as Arthur Cooper. 2 RP 253. The victim waited nearby and another officer eventually contacted him and they walked back to Gore's house. Meanwhile, Officer Maahs left with the defendant in route to the Pierce County Jail for booking. 2 RP 253-54.

Tacoma Police Officer Hudspeth also responded. Hudspeth testified that Maahs already had the defendant handcuffed when he arrived. 3 RP 272. He testified the defendant was laying against some steps, "fully out of breath, ... sweating... looked like he had been running...." 2 RP 272. Officer Hudspeth also identified the defendant in court as the man he encountered in the early hours of March 28, 2013. 2RP 272-73. Officer Hudspeth contacted the victim, Mr. Gore. 2RP 273. He and Gore walked back to the residence and met up with Dawkins. 2 RP 274. He obtained information from both Gore and Dawkins. Hudspeth looked through the kitchen window mentioned by Gore and noted he could clearly see Gore's pickup "straight out the window." 2 RP 275. Officer Hudspeth and Gore next examined the victim's truck. 3 RP 276.

Officer Hudspeth noticed both truck doors were ajar. Gore said that is not how he left his truck that night. 2 RP 193-94. Gore couldn't be

sure, but said he usually doesn't the lock the truck doors. 2 RP 193. When he opened the door, he saw a large pile of objects in the front seat. 2 RP 276. Gore explained they were not there before; all the items, had previously been in the back seat. 2 RP 277, 216. The items included several GPS units, some photography equipment, a tripod, and miscellaneous electronics. 2 R 194. Gore also noticed that his glove box had been ransacked. 2 RP 227. Hudspeth described the placement of the items in the front seat as "staging." 3 RP 277.

Officer Hudspeth explained that, based on his years of responding to numerous burglary and vehicle prowl cases, "staging" means when a perpetrator goes through the house or car, gathers all the items he wants to take as he does so and creates a pile. Once the perpetrator is ready to go, he can quickly pick up the pile of items and take off. 3 RP 277-78.

Gore also testified that the door to his garage had been latched that evening. After returning to his house, he pointed out to the officer that the garage door was now unlatched. 2 RP 235. Officer Hudspeth testified the garage door was standing fully open. 3 RP 286. Gore and the officer walked through the garage and determined it did not appear anything was missing. 2 RP 221; 3 RP 278-79. The same appeared true for the pickup. 2 RP 219.

Tacoma Police Forensics responded and unsuccessfully attempted to locate fingerprints in and on the pickup. 3 RP 305. She testified at length as to why and how it is possible for a person to touch an item, even repeatedly, and not leave a fingerprint. 3 RP 294-97, 304-06. In fact, Ms. Cambell testified it was not unusual not to find latent prints at a scene such as this. 3 RP 306. She was not able to locate *any* prints, including of the owner, Gore. 3 RP 304.

Meanwhile, Officer Maahs remained at the jail while the defendant was being processed for booking by jail staff. 2 RP 252. During the booking process, corrections officers searched the defendant's wallet. Inside his wallet they located a debit card bearing the name, "Amanda Dillard." 2 RP 255. Officer Maahs collected the card and booked it into evidence. 2 RP 254.

Later, it was learned that in the early morning hours of February 3, 2013 the pickup truck of Jason and Amanda Dillard was broken into and Mr. Dillard's wallet stolen. In the wallet was Amanda's debit card. The Dillards live at 4317 South Fawcett, in Pierce County. 3 RP 314. Neither of the Dillards gave anyone, including the defendant, permission to posses Mrs. Dillard's debit card. 3 RP 317, 322. Neither of them know or have ever met the defendant. 3 RP 317, 322. Since the theft of the card, no one

contacted them in an attempt to return the stolen access card. 3 RP 117, 322.

C. ARGUMENT.

1. THE STATE DID NOT IMPROPERLY SHIFT THE BURDEN TO THE DEFENDANT WHEN IT ARGUED PERMISSIBLE INFERENCES FROM THE EVIDENCE.

The defendant argues for the first time on appeal that the State engaged in improper conduct relating to the charge of possession of stolen property. The defendant contends the State "declared" the jury should find the element of knowledge because the access card was not in the defendant's name. *Opening Brf.*, p. 1. The record does not support this assertion, but more importantly, the defendant failed to preserve this issue for appeal.

If a defendant fails to object to alleged improper burden shifting at trial, he fails to preserve the issue unless he establishes that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. ***State v. Emery***, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). ***Emery*** also said that the appellate court should focus less on whether the prosecutor's misconduct was flagrant and ill intentioned and more on whether the resulting prejudice could have been cured. ***Emery*** at 762.

This court should begin with the threshold question of whether the prosecutor made improper remarks. The court should first examine the remarks in "the context of the prosecutor's entire argument, and the jury instructions." ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The court should look at the entire argument instead of, as defendant suggests, viewing the highlighted snippets of argument out of context. ***State v. Carver,*** 122 Wn. App. 300, 306, 93 P.3d 947 (2004) *citing* ***Dhaliwal*** at 578. Additionally, it is well settled that prosecutors are given wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. ***State v. Stenson,*** 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). In support of his argument, defendant selects several words and sentences from 3 RP 363[1]. Defendant's characterization is concerning in what defendant does not include. 3RP 363 reads, in its entirety, as stated below. The highlighted portions are the words cited by defendant.

> person, so there's no way that if the Dillards had walked by him on the street that they would have known he had it. He was definitely withholding it from the Dillards.
>
> And the incident occurred in the state of Washington, specifically, again, in the City of Tacoma.
>
> **So the only issue in this particular charge is whether the defendant knew that the card was stolen.**

[1] Defendant mistakenly cites to "2 RP 363," when the testimony is in the third volume, or 3 RP 363. That is true for most of the briefing. The State adopted the designation of the court reporter.

> Again, we're now looking at circumstantial evidence. We're looking at the fact that **the debit card was in the name of Amanda Dillard**, which was clearly on the card, and you will see that when you take it back into the jury room, that **the defendant is not Amanda Dillard,** that the defendant is not known by either of the Dillards. One could conclude that he doesn't know them.
>
> And when you look at the "knowledge" instruction, which is Instruction No. 18, it basically says that the individual knew or reasonably could have known that the card was stolen. And you **reasonably would know that the card was stolen because** you're **not entitled to it.** And keep in mind that the Dillards live basically about a block away from where Mr. Gore lives. They live, as I recall, at 4317 Fawcett Avenue, which is about a block away from where Mr. Gore lives. Yes, we're

First, in looking at the entirety of the State's argument and context, the court should note that the State began its opening remarks by directing the jury to Instruction No. 2, "direct and circumstantial evidence." 3RP 349. The State argued that:

> [C]ircumstantial evidence which, based on your common sense and experience, can allow you to reasonably infer or conclude that something that is at issue in the case had occurred or did not occur. 3 RP 349.

At 3 RP 352 the State again referenced circumstantial evidence.

> Instruction No. 2 advised you, they are both equally important. You don't ignore one because somebody has said it's circumstantial evidence. It is as important as direct evidence. Let's look at what the evidence shows.

The State next discussed testimony that were examples of circumstantial evidence that supported the charge of vehicle prowling and burglary. The State asked,

> "Why did he run off?" "[W]hen he came to the fence, ...he knocked [the fence] over, and took off running. "What right would the defendant have...to wander into this backyard?..."It is completely enclosed by a fence...." "[He] had to climb the fence." 3RP 353.

In support of the change of unlawful possession of stolen property, the State argued:

> It was undisputed the defendant possessed the stolen debit card belonging to Amanda Dillard, and that it is an "access device." 3 RP 362. The card was found inside the defendant's wallet. Neither Mr. nor Mrs. Dillard knew the defendant, nor did they know he had the card. There was no testimony that anyone attempted to return the card to the Dillards. 3 RP 362.

This brings us to the page relied upon by defendant. 3RP 363. The State's remarks are clearly examples of circumstantial evidence that support the stolen property charge. More importantly, at this point the State directs the jury to the instruction defining 'knowledge,' No. 18. 3 RP 363. Contrary to defendant's reliance on ***State v. Ford,*** 33 Wn. App. 788, 658 P.2d 36 (1983), the State in the present case is not relying on mere possession as they did in ***Ford***. ***Ford*** held:

> Although bare possession of recently stolen property will not support the assumption that a person knew the property was stolen, **that fact plus slight corroborative evidence**

> of other inculpatory circumstances tending to show guilt will support a conviction. ***State v. Couet,*** 71 Wn.2d 773, 775-76, 430 P.2d 974 (1967). Knowledge may not be presumed because a reasonable person would have knowledge under similar circumstances, but such knowledge *may be inferred.* ***State v. Shipp,*** 93 Wn.2d 510, 516, 610 P.2d 1322 (1980).

[Emphasis added. Highlighted portion is omitted from defendant's brief.] As already recited, the State presented sufficient evidence from which the jury could properly infer defendant's guilt and exceeds what ***Ford*** called "slight corroborative evidence."

Defendant further argues the State's comment in rebuttal amounts to impermissible burden shifting as it relates to the stolen property charge. *Opening Brief,* p. 11. The State's comments are not improper. The State points out factors that would lead a reasonable person in the same situation to believe the card was stolen. The State reiterated that the defendant and the Dillards did not know each other. The defendant could not have mistaken it as his given the card clearly bares Mrs. Dillard's name. There is no evidence he was holding it in anticipation of returning it. It was not found in a common area shared with others. Logic dictates the defendant is the person that placed the card in *his* wallet in *his* pant's pocket. They testified they did not give him permission to have the card. The defendant cannot reasonably have believed he had the permission of strangers to have their access card. The evidence supports one conclusion: the card

was stolen. The defendant had actual possession of it, he knew it wasn't his, and he knew the card was stolen. At no time did the State tell the jury to "presume" knowledge. The record does not support defendant's assertion. *Opening Brief,* p. 14.

Both the State's initial argument and its rebuttal argument are well within the boundaries of proper argument. The State's remarks were based on evidence admitted at trial in conjunction with the court's instructions.

Because defendant failed to object to the alleged misconduct at trial, he did not preserve the issue for appeal. Unless he can establish the alleged misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice, his claim fails. ***Emery***, 174 Wn.2d at 760–61, 278 P.3d 653. He cannot. Because the State accurately argued the reasonable inferences of the evidence and fairly responded to defense counsel's arguments, the State's remarks do not amount to misconduct. Therefore the defendant cannot show how this conduct was improper, unfairly prejudicial, or incurable by an instruction. Even had he preserved this issue, he has not shown error.

2. THE STATE PROPERLY ARGUED THE REASONABLE INFERENCES THAT COULD BE MADE BY THE EVIDENCE OR LACK OF EVIDENCE AND DID NOT IMPERMISSBLY COMMENT ON DEFENDANT'S RIGHT NOT TO TESTIFY.

The defendant also failed to preserve this issue for appeal by not raising any objection to the State's closing remarks. As with the earlier issue, to be successful on appeal the defendant must demonstrate the prosecutor's misconduct was flagrant and ill intentioned, but even more so on whether there was any prejudice and if so, could it have been cured by the trial court. ***State v. Emery,*** 174 Wn.2d 741, 760-61, 278 P.3d 1112 (2012).

The defendant bases his argument on one sentence in the State's rebuttal argument. *Opening Brief,* p. 18. The statement is an accurate statement of the evidence and is responsive to defendant's closing. In his closing, defendant argued:

> [T]here was not [sic] criminal intent or criminal knowledge on the part of [the defendant.] 3 RP 365.

Regarding the knowledge element for the stolen property charge, defendant argued,

> Where is the evidence of that? I submit there is not evidence that he could have known that....There is no evidence that he did know that....We have no evidence of

> [defendant] intentionally withholding [the card] from the true owner....We have no evidence of that either. 3 RP 367.

Counsel argued the defendant's act of running when spotted by the homeowner was, "under the circumstances not an unreasonable thing for [defendant] to be doing." [2] 3RP 370. Counsel then told the jury a list of items that someone who intended to steal would have had that night if they were intending to steal. He argued out the defendant had no such items. Counsel then argued this was evidence of lack of criminal intent. He also argued it was a "very incomplete investigation." 3RP 372-377.

The State properly responded to defendant's arguments. The high lighted portion is the sentence upon which defendant relies followed by what the State said immediately after.

> **There is no testimony that has been presented in this case that you can conclude that the defendant had any legitimate reason to be in Mr. Gore's fully fenced-in back yard in the early morning hours of March 28th, 2013.**
>
> What we have is more than sufficient evidence to show that the reason the defendant was there was for an intent to commit a crime, and that crime was theft.
>
> We know the property had been moved from the back to the front seat. We know the defendant was found rummaging in that pickup truck. There was no reason for him to have done any of those if he was there for some legitimate reason, but the State contends that, based upon

[2] Mr. Gore armed himself with a hammer when he ran out of his house to confront the defendant in his truck. 2 RP 199.

> all the evidence in this case, he wasn't there for any legitimate reason. 3 RP 386-87.

When read in context, in the entirety of both the State's closing arguments and the defendant's, the statement is not an improper comment on the defendant's election not to testify.

The mere mention that defendant evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. ***State v. Jackson,*** 150 Wn. App. 877, 885-86, 209 P.3d 553, *review denied,* 167 Wn.2d 1007, 200 P.3d 210 (2009). In fact, a prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case. ***State v. Killingsworth,*** 166 Wn. App. 283, 291-92, 269 P.3d 1064, *review denied,* 174 Wn.2d 1007, 278 P.3d 1112 (2012).

In the present case defendant invited the State to respond to defendant's theory that there was no evidence of guilty intent or guilty knowledge. The State properly responded by pointing out the defendant's questionable behavior that would tend to support guilty intent. One example included the lack of explanation for the conduct the State asserts supports his criminal intent. Defendant offered explanations for defendant's behavior, e.g the running, the lack of tools. The State responded.

The State's comment was a proper response to defendant's closing, was a reasonable use of the facts presented in the case, and was not improper. The defendant cannot meet his burden that the sentence was either flagrant or ill-intentioned, nor can he demonstrate that he suffered prejudice as a result.

### 3. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987) (applying the 2–prong test in ***Strickland v. Washington,*** 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). Competency of counsel is determined based upon the entire record below. ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* ***State v. Gilmore***, 76 Wn.2d 293, 456 P.2d 344 (1969)).

Defendant argues that trial counsel should have objected to the statement he argues amounted to burden shifting. For the reasons already stated in the State's brief, the State's comment was not improper. Therefore, any objection from defendant would have been baseless and not sustained.

In a claim of ineffective assistance based on a failure to challenge the admission of evidence, a defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted. ***State v. Sexsmith***, 138 Wn. App. 497, 509, 157 P.3d 901 (2007), *review denied,* 163 Wn.2d 1014 (2008); ***State v. Saunders***, 91 Wn. App. 575, 958 P.2d 364 (1998).

The failure to object constitutes counsel incompetence justifying reversal only in egregious circumstances on testimony central to the State's case. ***State v. Johnston***, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). Even if the defendant shows deficient performance, he then must establish prejudice by showing that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have differed. ***State v. Grier***, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). Defendant cannot demonstrate that the State's comment in closing

amounts to an "egregious circumstance." Defendant also cannot demonstrate any prejudice as a result.

Defendant also asserts he did not receive effective counsel because trial counsel failed to pursue the hearsay exception ER 803(a)(3) to gain admission of defendant's statements at the time of arrest.

The two statements defendant argues should have been admitted are as follows:

"*I didn't take anything.*" 2 RP 225, and

"*The doors were [already] open.*" 2 RP 225.

Trial counsel attempted to admit these statements through victim Gore, but the State properly objected citing hearsay. 2 RP 225. The exception regarding admission of a party-opponent is not available to defendants. The trial court sustained the objection. This court would need to find the trial court abused its discretion in sustaining the objection. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651, *review denied*, 120 Wn.2d 1022 (1992).

The trial court properly applied ER 801(d)(2), which does not allow out of court statements of a party opponent to be admitted through another person. The trial court clearly did not abuse its discretion in

applying the evidence rule. The defendant has another obstacle to overcome, the admission of either statement does not negate the primary element at issue in this case, i.e., defendant's intent. The fact the defendant was interrupted going through the pickup and not able to physically take anything does not mean he did not have the intent to steal when he climbed Gore's fence and entered and rummaged through his pickup truck. Similarly, assuming the pickup doors were unlocked does not in any way negate the criminal nature of defendant's acts of entering a backyard and vehicle when he undisputedly had no right to do so. The trial court was correct in sustaining the State's objection. Alternatively, if this court were to find the trial court abused its discretion, any error is harmless. The admission of defendant's two out of court statements would not have caused a different result.

*Also see argument in the following issue.*

4. DEFENDANT WAS NOT PRECLUDED FROM PRESENTING A MEANINGFUL DEFENSE.

Defendant relies on the same evidence as above, i.e., the two statements by defendant that were properly excluded by the court. Again, the defendant needs to demonstrate the court's ruling sustaining the State's objection was an abuse of discretion. Defendant cannot dispute that ER 801(d)(2) addresses the admission of statements of a party-opponent, in

this case the defendant. The pertinent part of the rule clearly states the party's own statement is admissible when the statement is *offered against [that] party.* ER 801(d)(2)(i). Defendant cannot admit his own out of court statements absent an exception; one was not given. Trial counsel did not offer any authority by which the two statements could be offered through Gore. The obvious purpose behind the evidence rule is to prevent a defendant from doing precisely what Mr. Cooper wished to do here. Defendant would liked to have conveyed his statements to the jury without being subjected to cross-examination. The court did not abuse its discretion by properly granting the State's objection. Alternatively, even if this court were to find the trial court abused its discretion, the two statements in question do not bolster defendant's argument of lack of criminal intent. Gore testified that nothing appeared to have been taken from his truck. 2 RP 219. There was no testimony that any property was taken from defendant at the time of his arrest. Therefore, the jury was told the defendant did not get away with any of victim Gore's property. 2 RP 209, 219. As for the truck being "open," Gore also testified that he usually does not lock the doors. 2 RP 193. Neither of these statements could possibly be so important such that their suppression amounts to a meaningful interference to present a defense. Furthermore, the very information defendant bases both a claim of ineffective assistance of

counsel and interference with his ability to present a defense were admitted through another witness.

D. CONCLUSION.

The State's single sentence in rebuttal is not improper. It was a reasonable comment on the evidence admitted at trial; it does not amount to an unconstitutional remark resulting in shifting the burden of proof to the defendant. It was stated in proper response to defendant's closing argument that no evidence existed to support the element of knowledge. Defendant offered several rather improbable explanations for the defendant's actions that night. The State was entitled to point out the lack of evidence that supported such claims.

Similarly, the State's argument did not impermissibly comment on the Defendant's decision not to testify. Defendant cannot reasonably claim the single sentence amounts to a comment on his right to remain silent. As stated above, when viewing the closing augments in context, it is apparent the State's comment was proper and did not amount to a comment on the defendant's exercise of his Fifth Amendment rights.

After review of the entire trial, the defendant cannot show he received effective assistance of counsel. He has not demonstrated that counsel's performance was deficient, therefore he cannot demonstrate that

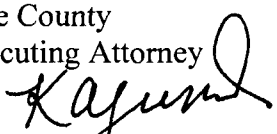
the outcome of his trial would have been different had counsel acted as appellate counsel advocates. The test is not whether appellate counsel would have done something different, it is whether what was done meets an objective standard of reasonableness based on the consideration of all the circumstances.

The defendant was not precluded from presenting a meaningful defense by the trial court's proper exclusion of two sentences made by the defendant and when the information was before the jury through another witness.

Defendant's issues fail. The State respectfully requests this court affirm all convictions.

DATED: July 30, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney



KAWYNE A. LUND
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WSB # 19614

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7/30/14 C Johnson

Date Signature

# PIERCE COUNTY PROSECUTOR

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