

63636-7

63636-7

NO. 63636-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN HUGGINS,

Appellant.

REC'D  
MAY 06 2010  
King County Prosecutor  
Appellate Unit

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

The Honorable Jim Rogers, Judge

2010 MAY -6 PM 4:05  


BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to charge and prove possession of a stolen motor vehicle, which was the applicable offense for the conduct set forth in count 7.

2. In count 7, the state charged the appellant, Jonathan L. Huggins, with first degree possession of stolen property, which did not apply to the conduct at issue.

3. The trial court violated Huggins's constitutional due process right to present a defense.

4. The trial court violated Huggins's constitutional right to confront adverse witnesses.

5. Trial counsel deprived Huggins of his constitutional right to effective assistance by (1) failing to challenge the prosecutor's mistaken charge of first degree possession of stolen property; and (2) failing to move for a mistrial based on a prejudicial trial irregularity.

6. The trial court exceeded its statutory sentencing authority by imposing an alcohol-related community custody condition.

Issues Pertaining to Assignments of Error

1. The state charged Huggins with committing first degree possession of stolen property (PSP), a 2006 Ford pickup truck. On the

date of the alleged offense, the first degree PSP statute specifically did not apply to motor vehicles. Did the state fail to prove the only applicable offense, possession of a stolen motor vehicle, beyond a reasonable doubt?

2. Did Huggins's trial counsel deprive him of his constitutional right to effective representation by failing to object to the state's use of the inapplicable PSP statute?

3. Did the trial court violate Huggins's constitutional due process right to present a defense by precluding him from presenting evidence that another person committed first degree burglary of a Bellevue home as charged in count 6?

4. Did the trial court violate Huggins's constitutional right to confront adverse witnesses when it barred him from cross-examining a critical state's witness about an inconsistent plea of guilt?

5. Did trial counsel deprive Huggins of his constitutional right to effective assistance by failing to move for a mistrial after a key state's witness testified he had heard Huggins was involved in other robberies?

6. There was no evidence alcohol played a role in the commission of the offenses on either date. Did the trial court therefore

exceed its statutory sentencing authority by imposing an alcohol-related community custody condition?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Trial one -- Bellevue offenses

a. *The incident*

As John McConnell drove up to his Bellevue home, he and his passengers, Virginia Rhoades and Mary Beth Anthony, observed an unknown white van in the driveway, the garage door open with the lights on, and a strange man and woman moving about inside the house and garage. 4RP 13-20, 26-28, 96-100, 136-42. McConnell stepped out of his car, opened the door of the van, observed a woman in the driver's seat, and told her to stop what she was doing. 4RP 28, 30.

The unknown man then charged up to McConnell, punched him on his head and threw him onto the ground. 4RP 32-35. Neither Rhoades nor Anthony could see this because the van blocked their view. 4RP 104-05, 143. McConnell got up quickly, saw the assailant jump into the van, ran

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<sup>1</sup> The trial court granted Huggins' motion to sever count 6 (first degree burglary of McConnell residence) and count 7 (first degree possession of stolen property, a white pickup truck owned by Ford of Kirkland). CP 34-38; 1RP 18-28, 32-33, 87-95. This appeal thus consists of two separate trials, the first involving counts 6 and 7 ("Bellevue incidents") and the second involving counts 1-5, 8, and 9 ("Seattle incidents").

into his house, and called 911. 4RP 36-37. McConnell and the women observed the van quickly strike the side of the car McConnell had first arrived in, drive through the yard, and leave. 4RP 37-40, 105-09, 144-47.

Police arrived quickly and gathered information from McConnell, Rhoades, and Anthony. 4RP 111-12, 148, 168-69; 5RP 46-48. McConnell's home had been ransacked. 4RP 37, 112-14, 166-67; 5RP 51-54. Two bicycles, climbing gear, jewelry and other items were missing. 4RP 41-48, 114-20, 7RP 55-56, 63-64.

Three days after the incident, an officer found some of McConnell's climbing gear in the backyard of one of several adjacent vacant houses in Kirkland. 6RP 122-28, 158-59. The homes were to be destroyed and the land used for a city park. 6RP 142-44. Huggins ("JD") and his girlfriend, Ute Wysgoll, were among the individuals squatting in the houses. 6RP 30-33, 35-36, 61-62.

The same day, a different officer found the white van used in the burglary parked on a street in front of a construction site in the general area of the vacant houses. 6RP 128-32, 142-43, 146, 7RP 57-59. Stuffed behind the driver's seat of the van was a digital camera. 6RP 133-35. Several photos were downloaded from the camera and introduced into evidence, including a photo of Huggins. 6RP 73-78, 148.

On the same day, a different officer discovered a white "Dually" pickup truck that had been reported stolen from Ford of Kirkland several days earlier. 6RP 41-43, 141. The Dually was parked in a condominium complex parking lot near the vacant houses. 5RP 184-90. Two residents of the complex saw Huggins at the complex that day. 5RP 123-30, 138-48, 160-65, 194-200, 6RP 28. Bicycles belonging to McConnell and Rhoades were in the bed of the Dually. 5RP 193, 7RP 145-52. Officers found Huggins's fingerprint inside the Dually's cab. 5RP 75-80, 189-92, 6RP 30. Paperwork from the Dually was found inside a truck parked near the vacant houses. 5RP 201, 6RP 25-27.

About one week later, Wysgoll directed police to a black Honda held in a Seattle towing yard. 6RP 68-71, 7RP 59-61. She had used the car with Huggins but did not know where it came from. 6RP 68-69, 88. Inside the Honda police found property belonging to McConnell and Rhoades, as well as items belonging to Wysgoll and Huggins, including Huggins's Arizona identification card. 7RP 63-73.

Wysgoll testified she took the photos downloaded from the digital camera police found in the white van. 6RP 73-78. She said she burglarized McConnell's home with Huggins. 6RP 59-64, 75, 98. She explained she went inside the house, put women's items into pillow cases,

and loaded them into the van. Huggins did not put anything into the van. 6RP 63-64.

In a pretrial statement, however, Wysgoll said different things. At one point, she said she committed the crime herself. 6RP 111. At another, she minimized her role in the incident, saying she woke up and found herself at McConnell's house. She walked into the house, repeatedly tried to return to the van, became very sick, and finally entered the van when McConnell's garage door opened. 6RP 84-86.

Wysgoll pleaded guilty to attempted burglary for her role in the incident. 6RP 71-73, 78-79. In the plea statement, Wysgoll said Huggins assaulted McConnell while she sat inside the van. 6RP 80. On the stand, however, Wysgoll said she never saw anyone hit anyone. She saw McConnell fall but did not know why or how he fell. 6RP 80-81. Wysgoll recalled very little of the incident because she was "on a lot of drugs." 6RP 64. More specifically, Wysgoll was high on methamphetamine, Vicodin, and Valium, which was how she spent most of her time during this period. 6RP 86, 95. She and Huggins stayed in one of the vacant Kirkland homes around the time of the burglary. 6RP 62, 87-88.

*b. The identifications*

When police spoke with McConnell after the incident, he described the male burglar as being in his late 20s, five feet eight inches tall to five feet ten inches tall, with a stocky build, short black hair, a dark, swarthy, complexion, and of Italian or Mediterranean appearance. 4RP 75-77. Rhoades described him as being 30 to 35 years old, six feet tall, with a medium build and short brown hair, and Caucasian or Hispanic. 7RP 82.

Police initially arrested a different man and woman because they generally met the descriptions. 7RP 47-49. Their photos were made part of photo montages shown to McConnell three days after the incident. McConnell chose one photo from each montage as possibly depicting the offenders. 4RP 53-58, 79, 7RP 49-55, 117-20, 127-28. McConnell testified he was 50 percent certain of his choice of the male suspect. 7RP 52. Further investigation eliminated the couple McConnell initially identified from consideration as the suspects. 7RP 53-55.

McConnell was not shown a montage containing Huggins's photo until more than five months after the incident. He chose Huggins's photo from the montage, but was again only about 50 percent certain of his choice. 4RP 69-73, 79-81, 7RP 74-77. At trial, McConnell nevertheless

identified Huggins as the male burglar with 80 percent certainty. 4RP 79-80.

*c. "Other suspect" evidence*

Huggins announced before trial the defense position was that Wysgoll committed the Bellevue burglary with someone other than him. 1RP 27. He provided the following offer of proof for the purpose of laying a foundation to present evidence that another individual, Abraham Hartfield, should be considered another suspect in the Bellevue offenses: (1) a booking photograph of Hartfield that described him as being 29 years old at the time of the incident, five feet seven inches tall, 180 pounds, with black hair and brown eyes, and showed him with a dark complexion and "Italian or Hispanic" features;<sup>2</sup> (2) information from Kirkland Police Officer Quiggle indicating Hartfield had gone back and forth moving items from his residence, which officers were watching, to the vacant homes where McConnell's stolen belongings were found; (3) Quiggle's assertion Ashley Purner was known to be Hartfield's girlfriend at the time; and (4) Wysgoll's anticipated testimony she knows Hartfield. 5RP 81-84, 93.

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<sup>2</sup> Huggins attached a copy of the photograph to a Proffer Regarding Other Suspect Evidence. Supp. CP \_\_\_ (sub. no. 96A, filed May 20, 2006).

In addition, Quiggle testified during a pretrial CrR 3.5 hearing that he told Huggins during a post-arrest interview that he had been working on a case involving a "rather prolific car thief, and residential burglar named Abraham Hartfield." 2RP 122. Quiggle also testified Purner had been arrested. A few days after Purner's arrest, officers were called to the vacant homes in Kirkland and found property belonging to Purner and Hartfield inside one of the homes. Police arrested Hartfield after a few days of surveillance. By then they had found two stolen cars from outside a residence Hartfield shared with Purner. 2RP 122-23.

The trial court denied Huggins's motion to present evidence Hartfield should be considered another suspect. Supp. CP \_\_ (sub. no. 93, Email Decision on the Introduction of Other Suspect Evidence, filed 5/16/2008); 5RP 98.

A further development occurred when, during trial, Huggins asked Wysgoll about Exhibit 53, handwritten notes she found in her notebook about a week after the Bellevue burglary. 6RP 101-06.<sup>3</sup> The prosecutor

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<sup>3</sup> Huggins attached a copy of the notes to the proffer. Supp. CP \_\_ (sub. no. 96A). The notes said:

Do not doubt me. Him JD and I need to communicate. We haven't even talked. His lawyer has not tried to contact me either. They are bombarding me. But remember this. Do not doubt what I say. Please. Love you. Burn this, destroy. But do not seek me out

objected and jurors were removed from the courtroom. 6RP 102-03. Wysgoll said she may have written the notes but was not sure. She agreed, however, the handwriting looked like hers and said she did not know who else could have written the message. 6RP 103-05.

Huggins argued the note tended to prove the existence of a third person who had a guilty state of mind about Wysgoll's criminal activity. The note writer, Huggins added, expressed a pressing need to speak with him ("JD") because of contacts the writer had with law enforcement personnel. 6RP 115. Because of the content of the message, Huggins said, it was not plausible that Wysgoll authored it. 6RP 116-17.

The trial court sustained the state's objection to admissibility of the note because it was not clear who wrote it. 6RP 106-07, 116.

Huggins later supplemented his "other suspect" offer of proof with the following: Hartfield lived less than 1.5 miles from the location where the suspect white van was located; Hartfield was under police surveillance for automobile theft; other persons continued to use the vacant homes after Wysgoll and Huggins were arrested; and police found the handwritten note

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to annihilate me.

Do not doubt me. Him JD and I need to communicate. We have not, and he or his lawyer have has made no attempts to contact me, and I'm being bombarded by nosy lawfuckers.

in Wysgoll's purse upon her arrest about one week after the incident. *Id.*;  
7RP 17.

The trial court denied the motion to reconsider without elaboration.  
7RP 18.

*d. The verdict*

The jury found Huggins guilty of first degree burglary of McConnell's residence and first degree possession of stolen property for having the "Dually." CP 172, 77-78.

2. Trial two – Seattle incidents

*a. The incidents*

Richard Heuring and Lauren Bennett were friends and methamphetamine dealers. 10RP 66-68, 11RP 126-35, 12RP 14-19. Bennett arranged to get some methamphetamine for Heuring and Heuring paid cash in advance. 10RP 133-36, 12RP 18-20. The plan was for Bennett to call Heuring when she obtained the drugs and for Heuring to come to her apartment to pick up the merchandise. 10RP 136, 12RP 18-20, 23.

Heuring did laundry and used his laptop as he waited at his apartment for Bennett's phone call. 10RP 136-39. He left his door ajar to get cool air inside. 10RP 139-40. As he sat with his back to the door,

Heuring heard the door swing open. He looked back and saw a gun in his face. 10RP 140-41. He described the gun as silver with a red laser coming from it. 11RP 124-26. His intruder, a man with a bandana pulled up just below his eyes, commanded him to get down and not look at him. All Heuring saw of the man, whom he said was in his upper 30s to mid 40s, was a tan forehead and receding short hair. 10RP 140-42. Heuring heeded the man's commands and was on the floor, face down, within a few seconds. 10RP 143.

A second man quickly entered the apartment and guarded Heuring as he lay on the ground for about the next 20 to 30 minutes. 10RP 144-46. Heuring's hands were bound together with duct tape and someone put a pillow case from his bedroom over his head. 10RP 156-60. During this time Heuring heard the masked man and a third person ransacking his apartment. 10RP 146-52. Throughout the incident the masked man referred to Heuring by his first name. 10RP 141-42. He also addressed one of the other two intruders as "Bruce." 10RP 147-48.

After a bit of searching, the invaders began demanding to know where the drugs and money were. Heuring repeatedly said he had none. 10RP 149-51.

Meanwhile, Heuring's telephone rang several times. The masked man grabbed the phone and read off the names of the callers. Among them was Bennett. 10RP 151-54. After repeated calls from her and under threat of physical injury and death, Heuring confessed to the intruders he sent his money to Bennett for drugs. 10RP 152-56, 160. The masked man made Heuring speak to Bennett on the phone and to tell her to come outside and greet him outside her apartment upon arrival. The men then loaded Heuring into a vehicle and drove to Bennett's apartment. 10RP 160-70.

When they arrived it Huggins who greeted Bennett. He pointed a large, silver gun with a red laser at her and marched her upstairs to her apartment. 12RP 23-29, 48, 51-55. Bennett's friend, Gary Naugle, was standing outside in the hallway. Huggins struck Naugle on the head with the gun and escorted him into the apartment. He then ordered him face down on the floor, bound his hands and feet with electrical cord, and covered his head with a pillow cover. 9RP 58-68, 12RP 27-33, 95. Naugle did not get a good look at his assailant and did not recognize him in a line up about three weeks after the incident. 9RP 84-86, 190-91.

Once he restrained Naugle, Huggins led Bennett into her bedroom and asked for the money and the methamphetamine. She opened a safe

where she stored the drugs, money and other items, including credit cards and jewelry, and piled the contents on the floor. Huggins also removed things from a closet. 12RP 33-35. When they finished in the bedroom, Huggins returned Bennett to the living room. He bound her with electric cords and put a shirt over her head. 12RP 36, 44-45. She then heard Huggins go through the apartment and collect items into bags. 12RP 38-39, 45. While doing that he repeatedly said his friend "Bruce" was outside the apartment door and would kill her if she said anything after he left. 12RP 35-38.

Huggins eventually left. Bennett was able to free herself after about 15 or 20 minutes, and then freed Naugle. 12RP 38-41. Huggins had "[t]orn apart" her apartment and took everything from the safe, including her credit cards. 12RP 45-48.

Bennett called her friends before calling police about 45 minutes to one hour after the incident because there had been drugs in her apartment and she feared going to jail. 12RP 41-43. When officers arrived, they observed an apartment in disarray and strands of electrical cords on the floor. Bennett was upset but appeared uninjured. Naugle was nearly "catatonic" and had a large cut over his eye. Both Bennett and Naugle had

red marks on their wrists that appeared consistent with being restrained. 9RP 38-41, 106-10, 131-37.

Bennett said nothing about drugs to the officers. 12RP 48-49. Even later, when speaking with detectives and defense counsel, Bennett denied drugs were involved in the incident. 12RP 43, 49, 68-69.

Meanwhile, Heuring remained restrained in the vehicle with the pillow case over his head. He heard Huggins return after about 20 minutes and put bags and what felt like "luggage type" things into the back where Heuring lay. 11RP 84-87. Shortly thereafter, he was released. 11RP 96-99.

Despite being dropped off only a few blocks from home, Heuring went to a friend's house. 11RP 18-28, 99-101. After helping Heuring with the pillow case and duct tape, the friend accompanied Heuring to his apartment. 11RP 24-31, 102-04. The apartment was a mess, and Heuring called some friends to come over and help him reorganize. 11RP 103-04. Among items that had been taken was a bicycle. 11RP 106-07.

Heuring tried calling Bennett several times after returning to his apartment. 11RP 103-05. By the time he contacted her several hours later, Bennett had already told police she believed Heuring had been involved in her ordeal. 11RP 105, 12RP 49-50. On the following

morning, officers arrived at Heuring's apartment, told him he was a suspect in the robbery of Bennett, put him in handcuffs, and took him to the station. 11RP 107-08. A detective observed Heuring had a cut on his head, a swollen face, and red marks with residue from tape on his wrists. 9RP 154-56. He also collected a pillowcase with duct tape on it from Heuring's friend. 9RP 154.

Heuring agreed to give a taped statement and reiterated the above version of events. 11RP 108-09. Only when a detective asked him if someone bore a grudge against him did Heuring realize Huggins was his assailant. 11RP 110-11, 144-52.

Heuring came to this realization because about three or four weeks earlier, Dave Winningham introduced him to Wysgoll and they began a brief relationship. 10RP 69-80, 11RP 110-11, 12RP 126-28, 13RP 23-25, 28-29. At one point Wysgoll considered selling drugs for Heuring. 12RP 144. Wysgoll testified although nothing sexual or romantic happened between the two, Heuring tried to move in that direction "[b]ecause he's a sleaze ball." 12RP 144.

Nevertheless, they spent one night together at Wysgoll's condominium. 10RP 79-82. Shortly after Wysgoll dropped him off at his apartment, Heuring received a call from someone who introduced himself

as "JD" (Huggins). 10RP 82-85. In that and several more phone calls, JD threatened Heuring for being with "his girl." 10RP 85-88. Heuring connected "JD's" voice with that of his assailant. 11RP 110-11. Heuring later identified Huggins from a lineup as the masked man in his apartment by recognizing his tanned forehead and his voice. 10RP 144-45.

The defense theory was that Heuring and Bennett collaborated to set up a story that Huggins robbed them. 9RP 26-33 (opening statement), 15RP 56-61 (closing argument). Huggins testified he became involved with methamphetamine when he began dating Wysgoll about four or five months before the incidents described above. Before long, Huggins was selling methamphetamine in large quantities. 14RP 22-26. For this reason he began carried a gun with a laser sight on it. 14RP 28.

Huggins met Heuring through Wysgoll about three weeks before the robberies. After two meetings he agreed to sell Heuring a quarter-pound of methamphetamine. 14RP 31-32, 42-44. Huggins and Wysgoll went to Heuring's apartment to consummate the transaction with Heuring and a third person, who turned out to be Bennett. 12RP 129-30, 14RP 44-49, 59. Heuring and Bennett bought several ounces and said they would call Huggins when they needed more. 14RP 50.

About a week later, Wysgoll told Huggins that Heuring had made her strip to her underwear because he thought she stole money from him. 12RP 145-46, 14RP 51-52. This irritated Huggins, so he decided he would retaliate by selling Heuring counterfeit methamphetamine during their next transaction. 14RP 52-54.

About two weeks later Huggins returned to Heuring's apartment for that transaction. Huggins's friend and business partner "Bruce" was with him. 14RP 54-57, 61-62, 149-54. Huggins removed his gun from his waistband and placed it on a table at the apartment. Heuring was also armed, and placed his pistol on the table as well. 14RP 62-65, 134-37.

From Heuring's apartment the three men, along with Wysgoll who had remained in the car, drove to Bennett's apartment. 14RP 59-61. When they arrived Bennett escorted them to her apartment. Naugle was waiting outside and Huggins ushered him into the apartment. 14RP 67-69. Huggins again laid his gun on the coffee table as they sat down for the transaction. 14RP 73-74. Heuring and Bennett were \$400 short of the agreed amount, so Huggins agreed to take as "collateral" Heuring's bicycle, Bennett's credit cards and several pieces of Naugle's identification. 14RP 74-80, 154-57.

Once in possession of the money and collateral, Huggins gave them the fake drugs. 14RP 80-81. They then drove back to Heuring's apartment, picked up the bicycle, and left. 14RP 80, 82. Huggins eventually put the bicycle behind one of the vacant homes he stayed in and gave the cards to Wysgoll. 14RP 39, 93-94, 112-13. Police later found the cards inside a black Honda that Wysgoll told them about. They were inside a bag that also contained Huggins's Arizona identification card. 10RP 107-13. Huggins testified he never drove the Honda, but Wysgoll had. He did not know what happened to the cards after he gave them to Wysgoll. 14RP 92-94.

An angry Heuring called Huggins after discovering he had been cheated. He demanded a return of the collateral and cash or real methamphetamine. 14RP 83-86, 157. Huggins refused, and Heuring said "they would handle it a different way" if their demands were not met. 14RP 86-87. Heuring did not elaborate. 14RP 87.

One week later, Huggins was at Wysgoll's mother's house to sell more drugs. 14RP 88-89, 158-59. By this time Huggins suspected police might be looking for him because he believed he may have drawn attention to himself by selling methamphetamine. 14RP 87-88. His suspicion turned to terror when the person he was selling to at Wysgoll's

mother's house told him Wysgoll and her mother were setting him up for a drug bust. 14RP 90-92. Huggins immediately fled on foot from the home before completing his deal. 14RP 92.

Unbeknownst to Huggins, police really had received information about his whereabouts, including from Wysgoll's mother, and were closing in on the house. 9RP 166-69, 14RP 213-17. Huggins feared he would go to prison if apprehended. 9RP 94-96. He ran across the nearby freeway and eventually went through an open door and into someone's basement to hide. 9RP 170-72, 11RP 51-60, 12RP 173-80, 14RP 96-99, 161, 179-82, 217. After a lengthy stand-off with police, Huggins surrendered and was arrested. 9RP 172-80, 183-93, 14RP 161-67. Officers found Huggins's gun in a chimney box in the basement. 9RP 181-83.

David Winningham testified on Huggins's behalf. He was a reformed methamphetamine user and had introduced Wysgoll to Heuring. He knew Heuring for nearly 11 years and knew he sold drugs for a living. He also knew Bennett as someone involved in the drug culture and a friend and drug supplier of Heuring's. Winningham did not know Huggins. 13RP 23-29, 40.

Winningham considered Heuring a good friend until he received a phone call from him about three weeks after the purported robberies.

13RP 24, 29-31, 55. Heuring said several people, including Wysgoll, had robbed him and Bennett. He wanted Winningham to pay his (Heuring's) drug debts owed to Bennett or he was going to say Winningham was involved in with the crimes. 13RP 31-32, 42, 54-55, 62-63. Heuring's threat angered Winningham and he acknowledged at one point in the conversation he threatened to kill Heuring. 13RP 55.

In response to the call, Winningham immediately called police. 13RP 33-35, 114-18. He owed no debts to Bennett. 13RP 43-44, 52-54. A responding officer advised Winningham to obtain a restraining order against Heuring. 13RP 119, 123. A detective followed up by speaking with Winningham and providing the information to the prosecutor's office. 10RP 28-29, 42-45.

Heuring recalled things differently. He testified he volunteered to collect the debt for Bennett because he felt responsible for the robbery at Bennett's apartment. So he asked Winningham to pay the debt Winningham owed Bennett. 11RP 170-72. It was not until after Winningham threatened to kill him that Heuring threatened to falsely accuse him of being involved in the robberies. 11RP 173-74.

Bennett testified Winningham owed her \$250. She did not, however, seek Heuring's assistance in collecting the debt and only learned about Heuring's attempt after the fact. 12RP 91-92.

*b. Right to impeach adverse witness*

Huggins moved in limine for permission to impeach Bennett through cross examination by asking her about a July 2002 Alford<sup>4</sup> plea to taking a motor vehicle without permission. CP 28; Supp. CP \_\_ (sub. no. 102, Supplemental Declaration and Memorandum, filed May 22, 2008) at 8-10, Appendix 5 (copy of plea statement), Appendix 6 (copy of portion of interview transcript); 8RP 35-44. In her plea statement, Bennett denied committing the crime: "I do not believe I am guilty of this crime. I plead guilty to take advantage of the State's offer." Supp. CP \_\_ (sub. no. 102), Appendix 5.

In contrast, Bennett admitted in a pretrial interview with Huggins's trial counsel she was guilty of the crime. Bennett told counsel she felt entitled to take the car because the owner took some of her property and sold it for drugs. Supp. CP \_\_ (sub. no. 102), Appendix 6. Huggins contended the evidence was relevant to Bennett's veracity because the plea

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<sup>4</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

constituted an "outright lie to a judicial officer" regarding a crime she felt entitled to commit. 8RP 35-36, 41-42.

The trial court denied the motion. The court found that while ER 608(b) permitted introduction of specific instances of untruthfulness, the instances must be discrete and unrelated to a particular conviction being used for impeachment. 9RP 7-8. The court found the conviction itself admissible, but not the plea statement and later interview answers. 9RP 8.

*c. Trial irregularity*

During direct examination, the prosecutor asked Heuring about his activities with Wysgoll the morning after he stayed the night at her condominium. 10RP 79-80. Heuring testified they decided to have something to eat. As Wysgoll drove them around to look for food, she received a telephone call. Heuring initially could hear only one end of the conversation, but because the discussion soon became heated, he could hear everything. It became apparent to Heuring Wysgoll was very involved with the caller. 10RP 81-82. Wysgoll told him the caller was JD, whom Heuring previously referred to as a former boyfriend. 10RP 83. Heuring was annoyed so he asked Wysgoll if she was still seeing JD. She admitted she was. Heuring then asked to be driven home and Wysgoll complied. 10RP 83-84.

The prosecutor asked how this made Heuring feel. He said, "I wondered what the big deal was. Why she didn't tell me. I was kind of relieved because sometime during that week I had heard bad things about her and JD doing robberies and stuff." 10RP 84. Defense counsel objected to the hearsay and moved to strike the testimony. The trial court granted the objection and the motion. The court said, "Jury will strike. I am striking that testimony and the jury will disregard it." 10RP 84. Counsel did not move for a mistrial.

*d. The verdicts and combined sentencing*

The jury could not agree whether or not Huggins committed first degree burglary or first degree robbery against Heuring. CP 169-70, 236-38. It found Huggins guilty of first degree burglary, first degree robbery, and unlawful imprisonment for the incidents at Bennett's apartment, all while armed with a firearm. CP 170-72, 230-32, 242-44. Huggins was also found guilty of first degree unlawful possession of a firearm, CP 173, 241, and guilty of the lesser offense of first degree criminal trespass for hiding in the basement before giving himself up for arrest. CP 173, 240.

In a consolidated sentencing, the trial court imposed standard range sentences and firearm sentencing enhancements totaling 254 months. CP 323-36.

C. ARGUMENT

1. THE STATE ERRONEOUSLY CHARGED HUGGINS WITH FIRST DEGREE POSSESSION OF STOLEN PROPERTY BECAUSE THE STATUTE DID NOT APPLY TO HIS CONDUCT.

The state charged Huggins with possessing stolen property (PSP) in the first degree under RCW 9A.56.150 for possessing the white Ford "Dually" pickup truck on or about July 31, 2007. CP 172 (count 7). The jury found Huggins guilty of the charge. CP 78. This was the wrong charge; the alleged conduct did not constitute first degree PSP as a matter of law. This Court should reverse Huggins's conviction and remand for dismissal with prejudice.

- a. *Because the PSP statute did not apply to Huggins, his conviction must be reversed.*

The Legislature amended RCW 9A.56.150 effective July 22, 2007, by adding the following italicized language:

A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 *or a motor vehicle*, which exceeds one thousand five hundred dollars in value.

Laws of Wash. Ch. 199, § 6. Effective on the same date, the Legislature enacted a new crime, called "Possession of Stolen Vehicle." That offense, codified in RCW 9A.56.068, provides that "[a] person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen

motor vehicle." Laws of Wash. Ch. 199, § 5. In other words, the Legislature created a new, more specific crime that proscribed possession of a stolen motor vehicle of any value.

Absent contrary legislative intent, all crimes must be prosecuted under the law existing at the time of their commission. State v. Kane, 101 Wn. App. 607, 611, 5 P.3d 741 (2000). Therefore, on July 31, 2007 – the alleged date of Huggins's possession of the truck – the only applicable charge was possession of a stolen vehicle.

A comparable but less drastic example of improper charging can be found in State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999). The state charged Aho with committing child molestation during a period that included about one and one-half years before the child molestation statute became effective. The jury returned general guilty verdicts, thereby making it possible Aho was convicted for an act occurring before "child molestation" became a criminal offense. Aho, 137 Wn.2d at 739. The Court reversed Aho's convictions, concluding they violated due process. Aho, 137 Wn.2d at 744.

The charging error in Huggins's case requires the same result for a more obvious reason. Unlike in Aho, there is no question Huggins was convicted for acts committed when the first degree possession of stolen

property no longer applied to stolen vehicles. His PSP conviction should therefore be reversed.

*b. Mandatory joinder prohibits retrial under the correct charge.*

The remaining question is whether the state may charge Huggins with possession of a stolen vehicle on retrial. The answer is no; the mandatory joinder rule precludes retrial under that statute.

CrR 4.3.1(b) requires mandatory joinder where the crimes are "related offenses." State v. Lee, 132 Wn.2d 498, 501, 939 P.2d 1223 (1997). Offenses are related if they are based on the same conduct and are within the jurisdiction and venue of the same court. CrR 4.3.1(b); State v. Anderson, 96 Wn.2d 739, 740, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982). "Same conduct" is conduct involving a single criminal incident and includes offenses based on the same act. Lee, 132 Wn.2d at 503.

Anderson is instructive here. There the defendant was charged with first degree murder by extreme indifference to human life. The conviction was reversed because the "extreme indifference" alternative did not apply to the facts. 96 Wn.2d at 740 (citing State v. Anderson, 94 Wn.2d 176, 616 P.2d 612 (1980)) (Anderson I). The state thereafter charged the defendant with first degree premeditated murder based on the same incident. Anderson, 96 Wn.2d at 740. The Court reversed the

resulting conviction and dismissed the charge because it violated the mandatory joinder rule. Anderson, 96 Wn.2d at 740-41.

The Court held, however, that double jeopardy did not bar the state from recharging the defendant with the lesser offenses of second degree murder, first degree manslaughter or second degree manslaughter. Anderson, 96 Wn.2d at 741-42. The Court relied on cases holding that if the reversal is not for evidentiary insufficiency, the defendant could be retried for the offense of conviction or and any lesser included offense. Anderson, 96 Wn.2d at 742 (citing State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959)).

But because mandatory joinder prevented the re-filing of a charge of the same degree as the dismissed charge, the proper remedy was reversal without prejudice to re-file lesser included or lesser degree offenses. Anderson, 96 Wn.2d at 743-44; see State v. Gamble, 168 Wn.2d 161, 173-74, 225 P.3d 973 (2010) (distinguishing Anderson on ground petitioners were charged with nonexistent crime rather than inapplicable one; because prosecutor should have realized statute did not apply, Anderson "involves an ordinary mistake by the prosecutor."); State v. Dallas, 126 Wn.2d 324, 329, 892 P.2d 1082 (1995) (mandatory joinder rule prohibited filing of new alternative means charges in Anderson

because means could have been charged in original information, whereas lesser included offenses need not be charged at all.).

Similarly, Huggins's possession of the stolen Dually could not support a charge of first degree possession of stolen property. And because charging the correct crime – possession of a stolen motor vehicle – would be barred by the mandatory joinder rule, the state on remand may charge only lesser included or lesser degree offenses.

2. THE TRIAL COURT VIOLATED HUGGINS'S RIGHT TO PRESENT A DEFENSE BY PROHIBITING OTHER SUSPECT EVIDENCE.

The Sixth<sup>5</sup> and Fourteenth<sup>6</sup> Amendments, as well as article 1, § 21<sup>7</sup> of the Washington Constitution, guarantee the right to trial by jury and to

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<sup>5</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

<sup>6</sup> The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

<sup>7</sup> Article 1, § 21 provides, "The right of trial by jury shall remain inviolate."

defend against the state's allegations. These constitutional guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Absent a compelling justification, excluding exculpatory evidence violates the Constitution because it deprives a defendant of the fundamental right to put the prosecutor's case to "the crucible of meaningful adversarial testing." Crane v. Kentucky, 476 U.S. 683, 689-690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

In Washington, State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) and State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002), define the expanse of a criminal defendant's right to present evidence in his defense. A defendant must be permitted to present even minimally relevant evidence unless the state can demonstrate a compelling interest for its exclusion. Moreover, no state interest is sufficiently compelling to preclude evidence with high probative value. Darden, 145 Wn. 2d at 621-

22; Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 714- 15, 6 P.3d 43 (2000).

As the Ninth Circuit Court of Appeals has recognized, there is a broad due process right to present all evidence tending to implicate another suspect:

Even if the defense theory [were] purely speculative . . . the evidence would be relevant. In the past, our decisions have been guided by the words of Professor Wigmore: "[I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt."

Thomas v. Hubbard, 273 F.3d 1164, 1177-78 (9th Cir. 2001) (quoting United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir. 2001) (quoting 1A John Henry Wigmore, Evidence in Trials at Common Law § 139 (Tillers rev. ed. 1983)), overruled on other grounds, Payton v. Woodford, 299 F.3d 815, 829 n.11 (9th Cir. 2002).

The United States Supreme Court has reiterated that a defendant is denied the right to present a defense if evidence is excluded under rules that are arbitrary or disproportionate to the purposes they are designed to serve. Holmes v. South Carolina, 547 U.S. 319, 324-25, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (citing United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)). Specifically, the Holmes

Court stated that when the defense proffers evidence that someone other than the defendant committed the offense, a trial court may only exclude that evidence if it is repetitive or poses an undue risk of prejudice or confusion. Holmes, 547 U.S. at 326-27 (citing Crane v. Kentucky, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)).

The rule in Washington governing the admission of evidence that someone else committed the crime ("other suspect" evidence) was articulated more than 70 years ago. Such evidence is admissible when "there is a train of facts or circumstances as tend clearly to point to someone besides the accused as the guilty party." State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932); see also State v. Maupin, 128 Wn.2d 918, 925, 913 P.2d 808 (1996), and State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993) (both cases citing Downs).

Under Downs, neither a third party's opportunity to commit the crime nor a third party's motive, will, by itself, satisfy this standard because it would simply invite speculation about whether an outsider committed the offense. Maupin, 128 Wn.2d at 927; Downs, 168 Wash. at 667-68. Instead, there must be specific evidence tending to connect such outsider with the crime. Downs, 168 Wash. at 667 (quoting 16 C.J. §

1085). When Washington courts have properly excluded evidence under Downs, they have done so based on the absence of a specific connection between the proffered evidence and the charged crime. See Maupin, 128 Wn.2d at 927 (discussing cases).

In Huggins's case, the trial court heard specific evidence to link Abraham Hartfield to the Bellevue burglary. Officer Quiggle described Hartfield as a "rather prolific car thief and residential burglar." 2RP 122. In fact, Hartfield was under police surveillance for automobile theft at the time of the burglary.

Police also found property belonging to Hartfield's then-girlfriend, Ashley Purner, in the same vacant house where McConnell's property was found.

Further, not only did McConnell's description of the male burglar match Hartfield,<sup>8</sup> his identifications of Huggins as the offender were dubious. Although McConnell identified Huggins as the burglar in court

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<sup>8</sup> McConnell described the burglar as being in his late 20s, five feet eight inches tall to five feet ten inches tall, with a stocky build, short black hair, a dark complexion, and of Italian or Mediterranean appearance. 4RP 75-77. Rhoades description was generally similar: 30 to 35 years old, six feet tall, with a medium build and short brown hair, and Caucasian or Hispanic. 7RP 82. Recall that a booking photograph of Hartfield described him as being 29 years old at the time of the incident, five feet seven inches tall, 180 pounds, with short black hair and brown eyes, and showed him with a dark complexion.

with 80 percent certainty, he picked photos of different people as possibly depicting the offenders only three days after the incident. 4RP 53-58, 79, 7RP 48-55, 117-20, 127-28. In addition, McConnell testified he was 50 percent certain of those photo choices, which is the same level of certainty he placed on his choice of Huggins's photo in a lineup more than five months after the incident. 4RP 69-73, 79-81, 7RP 74-77.

Additionally, police found the handwritten notes, which indicated a person other than Huggins was involved in the crime, in Wysgoll's purse upon her arrest about one week after the incident. 7RP 17. In a vacuum, the notes may not have been admissible in their own right. But in combination with the other evidence, including that Wysgoll knew Hartfield, this was further evidence indicating Huggins was not the burglar. Therefore, due process also required its admission.

Huggins's proffer was not mere opportunity evidence. It was specific, and included an eyewitness description of the burglar that indisputably matched Hartfield, the "prolific" residential burglar whose circles overlapped those of Wysgoll and Hartfield. The "other suspect" evidence was critical to the defense case. The trial court erred when it ruled the evidence inadmissible. Similarly, it erred when it precluded

jurors from hearing evidence about the handwritten notes indicating third-party involvement in the crimes.

If, however, this Court concludes the evidence was inadmissible because the Downs "train of facts" standard requires something more, that standard violates due process. Hudlow and Darden require the admission of evidence minimally relevant to the defense unless the State can show a compelling interest in its exclusion. This is what the federal and state constitutions require. If the Downs standard is more demanding, it unfairly limits a defendant who says "not me" from presenting evidence that attempts to answer the question "then who?" See United States v. Crosby, 75 F.3d 1343, 1347 (9th Cir. 1996) (introduction of other suspect evidence answers this relevant question, thereby rebutting the inference that only the defendant could have possibly committed charged crime).

The rationale behind Downs is to ensure an orderly and expeditious trial:

It rests upon the necessity that trials of cases must be both orderly and expeditious, that they must come to an end, and that it should be a logical end. To this end it is necessary that the scope of inquiry into collateral and unimportant issues must be strictly limited. It is quite apparent that if evidence of motive alone upon the part of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased; that a great many trial days might be

consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.

State v. Mak, 105 Wn.2d 692, 717, 718 P.2d 407 (citing People v. Mendez, 193 Cal. 39, 52, 223 P. 65 (Cal. 1924)), cert. denied, 479 U.S. 995 (1986).

This rationale is valid. Motive and/or opportunity alone are insufficient to present evidence that someone else committed the crime. Such evidence truly would be "collateral and unimportant." But to the extent Downs is read to exclude evidence, as in Huggins's case, pointing to another as the offender; i.e., that it requires some greater, heightened foundation beyond its tendency to create reasonable doubt, this violates due process.

Several courts have now rejected heightened foundational requirements for the admission of "other suspect" evidence. As the D.C. Court of Appeals has said:

There is no requirement that the proffered evidence must prove or even raise a strong probability that someone other than the defendant committed the offense. Rather, the evidence need only tend to create a reasonable doubt that the defendant committed the offense. In this regard, our focus is on the effect the evidence has upon the defendant's culpability, and not the third party's culpability.

Johnson v. United States, 552 A.2d 513, 517 (D.C. Ct. App. 1989); see also, e.g., Smithart v. State, 988 P.2d 583, 588 (Alaska 1999) (also

rejecting notion that evidence must raise a strong probability someone else committed the crime; due process merely requires that evidence tend to create a reasonable doubt as to defendant's guilt); People v. Hall, 718 P.2d 99, 104 (Cal. 1986) (rejecting need for substantial proof of probability someone else committed offense; even circumstantial evidence linking another to crime will suffice).

Particularly noteworthy is the California Supreme Court's rejection of a heightened burden because it is that court's initial rationale for the rule that has been cited in support of the Downs standard. See State v. Mak, 105 Wn.2d at 717; State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933). In 1986, the California Supreme Court rejected a heightened rule because it created an indefensible "distinct and elevated standard for admitting this kind of exculpatory evidence." People v. Hall, 718 P.2d at 104. Instead, the Hall Court recognized that other suspect evidence should be treated like any other -- if relevant, it is admissible unless its value is substantially outweighed by other factors such as undue delay or juror confusion. *Id.*

In Holmes, a murder case, there was overwhelming evidence of Holmes' guilt: his palm print was found on the inside of the front door of the victim's house; fibers consistent with Holmes's sweatshirt were found

on the victim's bed sheets; matching fibers were found on the victim's pink nightgown and on Holmes's jeans; fibers found on the victim's nightgown also matched fibers found on Holmes's underwear; a mixture of DNA consistent with Holmes and the victim was found on the victim's underwear; the victim's blood was found on Holmes's shirt; and Holmes was seen near the victim's home within an hour of the murder. Holmes, 126 S. Ct. at 1730.

In addition to attacking the forensic evidence, at trial Holmes sought to introduce proof that another man had attacked the victim. Holmes proffered witnesses who placed the other suspect in the victim's neighborhood on the morning of the assault and witnesses who would testify that the other suspect had either acknowledged his guilt or Holmes' innocence. The other suspect, however, denied making any incriminating statements and provided an alibi. Holmes, 126 S. Ct. at 1730-31.

The trial court excluded the other suspect evidence and the South Carolina Supreme Court affirmed, reasoning that because the evidence against Holmes was strong, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence. Holmes, 126 S. Ct. at 1731, 1734. The United States Supreme Court reversed Holmes's conviction. It reasoned that even where the

state's case is strong, evidence of other suspects cannot be excluded unless the evidence poses an undue risk of harassment, prejudice, or confusion of the issues. Holmes, 126 S. Ct. at 1734-35. Holmes had been denied 'a meaningful opportunity to present a complete defense.' Holmes, 126 S. Ct. at 1735 (quoting Crane v. Kentucky, 467 U.S. at 485).

To the extent the Downs rule requires a defense showing beyond the usual test for relevancy, Holmes makes it clear that such a heightened standard for other suspect evidence is unconstitutional. Holmes is consistent with Hudlow and Darden. Under the holdings in those cases, minimally relevant evidence under ER 401 -- evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable -- that someone other than the defendant committed the offense is admissible unless the State can show a compelling interest for excluding it. There was no such showing in Huggins's case.

Huggins's Bellevue burglary conviction (count 6) must be reversed because the state cannot show, as it must, that the violations of his constitutional rights were harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S.

1020 (1986) (constitutional error is presumed prejudicial and State bears burden to show otherwise).

The main issue at trial was the identity of the burglary of McConnell's home. The evidence was close in this respect. As previously discussed, the eyewitness evidence was weak, there was no conclusive physical evidence linking Huggins to the burglary,<sup>9</sup> and Wysgoll's testimony was inconsistent. She variously said she alone committed the burglary, she did nothing but wait for the garage door to open while she was sick, and she joined Huggins in burglarizing the home by carrying pillow cases stuffed with women's items from the house to the van. And in her plea statement to the lesser charge of attempted burglary, Wysgoll indicated Huggins assaulted McConnell, but on the stand she said she saw nothing of the kind.

The evidence pointing to Hartfield as the burglar could have convinced one or more jurors that the prosecution had not proved its case beyond a reasonable doubt. The additional evidence concerning the notes would have had this same effect. On appeal, the state simply cannot show that precluding compelling evidence someone else committed the crimes

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<sup>9</sup> For example, officers found no useable fingerprints at the burglary scene. 7RP 45, 121-23.

was harmless beyond a reasonable doubt. For these reasons this Court should reverse the conviction for count 6.

3. THE TRIAL COURT VIOLATED HUGGINS'S RIGHT TO CONFRONT ADVERSE WITNESSES BY BARRING HIM FROM FULLY IMPEACHING BARNETT.

Huggins sought to impeach Bennett's credibility by cross-examining her about an Alford plea she entered in 2002 to a charge of taking a motor vehicle without permission. Her plea contradicted her admission of guilt to Huggins's counsel. Because Bennett was the only eyewitness to the incidents in her apartment, the jury's assessment of her credibility was crucial. The trial court deprived Huggins of his constitutional right to confront adverse witnesses by preventing jurors from learning of Bennett's duplicity.

The Sixth Amendment and article I, section 22 guarantee criminal defendants the right of confront adverse witnesses. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Russell, 125 Wn.2d 24, 73, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011 (1997). This guarantee includes the right to impeach witnesses through reasonable cross examination. Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988). A

criminal defendant is given "extra latitude" in cross examination to show credibility, especially when examining a crucial state witness. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

The right to confrontation is "zealously guarded." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). It is subject to the following: (1) the evidence sought must be minimally relevant; (2) the defendant's right to present relevant evidence must be weighed against the state's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial; (3) only if the state's interest outweighs the defendant's need can otherwise relevant information be withheld. Darden, 145 Wn.2d at 622.

"The threshold to admit relevant evidence is very low." Darden, 145 Wn.2d at 621. The "prejudice" to which this test refers must be focused on the defendant and his right to a fair trial rather than to the impeached witness or the truth finding function itself. State v. Barnes, 54 Wn. App. 536, 541, 774 P.2d 547, review denied, 113 Wn.2d 1018 (1989). And the state's interest in barring relevant evidence must be "compelling." Darden, 145 Ww.2d at 621.

Appellate courts apply basic rules of evidence to determine whether a trial court violates a defendant's confrontation rights. Darden,

145 Wn.2d at 624. The evidence rule most applicable here is ER 608.

The rule provides in pertinent part as follows:

(b) **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

In applying this rule, a trial court may consider whether the instance of the witness's misconduct is relevant to the witness's credibility at trial and whether it is material to the issues presented at trial. State v. Gregory, 158 Wn.2d 759, 798, 147 P.3d 1201 (2006). When the witness's misconduct is a statement, it may be fair game whether it was sworn or unsworn. Gregory, 158 Wn.2d at 798-99; State v. Kunze, 97 Wn. App. 832, 859-60, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022 (2000).

In Huggins's case, a material fact of consequence was the identity of the perpetrator of the crimes in Bennett's apartment. Bennett was the only witness who identified Huggins as that offender. In other words, she was the most significant state's witness. Therefore any evidence tending to cast doubt on Bennett's credibility was crucial, as both parties recognized. See 15RP 29-31 (state's closing argument), 57-72, 81-88, (defense closing argument), 101-02 (rebuttal).

convicted of a crime of dishonesty in 1999; used and sold methamphetamine during the time of the instant incidents; called friends first rather than police after the incident because there had been drugs in the apartment; and withheld information from the police. 12RP 13-18, 41-43, 49.

On cross examination, defense counsel had little to add. Counsel elicited testimony that Bennett had been unemployed for eight years before the incident, had a methamphetamine habit, and needed income to support the habit; and that she testified she saw Naugle being restrained but said in a police interview she did not see that. 12RP 75-78, 82-85.

This summary demonstrates the trial court prevented Huggins from impeaching a key state's witness with relevant, noncumulative evidence tending to show an intent by Bennett to mislead a court in a plea proceeding. Under Darden and ER 608, this evidence was surely prejudicial to the state's case, but was not so damaging as to "disrupt the fairness" of the trial. Darden, 145 Wn.2d at 622. Even more certain is the state failed to provide a "compelling" reason to keep out the impeaching evidence. See McDaniel, 83 Wn. App. at 185 ("Before the State may preclude the admission of a defendant's relevant evidence, it must demonstrate a compelling state interest.").

McDaniel is instructive here. The trial court precluded McDaniel from impeaching an alleged victim of his assault with evidence she lied about the recency of her drug use in a related civil suit. 83 Wn. App. at 182-83. This Court held because a fact of consequence in the assault trial was the identity of the assailant, the purported victim's credibility as to who kicked her was also relevant. McDaniel, 83 Wn. App. at 186. And the state's countervailing interest in precluding the evidence -- preventing an acquittal based on prejudice against the victim's history of drug abuse -- was insufficient given other, unchallenged, evidence the victim frequently used drugs in the weeks preceding the assault. McDaniel, 83 Wn. App. at 187. Therefore, "the defense was entitled to explore the possibility that, given [the witness's] admitted willingness to lie under oath when it suited her purposes before, she may have been doing it again in the criminal prosecution, for whatever reasons might serve her purposes there." McDaniel, 83 Wn. App. at 187.

Huggins was thus entitled to explore the possibility that because Bennett demonstrated a willingness to distort the facts in an earlier court proceeding, she may have been doing it again. The trial court erred by preventing this cross examination.

The final issue is whether the error requires reversal. Confrontation clause violations can be harmless. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006), review denied, 159 Wn.2d 1017 (2007). The question is whether, assuming the damaging potential of the precluded testimony was fully realized, a reviewing court might nonetheless conclude the error was harmless beyond a reasonable doubt. Saunders, 132 Wn. App. at 604 (citing Van Arsdall, 475 U.S. at 684). Factors include ""the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and ... the overall strength of the prosecution's case."" Saunders, 132 Wn. App. at 604 (quoting Van Arsdall, 475 U.S. at 686-87).

Bennett was the most important state's witness with respect to the offenses that occurred in her apartment. The precluded testimony was not cumulative; there was no other evidence tending to show Bennett's willingness to mislead in a judicial proceeding. There was little to corroborate Bennett's testimony. Police found credit and identification

cards belonging to Bennett and Naugle in the black Honda Wysgoll and Huggins used, but there was no physical evidence, such as blood or fingerprints, linking Huggins to Bennett's apartment. Heuring identified Huggins as the disguised man who first entered his apartment and later demanded directions to Bennett's apartment. 10RP 143-45. But Heuring had only a few seconds to observe his attacker before his head was covered with a pillow case. He also could not identify Huggins's gun. 11RP 123-26. Nor did Heuring see if his assailants really went to Bennett's residence. 10RP 166-70, 11 RP 83-86. In any event, at least one juror must not have believed Heuring because the jury could not reach a decision regarding the counts naming Heuring as victim.

For the reasons stated, the state's proof regarding the Bennett-related crimes was far from overwhelming. The state cannot prove beyond a reasonable doubt the trial court's infringement on Huggins's right to confront Bennett was harmless. This Court should reverse Huggins's convictions with respect to those offenses and remand for a new trial.

4. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL IN THE FACE OF A PREJUDICIAL TRIAL IRREGULARITY.

Trial counsel was ineffective for failing to move for a mistrial following Heuring's gratuitous statement that he "had heard bad things

about her [Wysgoll] and JD doing robberies and stuff." 10 RP 84. Because there was no valid tactical reason for counsel's failure, Huggins establishes he was deprived of effective representation.

The Sixth Amendment and article I, section 22 guarantee criminal defendants the effective assistance of counsel. An accused is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)). Huggins meets both requirements.

The most serious charges facing Huggins were two counts of first degree robbery. Evidence of prior involvement in robberies was therefore devastating to his defense that he was set up and did not commit the offenses. See State v. Robtoy, 98 Wn.2d 30, 43-44, 653 P.2d 284 (1982) (potential for prejudice of evidence of prior killing to defendant on trial for murder "is obvious because the jury could well have interpreted the evidence of the prior killing as proof that Robtoy acted in conformity therewith on this occasion."); State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971) (in robbery trial, admission of testimony defendant

participated in other robberies so prejudicial as to require reversal of conviction).

Despite the obvious danger of Heuring's testimony in Huggins's case, trial counsel merely requested the testimony be stricken. 10RP 84. This was deficient because a trial court would likely have granted a mistrial motion.

Trial courts must grant a mistrial where the irregularity may have affected the outcome of the trial, thereby denying the defendant his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

For reasons already stated, the irregularity in Huggins's case was extremely serious. The evidence of involvement in other purported robberies with Wysgoll was not cumulative, nor could it have been because it was blatantly inadmissible. And although the trial court struck the testimony and instructed jurors to disregard it, the evidence was so

inherently prejudicial that jurors could not have been expected to follow the court's directive.

Instructions to disregard "cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Mack, 80 Wn.2d at 24; State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968) (police officer's testimony relating to defendants' alleged plan to commit another robbery like one charged "was so prejudicial in nature that its effect upon the minds of the jurors could not be expected to be erased by an instruction to disregard it."); see also State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996) (prosecutorial misconduct may be so flagrant no instruction will cure it, in which case declaration of mistrial appropriate remedy).

In Huggins's case no competent attorney would have been satisfied with the trial court's inadequate remedy. Trial counsel's failure to move for a mistrial in the face of the serious irregularity constitutes deficient performance.

In addition, counsel's performance prejudiced Huggins. In other words, there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Thomas, 109 Wn.2d at 226.

Because the irregularity warranted a mistrial, the result would likely have been a new trial for Huggins had counsel moved for such relief.

Finally, there could have been no legitimate tactical reason for continuing with the same jury after exposure to Heuring's propensity testimony. First, counsel worked hard to have the Bellevue counts severed from the Seattle charges, in part because evidence of Huggins's involvement in the former crimes "would be properly excluded as far more prejudicial than probative." CP 38. It made little sense to proceed after the goal of the severance had been frustrated by even more damaging evidence. Second, counsel moved to have Huggins's burglary conviction from the Bellevue case referred to generically as a conviction for a felony crime of dishonesty. Counsel explained it would be "very prejudicial . . . if [the prosecutor] were permitted to cross-examine Mr. Huggins about his very recent prior conviction for a burglary . . . ." 11RP 70-71. As with the motion to sever, counsel prevailed and the court granted the motion. 11RP 72. Counsel therefore successfully protected Huggins's from the prejudicial effect of the Bellevue incident. It would have been inexplicable for him to have nevertheless deliberately chosen to proceed with the same tainted jury.

Defense counsel performed deficiently to Huggins's prejudice. The convictions should be reversed and the case remanded for a new trial.

5. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY BY ORDERING HUGGINS TO COMPLY WITH AN ALCOHOL-RELATED COMMUNITY CUSTODY CONDITION.

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001). An offender has standing to challenge conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd., 135 Wn.2d 326, 957 P.2d 655 (1988); see also Bahl, 164 Wn.2d at 750-52 (defendant may bring pre-enforcement challenge to vague sentencing condition).

Among other offenses, Huggins was convicted of first degree burglary and first degree robbery. Under the Sentencing Reform Act (SRA), each crime is categorized as a "violent" offense. RCW 9.94A.030(50)(a)(i). At the time Huggins committed his crimes, offenders of violent crimes were sentenced according to former RCW 9.94A.715.

That statute authorized a trial court to impose a term of community custody. RCW 9.94A.715(1). Here the court imposed a of community custody for 18 months to 36 months. CP 327.

Under RCW 9.94A.715(2)(a), unless the court waives a condition, the conditions of community custody shall include those set forth in RCW 9.94A.700(4), and may include those provided for in RCW 9.94A.700(5). In addition, a trial court may order participation in rehabilitative programs or to otherwise perform affirmative conduct “reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community . . . .” RCW 9.94A.715(2)(a).

RCW 9.94A.700(5) provides:

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

One of the conditions the trial court imposed on Huggins was that he undergo a "drug *and alcohol* evaluation and follow recommended

treatment." CP 333 (emphasis added). This condition could not be imposed unless it reasonably related to the circumstances of Huggins's offense. Under State v. Jones,<sup>10</sup> the alcohol-related portion of the condition does not.

Jones pleaded guilty to first degree burglary and other crimes. During the plea hearing, Jones's attorney explained Jones was bipolar and not only off of his medication, but also using methamphetamine at the time of his crimes. Counsel contended this combination caused Jones to offend. Jones, 118 Wn. App. at 202. There was no evidence, however, that alcohol played a role in Jones' crimes.

The court sentenced Jones after accepting his pleas. The sentence included community custody, a condition of which was abstinence from alcohol and participation in alcohol counseling. The court made no finding alcohol contributed to Jones's crimes. Jones, 118 Wn. App. at 202-03.

On appeal, the Jones court held the trial court could not require Jones to participate in alcohol counseling given the lack of evidence alcohol contributed to his crimes. Jones, 118 Wn. App. at 207-08.

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<sup>10</sup> 118 Wn. App. 199, 76 P.3d 258 (2003).

In reaching this conclusion, the court first observed RCW 9.94A.700(5)(c) authorizes a trial court to order an offender to "participate in crime-related treatment or counseling services." Jones, 118 Wn. App. at 207. The court held because the evidence failed to show alcohol contributed to Jones's offenses or the trial court's alcohol counseling condition was "crime-related," the trial court erred by ordering Jones to participate in alcohol counseling. Jones, 118 Wn. App. at 207-08.

The Court also acknowledged, however, RCW 9.94A.715(2)(b) permitted a trial court to order an offender to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]" Jones, 118 Wn. App. at 208. This condition also applies to Huggins.

The Court held:

If reasonably possible, [RCW 9.94A.715(2)(a)] must be harmonized with RCW 9.94A.700(5)(c), so that no part of either statute is rendered superfluous. . . . If we were to characterize alcohol counseling as "affirmative conduct reasonably related to the offender's risk of reoffending, or the safety of the community," with or without evidence that alcohol had contributed to the offense, we would negate and render superfluous RCW 9.94A.700(5)(c)'s requirement that such counseling be "crime-related." Accordingly, we hold that alcohol counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.

Jones, 118 Wn. App. at 208 (footnote omitted).

The same language analyzed in Jones applies to Huggins's case. Therefore, the Jones analysis should apply here. Just as there was no evidence alcohol contributed to Jones's offenses, there was likewise no evidence alcohol contributed to Huggins's offense. That portion of the community custody condition requiring Huggins to obtain an alcohol evaluation and follow recommended treatment is too broad and not reasonably related to the circumstances of Huggins's offense. See State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and Parramore's conviction for delivering marijuana).

For these reasons, the "alcohol" portion of the condition should be stricken from Huggins's judgment and sentence. Jones, 118 Wn. App. at 207-08, 212.

D. CONCLUSION

The state charged Huggins with a statute that did not apply to his conduct. It therefore did not prove him guilty of the applicable offense. Count 7, first degree PSP, should therefore be dismissed. The trial court violated the appellant's constitutional due process right to present a

defense to the Bellevue burglary by precluding Huggins from presenting "other suspect" evidence. The conviction for count 6 should be reversed and remanded for a new trial. The trial court also violated Huggins's right to confront adverse witnesses by precluding impeachment of Bennett with her earlier Alford plea. This Court should therefore reverse the convictions for counts 3-5. Trial counsel deprived Huggins of his right to effective representation by failing to contest the PSP charge and failing to move for a mistrial after Heuring's gratuitous and prejudicial hearsay remark. Reversal of all counts is the proper remedy. Finally, the trial court exceeded its sentencing authority by imposing a condition of community custody that was not crime-related. This Court should order the condition stricken from the sentence.

DATED this 6 day of May, 2010.

Respectfully submitted,

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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63636-7-I
	)	
JONATHAN HUGGINS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6<sup>TH</sup> DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JONATHAN HUGGINS  
DOC NO. 331470  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

2010 MAY -6 PM 4:05

**SIGNED** IN SEATTLE WASHINGTON, THIS 6<sup>TH</sup> DAY OF MAY, 2010.

x. Patrick Mayovsky