S. Ct. No. 93240-9
COA No. 31862-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES BRUCE HAMBLETON,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

James Hambleton asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The decision of the Court of Appeals which Mr. Hambleton wants reviewed was filed on May 17, 2016. A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

1. Did the court err by making this certain finding in finding of fact 7 on the hearing pursuant to CrR 3.6?

> (7) . . . Ms. Huey had purchased [the cell phone used by Mr. Hambleton] . . .

2. Did the court err by denying the motion to suppress evidence from Mr. Hambleton's cell phone when he did not consent to the search that was conducted before a warrant was issued?

D. STATEMENT OF THE CASE

Mr. Hambleton was charged by amended information with one count of theft of a motor vehicle and one count of second degree burglary. (CP 151). The State also gave notice it was seeking an exceptional sentence. (*Id.*).

The defense moved to suppress (1) statements made by Mr. Hambleton to police and (2) evidence obtained from his cell phone. On the CrR 3.6 motion, Pasco Police Sergeant Bradford Gregory testified he had contact with Jodie Huey, Mr. Hambleton's girlfriend, and had a discussion regarding a cell phone. (6/4/13 RP 73). He knew Mr. Hambleton had a cell phone on him due to some contacts with a Leslie Osborne. (*Id.* at 74). Sergeant Gregory had contacted Ms. Osborne, who had shown him a couple of messages on her phone to Mr. Hambleton's phone, which the sergeant wanted to obtain so he could get information off it to match with Ms. Osborne's. (*Id.*). Ms. Huey told him she had Mr. Hambleton's cell phone. (*Id.*). She had picked up the phone from property at the jail and had been searching through it "to find out what Mr. Hambleton may have been up to." (*Id.*). Ms. Huey said he had contact with somebody named Leslie so she called her. (*Id.* at 74-75). When the sergeant asked for that number, Ms. Huey said no, but she would be willing to have Ms. Osborne contact him, which she did. (*Id.* at 75).

After he told Ms. Huey he wanted to do a search warrant on the phone to get information from it, she said she wanted to cooperate and gave it to Sergeant Gregory. (6/4/13 RP 75). Ms.

Huey told him the phone was hers and she contracted for it. (*Id.*). At that point, the sergeant decided it was legal for her to give him the phone. (*Id.*). Ms. Huey was concerned Mr. Hambleton would be upset with her if she gave the sergeant the phone. (*Id.*). He said he could get a warrant and search, but she immediately said he did not have to do that and would give him the phone. (*Id.*). Mr. Hambleton was then in the Franklin County Jail. (*Id.*). Ms. Huey gave the cell phone to the sergeant on January 15, 2013. (*Id.* at 88).

Sergeant Gregory later applied for a search warrant that was issued on January 22, 2013. (6/4/13 RP 90). Before getting the warrant, he obtained at least two phone numbers from the cell phone, one being for Les Warner, a suspect, and there were text messages from Ms. Osborne on the phone. (*Id.* at 74, 87-89). The sergeant acknowledged that Mr. Hambleton was probably the sole user of the cell phone. (*Id.* at 86).

Mr. Hambleton did not testify at the suppression hearing. (6/4/13 RP 115). Denying his motion to suppress evidence from the cell phone, the court entered these pertinent findings:

> . . . (7) During the course of investigation, Sgt. Gregory contacted defendant's girlfriend Jody

> Huey. Ms. Huey voluntarily turned over a cell phone to Sgt. Gregory and consented to it being searched. Ms. Huey and defendant lived together and have a child in common. Ms. Huey had at least an equal right with defendant to possess the cell phone. While defendant used the phone, Ms. Huey had purchased it and the contract was under her name. Under the common authority rule, Ms. Huey had authority to release the cell phone to Sgt. Gregory and consent to its search. While such consent by itself was sufficient, Sgt. Gregory took the additional step of obtaining a search warrant for the cell phone. The affidavit submitted an application for the warrant established probable cause and the warrant was proper in all respects. Any omissions from the affidavit were not material to the probable cause determination. (CP 229).

In its conclusion of law, the court stated: "(2) Defendant's motion to suppress evidence is denied." (*Id.*).

Viewed in a light most favorable to the State as it must be on on appeal, the affidavit in support of probable cause summarizes the State's evidence:

> On 1/12/2013 at 1020 hrs, I was dispatched to a theft of a motor vehicle at 4911 N. Railroad Ave. I arrived and spoke with Denver McFarland, the co-owner of R.J. Mack. McFarland explained to me that his business shares a building with Pelican, Inc. a railcar refueling business. An employee of Pelican Thomas Fruitts, who works the graveyard shift, witnessed one of his work trucks drive off the lot at around 2300 hrs which is not normal. McFarland responded to his office to investigate. He noticed that the keys to the

truck were stolen out of the office. The keys are kept in a special locker. Only he and four other employees know where these keys are located. McFarland explained that his company does not work after hours and his employees are not permitted in his office during off hours. McFarland walked outside to see if anything else was missing and noticed one of his employee's personal van was parked behind the office. It was a very cold night and all of the vehicles had frost on the windshields but the van did not. He called his employee James Bruce Hambleton the owner of the van. Hambleton told McFarland that he did not know why the truck was missing. He explained that he is going out on his live-in girlfriend and "hid " his van at work so she would not catch him. McFarland asked him to come back to the office so they could speak. McFarland also contacted several of the other employees and they did not have any knowledge of the truck's whereabouts. McFarland waited for over 2 hours and Hambleton did not show up. McFarland then called the police. McFarland explained that his work truck WA B06158W was a 2003 Chevrolet pickup with very expensive work tools and gas in the truck bed. We made attempts to contact Hambleton on his cell phone but could not reach him. We spoke with Hambleton's girlfriend Jodie Huey over the phone and she confirmed he was out with a friend named Les. She said it was not normal for him to be out so late and that he has used drugs in the past. I notified dispatch and entered the truck as stolen in the system. As we were driving away from the scene I observed a male walking on the side of the road. Railroad Ave. is a very secluded location near the BNSF rail yard and the male was not wearing a coat. I stopped the man and he identified himself as James Hambleton. Hambleton explained that he was dropped off by his girlfriend "Leslie" at

> Oregon Ave and he was walking to pick up his personal vehicle that he left at work. Oregon Ave is about 3 miles away from R.J. Mack's office. I told Hambleton that we were investigating a vehicle theft at his work place. Hambleton said he knew about the theft because his boss informed him about it but he had nothing to do with it. Hambleton said he was on his way to a Casino in Hermiston but got into an argument with her because he left his wallet in his van. Hambleton would not give us Leslie's information to collaborate [sic] his story. Hambleton could not give me a good explanation why his girlfriend would not drop him off at his work's office. . . (CP 221-22).

All five of the employees of R.J. Mack knew where the keys were and had access to them. (6/27/13 RP 59;175-76). Four employees, Gary Watts, Dave Roberts, Kenny Cullison, and Christian Linn established they were not at R.J. Mack the late evening of January 11 and early morning of January 12, 2013. (*Id.* at 53, 113; 6/28/13 RP 202, 213).

Mr. Fruitts saw the pickup being driven off between 11 and 11:35 p.m. on January 11, 2013. (6/27/13 RP 132-33). The vehicle was later recovered on January 14, 2013, at 5712 Larrabee Lane, Pasco, with everything intact and locked up. (*Id.* at 151-54).

In the early morning of January 12, 2013, Officer Kari Skinner was dispatched to R.J. Mack where she contacted Mr. McFarland. (6/27/13 RP 163). A green Ford van with no frost on it

was parked at the business. (*Id.* at 163). It was 21° at the time and all the other vehicles had frost on them. (*Id.* at 164). She was provided with contact information on the van's owner, Mr. Hambleton, and called him on his cell phone. He did not answer so she left voice mail. (*Id.*). After another officer got his last known address to locate him or the pickup, Officer Skinner had a phone conversation with Ms. Huey. (*Id.* at 165). Wrapping up at R.J. Mack around 3 a.m., she and Officer Pruneda came upon Mr. Hambleton walking along the side of the road about ½ mile from R.J. Mack. (*Id.* at 166). After conversing with Mr. Hambleton who gave changing stories, he was placed under arrest. (*Id.* at 173).

In the evening of January 11 and morning of January 12, 2013, Ms. Huey was at home, but Mr. Hambleton was not. (6/28/13 RP 231). She got a call from him at 10 p.m. when he said he would be home in a while. (*Id.* at 232). He did not come home, but a police officer showed up. (*Id.*). Ms. Huey then talked to another officer on the phone. (*Id.*). She learned he had been arrested and got a phone call from him to get his van. (*Id.* at 233). Ms. Huey got the van and found Mr. Hambleton's wallet inside. (*Id.* at 234-35). She went to the jail and picked up his property, including his cell phone. (*Id.* at 236). Mr. Hambleton bought the phone, but her

name alone was on the Sprint account. (*Id.*). She turned his cell phone over to Detective Gregory. (*Id.* at 237).

Leslie Osborne, a friend of Mr. Hambleton's, got a visit from him the day before he was arrested. (6/28/13 248-49). They were maybe going to Hermiston to gamble, but did not go. (*Id.* at 249-50). She sent a text message to Mr. Hambleton as well. (*Id.* at 252-53).

Detective Gregory got Mr. Hambleton's cell phone from Ms. Huey. (6/28/13 RP 271). He obtained data and photos from the phone. (*Id.*). The detective said that on January 12, 2013, about 8:30 a.m., some kids saw two men getting out of the stolen pickup and abandoning it. (*Id.* at 290). He acknowledged Mr. Hambleton was in jail at the time. (*Id.*).

Detective Justin Greenhalgh got information off Mr. Hambleton's cell phone received from Sergeant Gregory. (7/1/13 RP 314-15). Photos of generators on that cell phone were admitted as evidence because the court found them probative. (6/27/13 RP 92-93; 7/1/13 RP 323-24). In the State's offer of proof, Mr. McFarland said BNSF generators had been stolen from an R.J. Mack warehouse, but the photos were not a perfect match with those generators. (6/27/13 RP 83; 7/1/13 RP 330). He did not

know who stole them and they were never found. (6/27/13 RP 81, 83). When the stolen pickup was retrieved, the warehouse keys were found in the bed of the truck. (*Id.* at 78). Mr. McFarland said his forklift was used to load a whole pallet of generators into the back of the truck. (*Id.* at 87).

There were no exceptions to the court's instructions to the jury. (7/1/13 RP 377-78). The State's theory was that Mr. Hambleton was an accomplice to the theft of a motor vehicle and second degree burglary charges. (*Id.* at 390-409). The defense argued the State had failed to show accomplice liability. (*Id.* at 417).

The jury found Mr. Hambleton guilty of theft of a motor vehicle and second degree burglary. (7/2/13 RP 434-35; CP 81-82). Because of his 25 prior felony convictions and community custody status when the crimes were committed, the court found a standard range sentence on an offender score of 9+ would result in one of the crimes going unpunished and thus imposed an exceptional sentence. (CP 20, 225-26).

The Court of Appeals affirmed his convictions and sentence by unpublished opinion on May 17, 2016. (App.).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted by this court because the Court of Appeals decision conflicts with a decision of the Supreme Court. RAP 13.4(b)(1).

On review of a CrR 3.6 motion to suppress, the court's inquiry is whether the findings were supported by substantial evidence and, if so, whether the findings support the conclusions of law. *State v. Schlieker*, 115 Wn. App. 264, 269, 62 P.3d 520 (2003). Mr. Hambleton argues the portion of finding of fact 7 that states "Ms. Huey had purchased the cell phone [used by him]" is not supported by any evidence whatsoever. Ms. Huey only said the phone was hers and she contracted for it. (6/4/13 RP 75). She did not say she had purchased the cell phone and, indeed, it was purchased by Mr. Hambleton and her sole connection to the phone was her name on the contract. (6/28/13 RP 236). That erroneous finding was a critical factor in the court's denial of the suppression motion and that finding does not then support the conclusion she had the authority to release the phone and consent to its search under the common authority rule.

There was no dispute that the cell phone searched by Sergeant Gregory before getting the warrant was used only by Mr. Hambleton. (6/4/13 RP 75, 86). The court nonetheless determined Ms. Huey could consent to the search of the cell phone because she had at least an equal right with Mr. Hambleton to possess the phone even though her only connection to it was her name on the contract. In this warrantless search, the common authority rule requires more.

Absent an exception to the warrant requirement, a warrantless search is impermissible under Wash. Const. art. 1, § 7 and the Fourth Amendment. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The exceptions are jealously and narrowly drawn and the State has the burden of proving the presence of one. *Id.* at 717. Evidence seized during an illegal search is suppressed under the exclusionary rule. *Id.* at 716-17. Furthermore, evidence derived from the illegal search is subject to suppression under the fruit of the poisonous tree doctrine. *See State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963)).

As noted by the State in its memorandum below, under the common authority rule, a third party may consent to a search of

another's property when they possess common authority over it and that authority rests on the right of possession rather than the right of ownership. (CP 159 (citing 12 Wash. Prac. § 2713)). Ms. Huey had no right to possession of Mr. Hambleton's cell phone as he used it exclusively and had bought the phone. She did not even have the right of ownership as her only connection with the cell phone was her name on the contract – a service contract having nothing to do with who had the right to possess the phone. Furthermore, Detective Gregory's reasonable belief that Ms. Huey had the authority to consent to the search of Mr. Hambleton's cell phone is irrelevant. *State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008). Art. 1, § 7 provides greater protection from state action than the Fourth Amendment. *Id.* at 637. The detective's belief, no matter how reasonably held, cannot be used to validate a warrantless search under the Washington Constitution. *Id.* at 639.

Ms. Huey could consent for Mr. Hambleton, the non-consenting party, only if she had such access to the cell phone that he assumed the risk she would invite others to share it. *Cf. State v. Morse*, 156 Wn.2d 1, 10-11, 123 P.3d 832 (2005). To the contrary, Ms. Huey was hesitant and concerned Mr. Hambleton would be upset if she gave his cell phone to Sergeant Gregory. (6/4/13 RP

75). In these circumstances, she did not have authority to consent to the search of Mr. Hambleton's cell phone under the common authority rule. The court erred by determining she did.

The illegally obtained evidence prompted the search warrant, which cannot be upheld because evidence obtained in violation of the privacy protections of the Fourth Amendment and Wash. Const. art. 1, § 7 must be excluded. *State v. Afana*, 169 Wn.2d 169, 179-80, 233 P.3d 879 (2010). Washington's exclusionary rule is "nearly categorical." *Id.* at 180. But a recognized exception is the independent source rule under which a search warrant obtained with unlawfully seized evidence may still be valid if the remaining information, after excluding the improper, is genuinely independent of the illegal search. *State v. Ruem*, 179 Wn.2d 195, 209, 313 P.3d 1156 (2013). Here, Mr. Hambleton's cell phone was illegally searched and there is no remaining information that was independent of the original warrantless search.

The subsequent search warrant cannot save the illegal search of the cell phone under that doctrine. *See Ruem*, 179 Wn.2d at 210. Therefore, even if the court had upheld the search based on the after-acquired search warrant (which it did not), the evidence must still be suppressed as the warrant did not cure the

initial illegal search of the cell phone since Mr. Hambleton had an expectation of privacy in its contents. *State v. Hinton*, 179 Wn.2d 862, 871, 319 P.3d 9 (2014). Its admission was not harmless error as the untainted evidence was far from overwhelming. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

In its opinion, the Court of Appeals determined substantial evidence supported the trial court's finding Mr. Hambleton's girlfriend had common authority over the cell phone she relinquished to police. To the contrary, as noted by the court, common authority rests not on "the law of property, with its attendant legal refinements, but . . . rather on mutual use of the property." *Morse*, 156 Wn.2d at 7. There is no dispute that Mr. Hambleton used the phone exclusively and there was no mutual use by his girlfriend. This conflicts with *Morse*.

Furthermore, the Court of Appeals, like the trial court, mistakenly focused on who purchased the cell phone. (CP 229; Op. at 8-10). Again, the issue is not ownership/purchase, but rather mutual use of the phone. Although citing *Morse*, the court ignored it and further noted "[e]ven evidence that the phone was almost always used by Mr. Hambleton would not detract from this other evidence of common authority." (Op. at 10 (citing *State v.*

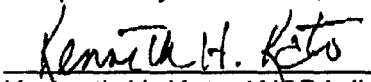
Gillespie, 18 Wn. App. 313, 569 P.2d 1174 (1977)). The Court of Appeals' decision conflicts with *Morse*, thus warranting review under RAP 13.4(b)(1).

E. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hambleton respectfully urges this court to grant his petition for review.

DATED this 13th day of June, 2016.

Respectfully submitted,



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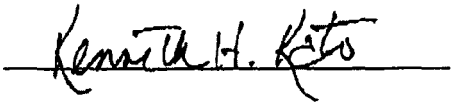
CERTIFICATE OF SERVICE

I certify that on June 13, 2016, I served a copy of the petition for review by USPS on James Hambleton, # 725847,1830 Eagle Crest Way, Clallam Bay, WA 98326; and by email, as agreed, on Frank Jenny at airacheta@co.franklin.wa.us.



APPENDIX

Renee S. Townsley
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May 17, 2016

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CASE # 318621
State of Washington v. James Bruce Hambleton
FRANKLIN COUNTY SUPERIOR COURT No. 131500158

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

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FILED
MAY 17, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent,	)	No. 31862-1-III
v.	)	
JAMES BRUCE HAMBLETON, Appellant.	)	UNPUBLISHED OPINION

SIDDOWAY, J. — James Hambleton appeals his convictions for theft of a motor vehicle and burglary in the second degree. He challenges the trial court's denial of his motion to suppress pictures found on his cell phone, which was relinquished to police officers by his girlfriend. He also argues the evidence was insufficient to support the guilty verdicts.

Substantial evidence supports both the trial court's finding that Mr. Hambleton's girlfriend had common authority over the cell phone she relinquished to police and the jury's verdicts. For these reasons, and because Mr. Hambleton raises no viable issue in a pro se statement of additional grounds, we affirm.

FACTS AND PROCEDURAL BACKGROUND

RJ Mac is a business that performs contract services for the Burlington Northern Santa Fe Railroad (BNSF). The services include cleaning cars, shifting and loading cars, and delivering supplies. It is located in Pasco, on North Railroad Avenue. James Hambleton was formerly an RJ Mac employee.

Sometime between 11:00 and 11:35 p.m. one Friday night in January 2013, an employee at a neighboring business heard and then saw a truck leaving the area and realized that an RJ Mac service truck was missing from the businesses' shared parking lot. The employee called his manager, who called the owner of RJ Mac at home, alerting him to the missing truck. RJ Mac's owner, Denver McFarland, traveled to his business and confirmed the service truck was not there. The truck's keys were missing from the locker in his office, where they were kept. Only Mr. McFarland and four of his employees—one being Mr. Hambleton—knew where the keys were kept, and employees were not authorized to enter the business at night. Mr. McFarland called the police to report a burglary and the missing truck.

Mr. McFarland then noticed Mr. Hambleton's van, which he later described as "hid[den] behind the building." Verbatim Report of Proceedings (RP) (Trial and Sentencing)[1] at 61. Employees usually parked in the main parking lot. While other

[1] The verbatim report of proceedings consists of multiple volumes. We refer to the volume containing the transcript of proceedings taking place on June 26, 27, and 28,

vehicles nearby had frost on their windshields, Mr. Hambleton's van did not, suggesting it had not been there long. While awaiting police, Mr. McFarland called Mr. Hambleton and asked about the van's presence and the missing truck. Mr. Hambleton told his boss he parked where he did in order to hide the van from his live-in girlfriend, Jodie Huey. He denied any knowledge of the missing truck.

When Pasco police officers arrived at RJ Mac in response to the theft report, Mr. McFarland pointed out Mr. Hambleton's van. The officers' own attempt to phone Mr. Hambleton was unsuccessful. They were able to reach Ms. Huey, but did not learn from her where to find Mr. Hambleton.

After completing their investigation at RJ Mac at around 3:00 a.m., the responding officers were returning to the Pasco Police Department when they saw a man who turned out to be Mr. Hambleton walking toward RJ Mac on a desolate stretch of road. The officers stopped him. Asked what he was doing in the area, he said he and his girlfriend, Jodie Huey, had an argument and that she had stopped and evidently invited him out of her car. According to the officers, Mr. Hambleton changed his story when he learned they had already spoken with Ms. Huey, telling them it was his "*other* girlfriend, Leslie,"

July 1 and 2, and August 13, 2013, as the "Trial and Sentencing" report of proceedings; to the volume containing the transcript of proceedings taking place on February 5, March 5 and 19, April 16, and June 4, 2013, as the "Pretrial Hearings" report of proceedings; and to the volume containing the transcript of proceedings taking place on June 26 and 27, 2013, as the "Voir Dire" report of proceedings.

who left him on the roadside. RP (Trial and Sentencing) at 171 (emphasis added). The officers were satisfied they had probable cause and arrested Mr. Hambleton.

The following Monday, Mr. McFarland noticed that six generators belonging to BNSF that had been stored in RJ Mac's warehouse were missing. A portion of the pallet on which they had been sitting was found on RJ Mac's forklift, which had been moved from where it was parked the prior Friday. Mr. McFarland surmised the forklift was used to lift BNSF's generators into the back of the service truck.

The missing service truck was found the same day, parked across town in front of a house. Keys to RJ Mac's warehouse, which were typically kept inside the office, were found in the bed of the truck. There were no signs of forced entry into the truck and the ignition was not damaged, suggesting that keys had been used to enter and start it. A witness told officers she saw a man walk away from the parked truck at around 8:30 a.m. on the Saturday after the theft—timing that would have been several hours after Mr. Hambleton was arrested.

Investigation of the theft and burglary was assigned to Detective Brad Gregory, who contacted Leslie Osborne—the "Leslie" Mr. Hambleton claimed left him on the roadside on the night of the theft. Ms. Osborne denied being out with Mr. Hambleton the night of the theft. Producing her phone, Ms. Osborne showed the detective text messages she had sent to and received from with Mr. Hambleton that night, including one sent by Mr. Hambleton at 1:14 a.m. that she did not see until the following morning. It said,

"Please call me. Need your help." RP (Trial and Sentencing) at 255.

Detective Gregory also spoke with Ms. Huey. According to the detective, she was "as interested as we were as to what had happened." RP (Pretrial Hearings) at 74. Detective Gregory learned from Ms. Huey that at Mr. Hambleton's request, she had picked up his property from the jail following his arrest. She had the phone from which he had sent text messages to Ms. Osborne. Ms. Huey voluntarily surrendered the phone to the detective.

After obtaining the phone, Detective Gregory applied for a search warrant. Before his application was granted, he received a call from Ms. Huey, who asked him to provide two phone numbers from the phone's contact list. He retrieved the numbers from the phone and provided them to her.

The application for a search warrant was granted, and the cell phone turned out to contain photographs of generators similar to those stolen from RJ Mac. Mr. Hambleton moved to suppress evidence obtained from the cell phone, but the State argued Ms. Huey had common authority over the phone and had consented to the search. At the CrR 3.6 hearing, Detective Gregory testified to how he obtained the phone:

> I told Miss Huey that I wanted to do a search warrant on the phone to obtain the information from inside the phone. She said that she wanted to cooperate and give me the phone. She said that the phone was hers. She gave it to Mr. Hambleton. She made the contract. She bought the phone. And I decided at that point that that would be legal for her to give me the phone. She was concerned that Mr. Hambleton would be upset with her if she gave me the phone. Although I told her that I could go back to the

> police department, get a warrant and come back and look for the phone, she immediately told me I didn't have to do that. She would give me the phone. She actually wanted me not to tell him that she was giving it to me of her own free will. She was afraid he'd be upset with her.

RP (Pretrial Hearings) at 75. In cross-examining the detective, Mr. Hambleton's lawyer unsuccessfully challenged his statement that Ms. Huey "bought the phone."[2] Mr. Hambleton did not testify at the suppression hearing.

The trial court denied the motion to suppress, concluding that "[u]nder the common authority rule, Ms. Huey had authority to release the cell phone to [Detective] Gregory and consent to its search." Clerk's Papers (CP) at 229. The generator photographs from the phone were admitted at trial, and the State argued to the jury that "[i]f you have pictures of generators on your cell phone you're interested in trafficking in generators, buying generators, [or] providing generators to someone who's . . . interested in buying some generators. . . . Nobody has pictures of generators on their cell phone [out of] love." RP (Trial and Sentencing) at 406.

Mr. Hambleton was found guilty as charged. He appeals.

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[2] The following exchange took place:

> Q. You testified earlier that you understood that this cell phone at issue was under contract by Miss Huey? Is that right?
> A. She told me that, yes.
> Q. Isn't it true that Mr. Hambleton actually purchased the phone, but the contract was in her name?
> A. I would have no idea.

RP (Pretrial Hearings) at 85.

ANALYSIS

I. Suppression Decision

Mr. Hambleton assigns error to the trial court's finding, in ruling on the motion to suppress that "Ms. Huey had purchased [the cell phone]," and to its denial of the motion to suppress. Br. of Appellant at 1. In reviewing the denial of a suppression motion, we determine whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Under article I, section 7 of the Washington State Constitution, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[3] A warrantless search or seizure is per se unreasonable and without authority of law. *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). One of the few carefully delineated exceptions to the warrant requirement is consent. *State v. Leach*, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989). "The State must meet three requirements in order to show that a warrantless but consensual search was valid: (1) the consent must be voluntary; (2) the person granting consent must have authority to consent; and (3) the search must not

[3] When a party alleges violations of both the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution, we analyze the state constitution first because it is more protective of individual privacy. *State v. MacDicken*, 179 Wn.2d 936, 940, 319 P.3d 31 (2014) (citing *State v. Walker*, 157 Wn.2d 307, 313, 138 P.3d 113 (2006)).

exceed the scope of the consent." *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). At issue here is only the second requirement.

In search and seizure cases involving cohabitants, our Supreme Court has adopted the common authority rule. *Morse*, 156 Wn.2d at 7-8. The consent to a search by a cohabitant who has common authority over property is valid against the absent nonconsenting cohabitant. *Walker*, 136 Wn.2d at 683-84 (citing *Leach*, 113 Wn.2d at 744). Common authority rests not on "the law of property, with its attendant legal refinements, but . . . rather on mutual use of the property." *Morse*, 156 Wn.2d at 7. The reasoning behind the common authority rule is that a person's expectation of privacy is necessarily reduced when the authority to control a space or a possession is shared with another. *Id.* A person assumes the risk that the individual they share authority with may allow an outsider access to the property.

"The mere fact that a certain object may be characterized as a personal effect does not compel the conclusion that no risk is assumed by leaving that object in premises also occupied by a spouse. The joint dominion and control of a husband and wife over the family home may extend to a non-consenting spouse's personal effects." 12 WASHINGTON PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 2713, at 623 (3d ed. 2004).

At the suppression hearing, Detective Gregory testified Ms. Huey told him she

bought the phone.[4] When challenged on this point on cross-examination, the detective admitted he "would have no idea" if Mr. Hambleton *actually* purchased the phone. RP (Pretrial Hearings) at 85. But since no evidence was offered that Mr. Hambleton actually purchased it, the only evidence before the court as to its purchase was Detective Gregory's testimony that Ms. Huey "said that the phone was hers. She gave it to Mr. Hambleton. She made the contract. She bought the phone." RP (Pretrial Hearings) at 75. Substantial evidence supported the trial court's finding that "Ms. Huey had purchased [the cell phone]." CP at 229.

And the facts found by the court support its denial of the suppression motion. They state, in their entirety:

> Ms. Huey and defendant lived together and have a child in common. Ms. Huey had at least an equal right with defendant to possess the cell phone. While defendant used the phone, Ms. Huey had purchased it and the contract was under her name. Under the common authority rule, Ms. Huey had authority to release the cell phone to [Detective] Gregory and consent to its search. While such consent by itself was sufficient, [Detective] Gregory took the additional step of obtaining a search warrant for the cell phone. The affidavit submitted in application for the warrant established probable cause and the warrant was proper in all respects. Any omissions from the affidavit were not material to the probable cause determination.

Id.

Presented with evidence that Ms. Huey purchased the phone, that the contract was

[4] She testified otherwise at trial, stating Mr. Hambleton purchased the phone but that the phone contract was under an account in her name only, and that she and Mr. Hambleton split the bills.

under her name, that she lived with Mr. Hambleton, and that he used the phone, the court reasonably found common authority, and a risk assumed by Mr. Hambleton that Ms. Huey might allow an outsider access to the phone. The fact that he asked Ms. Huey to pick up the phone and his other property following his arrest lends further support. Even evidence that the phone was almost always used by Mr. Hambleton would not detract from this other evidence of common authority. *See State v. Gillespie*, 18 Wn. App. 313, 569 P.2d 1174 (1977) (wife could consent not only to a search of her and her husband's home, but also to a search of his jacket).[5]

The trial court did not err.

II. Sufficiency of Evidence

Mr. Hambleton's specific challenges to the sufficiency of the evidence to support the guilty verdicts is that the State did not present evidence of an overt act, or that he had knowledge his actions would "promote or facilitate" the commission of theft of a motor vehicle or second degree burglary. In making these arguments, he concedes only that the State proved that "his van [was] parked at [RJ Mac] when the pickup was driven off." Br. of Appellant at 17. The State offered evidence from which a reasonable jury could find much more.

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[5] Because we affirm the trial court's decision on the basis of common authority and consent, we need not address Mr. Hambleton's argument that the detective illegally searched the phone before obtaining the search warrant when he retrieved the two phone numbers requested by Ms. Huey. The detective had consent to retrieve the numbers.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficient evidence admits the truth of the State's evidence as well as the truth of all inferences reasonably drawn therefrom. *Id.*

Mr. Hambleton was charged with the crimes as either a principal or an accomplice. And while the evidence suggested the involvement of others in the theft of the service truck at a minimum, there was ample circumstantial evidence of Mr. Hambleton's involvement in both crimes.

The State proved he was one of four employees (apart from Mr. McFarland) who knew where the keys to the service truck were located. Mr. Hambleton's van was found outside RJ Mac's shortly after the service truck was taken, in a frost-free condition suggesting it had not been there long. He was found later that night a half-mile from the office building and provided officers with two versions of who let him out at roadside, which neither Ms. Huey nor Ms. Osborne would back up. All the other employees who knew where the keys were had an alibi.

The elements of a crime can be established by both direct and circumstantial evidence. Circumstantial evidence is considered just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). There was sufficient evidence to support the State's theory that Mr. Hambleton unlawfully entered RJ Mac's after hours,

used the warehouse keys to obtain access to the generators, and used the service truck keys to steal the truck himself or assist someone else in stealing it.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds for review (SAG), Mr. Hambleton raises five.

Failure to authenticate photographs. Mr. Hambleton argues the trial court abused its discretion when it admitted photographs of generators without the authentication required by ER 901(a). That rule provides that the requirement of authentication or identification as a condition precedent to admissibility "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

We review a trial court's decision to admit or exclude evidence for abuse of discretion. A trial court abuses its discretion when its evidentiary ruling is based on untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Photographs are often offered to provide the trier of fact with a portrayal of the specific location where events took place or a specific object used or possessed by persons involved in the case. Authentication of a photograph offered for that purpose requires that the proponent "put forward a witness 'able to give some indication as to when, where, and under what circumstances the photograph was taken, and that the photograph accurately portrays the subject illustrated.'" *State v. Sapp*, 182 Wn. App. 910, 914, 332 P.3d 1058 (2014) (quoting *Tate v. Newman*, 4 Wn. App. 588, 593, 484

P.2d 473 (1971).

Here, however, the State offered the photographs not as depicting any particular generators, but merely to show that Mr. Hambleton was interested enough in generators to store pictures of them on his cell phone. The authentication required for that purpose was evidence that the photographs existed on Mr. Hambleton's cell phone at the time it came into law enforcement custody. The State presented such evidence in the form of testimony about the chain of custody, the extraction of data from the phone by a specially trained detective, and Detective Gregory's testimony that the printouts marked as exhibits accurately reflected the photographs extracted from the cell phone. The authentication was sufficient.

Admissibility of photographs under ER 401, 403, and 404(b). Mr. Hambleton also contends the photographs of the generators were not relevant and, if relevant, their probative value was outweighed by the danger of unfair prejudice.

"Relevant evidence" is evidence tending "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401 (internal quotation marks omitted). Where other evidence suggested that RJ Mac's premises were burglarized and its service truck stolen in order to steal the BNSF generators, the fact that Mr. Hambleton had photographs of generators on his cell phone made it more probable that he was involved in the burglary and theft than if he did not have such photographs on his phone.

Mr. Hambleton objected at trial that the photographs were inadmissible under ER 403. ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." It was Mr. Hambleton's position that because the State had not charged him with theft of the generators, its only possible reason for offering the photographs was a prejudicial one: to suggest he was involved in an uncharged crime. The court expressed its view that a formal charge was not necessary to make the photographs relevant. It found them probative because they tended to connect Mr. Hambleton with the burglary and theft of the service truck. We find no abuse of discretion.

Finally, Mr. Hambleton argues for the first time on appeal that the photographs were evidence relevant to the alleged theft of the generators and were therefore inadmissible under ER 404(b). ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." It goes on to provide examples of purposes for which evidence of other crimes, wrongs, or acts *is* admissible, the first being to prove motive. The alleged theft of the generators is contended to be the reason for a service truck theft and burglary that otherwise yielded no criminal gain.

In any event, since ER 404(b) was not relied on in the trial court as a basis for objection, the objection is waived. RAP 2.5(a)(3). "An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude." *State v.*

Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). It cannot be raised for the first time on appeal and we will not consider it further.

Speedy trial right. Mr. Hambleton contends his right to a speedy trial under CrR 3.3(b)(1) was violated. His argument proceeds from his premise, "I never signed a waiver of my right to fast & speedy trial." SAG at 6. But the record on appeal includes a "Stipulation for Continuance Waiver of Time for Trial [and] (CrR 3.3) Order of Continuance" signed by Mr. Hambleton, his lawyer, and the prosecutor on March 19, 2013. CP at 179. Based on the waiver, the court continued the trial scheduled for March 27 to May 29.

On May 21, the State moved to continue the trial date to June 12, noting there was a 30-day buffer period as a result of the stipulated continuance. The court granted the motion. Trial began within the buffer period, on June 26.

Evidence of criminal history. Mr. Hambleton complains of three instances in which he claims jurors heard information about his criminal history. Through motions in limine, he had asked the court to exclude "[a]llegations of prior bad acts by the defendant as prohibited by ER 404(b)" and "[a]ny and all evidence concerning any prior traffic citations and/or criminal convictions of the defendant. ER 402, 403, and 609." CP at 171.

First, he contends the trial court abused its discretion when it permitted his criminal history to be discussed with a potential juror in front of the venire during voir

dire. The court did not "permit" such questioning. Rather, when Mr. Hambleton's lawyer questioned a potential juror who worked as a corrections officer and had made statements on his juror questionnaire casting doubt on his impartiality,[6] the potential juror speculated that Mr. Hambleton had a criminal history. He said:

> Well, if somebody's got a history of this, they don't necessarily change. I think that should all be incorporated. So, I think I might have a hard time being non biased. Quite frankly, I don't recall Mr. Hambleton. He looks vaguely familiar, but we've got over 2,000 people incarcerated just in this facility.

RP (Voir Dire) at 58. Mr. Hambleton's lawyer moved to excuse the potential juror for cause, the State did not disagree, and the court excused him. No other relief was requested by the defense and Mr. Hambleton presents no basis on which the court, sua sponte, should have done anything more.

Next, when Ms. Osborne was called to testify and the State began to ask why Mr. Hambleton and she did not go to a casino in Oregon on the night of the burglary, Mr. Hambleton's lawyer requested a sidebar and expressed concern that she would testify to conditions of Mr. Hambleton's probation. The court instructed the prosecutor to lead the witness, to avoid the probation issue. But the following exchange took place,

> [PROSECUTOR]: All right. So, it didn't work out, then, for you to go to Oregon, correct?

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[6] According to the transcript, the summoned correction officer had written, in part, "Working in the business and would like to convict criminals. Job security!" RP (Voir Dire) at 56-57.

> [MS. OSBORNE]: I had just mentioned that I wanted to go to Hermiston. I go there frequently to go gambling, and *he said he couldn't leave the county.*
> [PROSECUTOR]: Okay. All right. So, he—
> [DEFENSE COUNSEL]: Objection. I ask the last matter be stricken.
> THE COURT: I'll grant that.

RP (Trial and Sentencing) at 251 (emphasis added).

Here again, Mr. Hambleton does not identify what more the trial court should have done and we find no abuse of discretion.

Finally, during cross-examination, defense counsel asked:

> [DEFENSE COUNSEL]: But up until your birthday on January 1st of—your birthday on January 1st you hadn't seen [Mr. Hambleton] for some time; is that right?
> [MS. OSBORNE]: Correct. He'd been incarcerated for many years.
> [DEFENSE COUNSEL]: Objection. I'd ask that that last statement be stricken and—
> THE COURT: Overruled. You asked the question.

Id. at 257. Later, outside the presence of the jury, the court explained that it denied the motion to strike because the defense had moved to exclude criminal history but not the fact of Mr. Hambleton's incarceration, and Ms. Osborne's answer was not nonresponsive. The court's ruling was not manifestly unreasonable.

Jury instruction. Finally, Mr. Hambleton contends the State's proposed jury instruction relieved it of the burden to prove every element of the crime charged because it mistakenly provided "[t]o convict the defendant of the crime of Burglary in the *first degree*," when Mr. Hambleton was charged with burglary in the second degree. SAG at

16 (emphasis added).

Mr. Hambleton is mistaken. The instruction the court provided the jury reads, "To convict the defendant of the crime of burglary in the second degree. . . ." CP at 103. There was no error.

Affirmed.

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

Siddoway, J.

WE CONCUR:

Korsmo, J.

Fearing, C.J.

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Dear Clerk: Attached for filing is the petition for review in State v. Hambleton, COA No. 31862-1-III. Thank you. Kenneth H. Kato, 1020 N. Washington St., Spokane, WA 99201; tel: (509) 220-2237; email: khkato@comcast.net