

NO. 35020-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS SMITH,

Appellant.

BY [Signature]
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
JUL 27 2007
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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-02047-2

BRIEF OF RESPONDENT

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DATED June 28, 2007, Port Orchard, WA
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Smith presents any basis for this Court to revisit its holding that, based on the plain language of the statute, subsection (1)(a) of the money-laundering statute does not include an element of intent to conceal or disguise the source of the proceeds?

2. Whether the information was defective for failing to contain the non-existent money-laundering element of intent to conceal or disguise the source of the proceeds?

3. Whether Smith fails to show prosecutorial vindictiveness based on the amendment of the charges after plea negotiations failed?

4. Whether the trial court properly excluded Smith's irrelevant and self-serving hearsay statement that he was afraid of Jesse because Jesse served time for robbery?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Thomas Smith was charged by information filed in Kitsap County Superior Court with second-degree burglary, based on Smith or an accomplice having broken into an office where Smith's sister worked and having emptied the safe therein. CP 1.

On Friday, April 7, 2006, the State attempted to file a first amended

information adding a charge of trafficking in stolen property in the first degree based on Smith's purchase of a Dodge Intrepid with the proceeds of the burglary. CP 9. The trial court, being of the belief that cash could not satisfy the definition of stolen property, declined to find probable cause and refused to arraign Smith on the charge. RP (4/7) 5.

The following Monday, the trial deputy presented further argument on the issue, but the court adhered to its ruling. RP (4/10) 4-6.

The next day, the State notified Smith's counsel that it would be filing a second amended information alleging second-degree burglary and money laundering. 1RP 6. That document was filed on April 18, and the trial court arraigned Smith on the charge and the case proceeded to trial after defense counsel conceded that she had told the prosecutor that she would be ready for trial. 1RP 36-37, 39; CP 12.¹

The jury found Smith guilty as charged. CP 93.

B. FACTS

Smith's sister, Debbie Smith,² had worked at Kitsap Property Management since March 2005. 2RP 26. She worked as an office assistant

¹ A third amended information was filed that narrowed the offense date of burglary and clarified that the State was proceeding under RCW 9A.83.020(1)(a) alone on the money-laundering charge. 1RP 53, 64; CP 16.

² The State will refer to Ms. Smith by her first name to avoid confusion with the appellant. No disrespect is intended.

there while she was undergoing training to become a realtor. 2RP 27. It was a small office; only Debbie, the owner, Leslie Huff, and the property manager, Diane Idle, worked there. 2RP 27. The safe, which was large, was in the back office that Huff occupied. 2RP 29.

In August 2005, Debbie was living with Smith. 2RP 30. He would come to see her at the office a few times a week, for various reasons. 2RP 31. Debbie kept her office key on a ring with her other keys. 2RP 33. She would give Smith the entire ring if he borrowed her car. 2RP 33.

On Friday, August 26, Smith came into the office around 4:30 to pick her up. 2RP 34. When Smith arrived, Idle was conducting a lease signing. 2RP 37. Idle and the clients were at Idle's desk, which was in the same room as Debbie's. 2RP 29, 37. They handed over \$3100.00 in cash to cover the rent, deposit, and associated fees. 2RP 37-38; 3RP 9. The money could still have been on the desk with Smith arrived. 2RP 38.

Idle called Debbie after she got home and asked her to come back in because the answering machine was not set up correctly. 2RP 34. Debbie went back to the office by herself, fixed the problem, and she and Idle left together. 2RP 34.

Debbie then went home and picked up Smith, who helped her retrieve some signs, which they took back to the office. 2RP 34. While they were

there, Debbie put some money into the safe that she had forgotten to attend to earlier. 2RP 35. The key to the safe was under a file, although it was supposed to be kept under the flower pot on top of the file cabinet in Huff's office. 2RP 35. Smith was next door in the kitchen while she was putting the funds in the safe. 2RP 36. Huff's office did not have a door. 2RP 47. After she was done she went back to her desk, where Smith was by this time sitting. 2RP 36.

When Idle arrived Monday morning the safe was open. 3RP 18. She had closed and locked it Friday evening. 3RP 14. Idle called Huff and asked her if she had been in over the weekend, and Huff said she had not. 3RP 18. While she was on the phone, she checked the safe and discovered that the money was gone. 3RP 18. Huff told her to call the police. 3RP 18.

Sheriff's Deputy Steve Clarkson responded to the burglary complaint. There were no signs of forced entry on either the building or the safe. 3RP 21. The "safe" was actually a locking two-drawer file cabinet. 3RP 22. No usable prints on safe or key. 3RP 26-27.

Later that morning the police went to the Smith house to discuss the burglary that had occurred at the office over the weekend. 2RP 42; 3RP 28. Clarkson spoke with Debbie first. 3RP 28. Then he spoke with Smith. 3RP 29. He spoke with them separately, outside their apartment. 3RP 28-29.

Smith denied knowing anything about the burglary. 3RP 30. While he was speaking to Smith, Debbie came out. 3RP 48. She was upset and told Smith, "If you had anything to do with this, you better tell me." 3RP 48. She was concerned about her job. 3RP 49. Smith denied any involvement. 3RP 49. Smith looked surprised when Clarkson told him that he found a thumbprint on the key, and said, "Really?" 3RP 49.

Clarkson asked them if they would take a polygraph, and after some hesitation, Smith said he would. 3RP 50. Debbie responded right away and was adamant about talking it. 3RP 51. She told them she would take it right then and there, because she was not involved in the burglary. 2RP 43. She set up an appointment to take it on September 16. 2RP 43.

On Smith's birthday, September 15, he and Debbie talked about the burglary. 2RP 43. Up until that time, he had assured her that he was not involved. 2RP 43. They were drunk, and Smith told her that he had copied her office key and given it to someone else. 2RP 44. He might have said it was taken from him; Debbie could not recall clearly. 2RP 44. They had been drinking shots for at least three hours at the time. 2RP 45. She "freaked out" and went and confronted the people Smith had said had the copy of the key. 2RP 48. They neither confirmed nor denied the story. 2RP 48.

Smith also told Debbie that a car was bought. 2RP 49. It was a 1995

Dodge Intrepid that sold for \$3500. 2RP 49.

The next morning, Debbie went to the sheriff's office to take the polygraph test. 2RP 48. Debbie was crying, and told the receptionist she was there to see Detective Trogdon for her polygraph. 2RP 48. She was very emotional because she did not know what was going on, she was hung-over, and she was being treated oddly at work. 2RP 48.

Trogdon took her to his office, and asked her why she was crying. 2RP 49. She told him what Smith had told her about the car and the key. 2RP 49. Debbie and the detective then went to the Smiths' apartment. 2RP 51. Trogdon talked to Smith, and Smith turned over a bill of sale for the Intrepid to Trogdon. 2RP 51-52, 58; Exhibit 1.

Later that morning, Trogdon and Detective Rodrigue went back to the Smith apartment. 3RP 60. Debbie let them in. 3RP 60. Smith agreed to talk to them. 3RP 60. Smith was somewhat evasive initially. 3RP 61.

Eventually he told Trogdon that on Saturday he was at the home of Jesse³ and Rachel. 3RP 63. He told them that it would be easy to get into the office, because he had made a copy of the key. 3RP 63. He also told them that he knew where the key to the safe was. 3RP 63. Smith said after he gave them the key, Jesse and Rachel left with it. 3RP 63. They came back

³ Jesse and Rachel's last names are not clear from the record.

later, but Smith denied that they had given him any money. 3RP 64.

The next day, Sunday, Jesse found an ad in the paper for the Intrepid, and they went and bought it for \$3500.00. 3RP 64. Smith asserted the Jesse gave the money to the seller. 3RP 64. Smith was present for the transaction. 3RP 64. Smith gave him a handwritten bill of sale dated August 28, 2005. 3RP 65.

Smith said Jesse had the car. 3RP 65. Jesse was keeping the car because Jesse claimed that Smith owed him \$150.00. 3RP 65. Smith asserted that the only benefit he received was that Jesse and Rachel bought him cigarettes and food and other minor items. 3RP 65. Smith then showed the deputies where Jesse lived. 3RP 66. Clarkson subsequently impounded the Dodge Intrepid from Jesse's house. 3RP 52.

On cross-examination, Trogdon was allowed to testify that Smith asserted he was afraid of Jesse, and that Smith told Trogdon why he was afraid of Jesse. 3RP 68. Smith also told him that he did not personally participate in the burglary because he was "chicken," and that he felt it was wrong of him to tell Jesse and Rachel about the key. 3RP 68. Smith did tell Trogdon that he gave the key to Jesse and Rachel. 3RP 68.

III. ARGUMENT

- A. **THIS COURT HAS ALREADY SPECIFICALLY DECLINED, BASED ON THE PLAIN LANGUAGE OF THE STATUTE, TO WRITE SMITH'S PROPOSED ELEMENT OF INTENT TO CONCEAL OR DISGUISE THE SOURCE OF THE PROCEEDS INTO SUBSECTION (1)(A) OF THE MONEY LAUNDERING STATUTE.**

Smith argues that this Court should rewrite the money laundering statute to add the element of intent to conceal or disguise the source of the funds. This claim is without merit because the statute plainly reflects a legislative intent not to include such an element, as this Court has already held.

Before addressing the legal standards, the State would point out some of the salient features of the statute in question. Smith was charged and convicted under RCW 9A.83.020(1)(a), which provides:

A person is guilty of money laundering when that person conducts or attempts to conduct a financial transaction involving the proceeds of specified unlawful activity and:

- (a) Knows the property is proceeds of specified unlawful activity;

Notably absent is the element Smith would have the Court write into the statute.

That element is, however, notably *present* in the next-listed alternative means of committing money laundering:

A person is guilty of money laundering when that person conducts or attempts to conduct a financial transaction involving the proceeds of specified unlawful activity and:

* * *

(b) Knows that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds, and acts recklessly as to whether the property is proceeds of specified unlawful activity;

RCW 9A.83.020(1)(b).

What is also notable is the respective mens rea in each paragraph with regard to the unlawful origin of the proceeds. In the second paragraph, where the defendant knows that the transaction is intended to conceal the origin of the proceeds, the State need only prove recklessness as to whether the property stems from the unlawful activity. On the other hand, under the first paragraph, where the defendant does not have to know that the transaction is designed to conceal the origin of the proceeds, the State must prove actual knowledge of the proceeds' unlawful origin.

The definition of the elements of a criminal offense entrusted to the Legislature. *State v. Bradshaw*, 152 Wn.2d 528, 535, 98 P.3d 1190 (2004) (citing *Staples v. United States*, 511 U.S. 600, 604, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994)). The courts look first to the statutory language to determine legislative intent. *Bradshaw*, 152 Wn.2d at 537.

Smith fails to note that this Court has specifically rejected his

contention, and declined, after not a little discussion of the matter, to add his proposed element to RCW 9A.83.020(1)(a). *State v. McCarty*, 90 Wn. App. 195, 200-05, 950 P.2d 992, *review denied*, 136 Wn.2d 1003 (1998). In reaching that conclusion, the Court specifically noted the fact that some means of committing money laundering contained the additional element, which indicated that the Legislature did not intend to include the element in those means from which it was omitted. *McCarty*, 90 Wn. App. at 203. This reasoning is sound, and Smith has presented no reason to depart from it.

Smith's reliance on *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000), and *State v. Bash*, 130 Wn.2d 594, 604-05, 925 P.2d 978 (1996), is misplaced. Those cases do not set forth a test for when the courts will add an element, as he loosely describes them. They instead focus on Legislative intent to determine whether the *Legislature* intended to create a strict liability crime, *i.e.*, a crime with *no mens rea*. *Anderson*, 141 Wn.2d at 361. They have no application where the statute already contains a mens rea. Here the statute requires both an overt act (conducting a transaction) and guilty knowledge that the proceeds used in the transaction came from a specified unlawful activity. The statute is not one of strict liability.

Smith also attempts to rely on federal authority for his position. As intimated in *State v. Casey*, 81 Wn. App. 524, 915 P.2d 587, *review denied*, 130 Wn.2d 1009 (1996), to which he cites, the federal statute is different than

the state law. Much like RCW 9A.83.020(1)(b), 18 USC § 1956(a)(1)(B)(i) has language about an intent to conceal the origin of the proceeds. Unlike RCW 9A.83.020(1)(a), however, the alternative means under the federal statute has the additional element of “the intent to promote the carrying on of specified unlawful activity.” 18 USC § 1956(a)(1)(A)(i).

Moreover, *United States v. Sanders*, 929 F.2d 1466 (1991), on which Smith relies, fails to support his claim. *Sanders* was a simple sufficiency-of-the-evidence case. There, the defendants were convicted under 18 USC § 1956(a)(1)(B)(i), which unlike the statute under which Smith was charged, already contained the element Smith would write into subsection (1)(a) of our statute. *Sanders*, 929 F.2d at 1471. The court simply found that the Government had failed to prove its case. It did not, however, rewrite the statute as drafted by Congress. Notably, in a passage immediately following that quoted by Smith, the Court declined to depart from the language as written by the federal legislature:

This interpretation would be contrary to Congress’ expressly stated intent that the transactions being criminalized in the statute are those transactions “designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.”

Sanders, 929 F.2d at 1472. This Court should follow that example, follow its own precedent, and enforce the statute as the Legislature clearly intended.

B. THE INFORMATION WAS NOT DEFECTIVE FOR FAILING TO CONTAIN THE NON-EXISTENT MONEY-LAUNDERING ELEMENT OF INTENT TO CONCEAL OR DISGUISE THE SOURCE OF THE PROCEEDS.

Smith next claims that the information was deficient because it did not contain proof of the purported element that the defendant intended to conceal or disguise the source of the funds. He is correct as to the contents of the information. As discussed in the previous section, however, no such element was intended by the Legislature and should not be engrafted onto the statute by the Court.

C. SMITH FAILS TO SHOW PROSECUTORIAL VINDICTIVENESS BASED ON THE AMENDMENT OF THE CHARGES AFTER PLEA NEGOTIATIONS FAILED.

Smith next claims that the State engaged in prosecutorial vindictiveness by charging him with money laundering.⁴ This claim is without merit because Smith fails to point to any facts supported by the record beyond the amendment of the charges upon the failure of plea negotiations.

Smith's characterization of the record as showing the State "treating

⁴ Smith does not in any way suggest that the amended charge should have been dismissed pursuant to CrR 8.3 and *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Without in any way conceding that such a claim would have merit, the State assumes that counsel made a tactical decision to pursue a vindictiveness claim rather than a

the plea bargaining process as a random grab bag,” and his contention that the State was somehow tardy in its discovery obligations, Brief of Appellant at 18-19, are both factually inaccurate.

The State fully complied with its discovery obligations. CrR 4.7 does not require the State to provide copies of the physical evidence to the defense. Instead it requires that the evidence be “disclosed.” CrR 4.7(a)(1)(v). Moreover, the duty is limited to materials in actual possession of the prosecuting attorney’s office. CrR 4.7(a)(4).

The record here reflects that the bill of sale was mentioned not only in the police reports, where there was apparently a typo regarding the date of the sale, but also in the probable cause statement, which bore the correct date, which Smith conceded. CP 8, 1RP 11. Smith also conceded that other parts of the police reports also indicated that the sale occurred on the correct date, August 28. All of this information was provided to the defense at the time of arraignment.

Moreover, the claim regarding the bill of sale being a “complete defense” rings hollow. The dismissed trafficking charge also relied on the very same bill of sale. Given the obvious discrepancy between the single

mismanagement claim, and will confine its response to the claim as raised.

reference to August 25 in one police report⁵ and the reference to August 28 in the probable cause statement, the information, and the rest of the police reports, as well as the internal inconsistencies in the police reports, it was incumbent on Smith to examine the actual document.⁶ There is no evidence whatsoever that Smith ever asked the State to clarify the discrepancies, or to provide a copy of the bill of sale, or that counsel at any point walked the 50 feet from the courthouse to the sheriff's office to examine the evidence. Smith's claim of a discovery violation, particularly as he has not identified it as an issue or assigned error to it, should be disregarded as the red herring that it is.

Nor does the record reflect the "charging grab-bag" allegation. After Smith declined the initial plea offer, the State, as promised, filed the amended information on Friday, April 7, 2006. CP 9. At that time, the court declined to find probable cause, but set the matter over for further discussion on Monday, April 10. RP (4/7) 6. On Monday, the State presented renewed argument,⁷ but the Court held to its ruling. RP (4/10) 6. The *very next day*, April 11, the State gave Smith notice of its intent to file the money laundering charge. 1RP 18. Trial did not begin, with pretrial motions, until a week later,

⁵ The actual report in question was not made a part of the record.

⁶ Not to mention that Smith himself told the police that he was present for the transaction and could have resolved the discrepancy for counsel.

⁷ The "calendar deputy" rather than the trial prosecutor was present for the Friday hearing.

on April 18. 1RP. Testimony began on April 19. 2RP 26.

Nor does the record reflect a willy-nilly process that violated the office's charging standards. The office's charging guidelines specifically provide for the result here:

If the defendant does not plead guilty to the initial charge or charges, additional counts may be added, the degree of the crime may be increased, and enhancements may be added to the original charges to increase the strength of the State's case at trial and/or to ensure restitution to all victims of the defendant's criminal conduct.

Kitsap County Prosecuting Attorney, *Mission Statement and Standards and Guidelines*, at 9.⁸ The guide further provides that:

It is the policy of the Office of the Kitsap County Prosecuting Attorney to charge the crime or crimes that accurately reflect the defendant's criminal conduct, taking into account reasonably foreseeable defenses, and for which we expect to be able to produce at trial proof beyond a reasonable doubt.

Id., at 6.

Here, when it became apparent that the trial court did not agree with the deputy prosecutor that the facts described constituted trafficking in stolen property (under the theory that cash cannot be "stolen property"), the prosecutor merely filed a charge that accurately described the very same conduct of using the proceeds of the burglary to buy the Dodge. Notably Smith does not argue that the evidence did not support the charge as filed and

⁸ The guide is online at <http://www.kitsapgov.com/pros/StandardsGuidelines2007.pdf>.

given to the jury.⁹ In short, the prosecutor *complied* with the two standards that form the core of Kitsap County's charging and plea procedures: charging the minimum crime that will produce an acceptable resolution of the case, and if the plea process fails, levying additional charges that reflect the defendant's conduct and improve the State position at trial (or sentencing).
1RP 16.

Under CrR 2.1(d), the State can amend the information anytime before the verdict if the defendant's substantial rights are not prejudiced. *State v. Vangerpen*, 125 Wn.2d 782, 788-89, 888 P.2d 1177 (1995). Smith fails to identify any prejudice to his right to be prepared for trial. He was given notice of the money laundering charge two court days after the trafficking charge was filed and dismissed. He had been on notice of the trafficking charge since arraignment. The charges were based on the exact same factual circumstances and involved the exact same witnesses. Smith failed below, and fails now, to identify any factual or legal defense to the laundering charge that would not have applied to the trafficking charge. Nor were his time-for-trial rights in any way impaired. The time for trial did not run until May 1, 2006, another two weeks after trial actually commenced.

In *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006), the Supreme

⁹ Although he claims this Court should read an extra element into the offense, *see* Point A, *supra*, at no point does he suggest that the evidence is insufficient if his proposed element is

Court recently addressed the issue of prosecutorial vindictiveness. The Court noted that there are two “kinds of prosecutorial vindictiveness: actual vindictiveness and a presumption of vindictiveness.” *Korum*, 157 Wn.2d at ¶ 17. Smith does not point to any evidence of actual vindictiveness. The record suggests that to the contrary, the prosecutor was merely filing the charge to reflect all the criminal acts committed and to add a point to Smith’s offender score, acts well within office policy.

The Court further noted that existing Washington precedent strongly suggests that a presumption of vindictiveness may not arise pretrial. *Korum*, 157 Wn.2d at ¶ 19 (citing *State v. McDowell*, 102 Wn.2d 341, 344, 685 P.2d 595 (1984)). The Court did not conclusively resolve the issue because “even assuming arguendo” that such a presumption could pretrial, *Korum* failed to establish facts supporting a presumption of vindictiveness. *Korum*, 157 Wn.2d at ¶ 19.

The Court noted that the United States Supreme Court had “emphatically rejected the notion that filing additional charges after a defendant refuses a guilty plea gives rise to a presumption of vindictiveness.” *Korum*, 157 Wn.2d at ¶ 20 (citing *United States v. Goodwin*, 457 U.S. 368, 377-85, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982), and *Bordenkircher v.*

not part of the offense.

Hayes, 434 U.S. 357, 360-65, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)).

In *Bordenkircher*, the offered sentence went from five years to life. *Bordenkircher*, 434 U.S. at 365. The Supreme Court found no presumption of vindictiveness, because the “the accused is free to accept or reject the prosecution’s offer” and “the prosecutor has probable cause to believe that the accused committed an offense defined by statute.” *Bordenkircher*, 434 U.S. at 363-64. *Goodwin* reaffirmed this principle.

Here, the original charge of second-degree burglary (with an offender score of five) carried a standard range of 17-22 months. Sentencing Guidelines Commission, *Adult Sentencing Guidelines Manual* (2005), at III-62. The first-degree trafficking in stolen property charge (with an offender score of six) would have resulted in a range of 33-43 months, *Id.*, at III-197, while the charges of which Smith was convicted resulted in a range of 22-29 months. CP 99. Clearly under *Bordenkircher*, Smith fails to demonstrate facts giving rise to a presumption of prejudice.

In *Korum*, the Supreme Court saw no distinction from the failed guilty plea situation in *Bordenkircher* and *Goodwin* (and the present case), and the situation in *Korum*, where the State filed further charges after Korum successfully withdrew his guilty plea. *Korum*, 157 Wn.2d at ¶ 22. The Court declined to find a presumption of vindictiveness where the offer of ten years

pre-plea resulted in an actual sentence of 100 years after the charges were amended. *Korum*, 157 Wn.2d at ¶ 25. Significant was the fact that there was no contention “that the prosecutor lacked probable cause for the additional charges, or that the added charges exceeded the 16 additional charges that the prosecutor had promised to file if Korum did not plead guilty.” Likewise here, there is no claim that the State lacks probable cause for the money-laundering charge¹⁰ or that the State exceeded the charges it promised to file if Smith did not plead. Although the named offense changed, the underlying factual basis remained the same, and the resulting sentence was actually 11 to 14 months *less* than that promised.

In *Korum*, the Court concluded that “[b]ased on our reading of Supreme Court precedent, the mere filing of additional charges and the consequent increase in sentence, regardless of the ‘magnitude,’ cannot support a presumption of vindictiveness without proving ‘additional facts.’” *Korum*, 157 Wn.2d at ¶ 27. As discussed, Smith only cites three additional “facts”: the purported discovery violation, the alleged lack of advance notice of the charges, and the supposed deviation from standard procedure. The lack of substance of each of these claims has already been addressed. As in *Korum*, Smith fails to show any actual “other facts” in the record that would give rise to a presumption of vindictiveness. This claim should be rejected.

¹⁰ Again, *see* Point A, *supra*.

D. THE TRIAL COURT PROPERLY EXCLUDED SMITH'S IRRELEVANT AND SELF-SERVING HEARSAY STATEMENT THAT HE WAS AFRAID OF JESSE BECAUSE JESSE SERVED TIME FOR ROBBERY.

Smith's final claim is the trial court erred in excluding Smith's statement to Detective Trogdon that Jesse was convicted of robbery in the past. Smith raises a number of contentions for why this statement should have been admitted: that the rule of completeness under ER 106 required admission of the statement; that hearsay may be impeached; and that counsel was unable to adequately raise the defense of duress.

First, this contention should not be considered for the first time on appeal. Questions of the admissibility of evidence, are not of constitutional magnitude and do not fall within RAP 2.5's exceptions, and thus may not be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000); *see also State v. Clark*, 139 Wn.2d 152, 156-57, 985 P.2d 377 (1999). Further, a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Here, the State moved in limine to exclude the evidence. Smith's only response was that the evidence was relevant to explain why he was afraid of Jesse. At no point did Smith suggest to the trial court that admission

was required by the rule of completeness. Nor did he suggest that it was admissible under ER 609 and 806. The Court should decline to consider these contentions now.

Even if these claims had been preserved below, they would be without merit. Curiously, Smith relies on *State v. Larry*, 108 Wn. App. 894, 34 P.3d 241 (2001), *review denied*, 146 Wn.2d 1022 (2002). While that case does hold that despite its terms ER 106 may also apply oral statements like Smith's, the Court ultimately concluded that the trial court did not abuse its discretion in excluding the defendant's statement regarding a prior robbery by a codefendant. *Larry*, 108 Wn. App. at 909-10.

As a preliminary matter, Smith fails to show that the statements in question even fall within the rule of completeness. The State elicited only the details of the transaction involving the key and the car. It was Smith who brought out that he was afraid of Jesse, on cross-examination of Detective Trogdon. 3RP 68. In *United States v. Haddad*, 10 F.3d 1252, 1259 (7th Cir. 1993), discussed in *Larry*, and relied on by Smith, the court applied the rule where the excluded remarks "were part and parcel of the very statement" the prosecution presented.

In *Haddad*, the police found some marijuana and a gun under the defendant's bed. The defendant told them that the drugs were his, but the gun

was not. The trial court excluded the statement about the gun, which the Court of Appeals found to be error, albeit harmless. *Haddad*, 10 F.3d at 1259. Here, on the other hand the record does not reflect when or in what context Smith made the statements (1) regarding the burglary and purchase of the car, and (2) that he feared Jesse and that Jesse had served time for robbery. As such, Smith fails to demonstrate that the inculpatory statements and the “fear” and “robbery” statements were part of the same statement and therefore subject to ER 106.

Notably, Smith also fails to mention or apply the test cited in *Larry* and *Haddad*:

[T]he Court is to apply a four-part test in order to determine whether the offered portions of the statement is necessary to: 1) Explain the admitted evidence, 2) Place the admitted portions in context, 3) Avoid misleading the trial [sic] of fact, and 4) Insure fair and impartial understanding of the evidence. This Court will not disturb a district court’s decision regarding a rule of completeness issue absent an abuse of discretion.

Larry, 108 Wn. App. at 910. Here, of course, the trial court did not exercise its discretion because it was never asked to rule on the rule of completeness. Nevertheless, Smith fails to show that the trial court would have abused its discretion in rejecting the evidence under this test.

That Jesse had been in prison for robbery was not necessary to explain the admitted evidence, which was that Smith told the detective that he was

afraid of Jesse, and that Smith had also told the detective why he was afraid. Because neither Jesse nor Smith testified, there was no evidence relating the fact that Smith was afraid of Jesse to anything. 3RP 68, 71. The only statement was that he was afraid of Jesse.

Smith fails to explain why the fact that he was afraid of Jesse at all was relevant. He theorizes, Brief of Appellant at 22, that “if Mr. Smith was afraid of Jesse for an understandable reason, then it is less probable that he aided or encouraged Jessie [sic] to commit the burglary.” No evidence was adduced at trial to support this theory, however.

Relevance means that a logical nexus exists between the evidence and the fact to be established. *State v. Peterson*, 35 Wn. App. 481, 484, 667 P.2d 645, *review denied*, 100 Wn.2d 1028 (1983). Thus, the evidence must tend to prove, qualify or disprove an issue for it to be relevant. *Peterson*, 35 Wn. App. at 484. Evidence is properly excluded where it amounts to nothing more than conjecture absent evidence connecting a fact with the theory sought to be proved. *State v. Woodward*, 32 Wn. App. 204, 208-209, 646 P.2d 135, *review denied*, 97 Wn.2d 1034 (1982)

Smith never asserted to the police that he committed the crime because he was afraid or even that he gave the key to Jesse because he was afraid of him. Indeed, he admitted to the police that he told Jesse that he had

a key to the office, that he knew where the key to the safe was, and that he gave the key to Jesse and his girlfriend. 3RP 63. He also told the police that he was present for the purchase of the Dodge, and when he turned over the bill of sale, it bore only his name. 3RP 64-65; Exh. 1.

Under these circumstances, the statement about being afraid of Jesse could just as logically have related to his discomfort in discussing the matter with the police or his sister. This is particularly true given the lack of any details about the alleged robbery or the circumstances surrounding it, or what Smith knew about these details. That Smith was afraid of Jesse, standing alone, and regardless of whether he was afraid of him because of his robbery conviction or for any other reason, fails to make any fact tending to prove or disprove the charges any more or less likely. As such the evidence that *was* admitted was of marginal relevance at best.

Appellate counsel's musings, Brief of Appellant at 23, about whether trial counsel was trying to raise the defense of duress are undeveloped and fail to shed any light on the issue raised.¹¹ RCW 9A.16.060(1) defines the defense of duress:

In any prosecution for a crime, it is a defense that:

(a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension

¹¹ Indeed, counsel essentially argues that the evidence was relevant both as proof that Smith did not participate in the crime with Jesse and as proof of why he did.

in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and

(b) That such apprehension was reasonable upon the part of the actor; and

(c) That the actor would not have participated in the crime except for the duress involved.

There was no evidence at trial supporting *any* of these elements of the defense. Duress cannot be argued to make the fear or robbery references relevant. If the admitted evidence was not particularly relevant, it follows that the excluded evidence was not necessary to explain it.

For the same reasons, nor does the fact that Jesse served time for robbery place the admitted portions in context or avoid misleading the trier of fact. As noted, the jury was told that Smith told the detective the reason he was afraid.

Finally, and this was essentially the trial court's conclusion, admission of the fact would not insure a fair and impartial understanding of the evidence. To the contrary, the trial specifically found that any relevance the evidence did have was outweighed by its prejudicial effect:

I think its too prejudicial and overweighs any relevance in the probative value. The jury may conclude he's more likely a suspect based on the conviction alone, and I think that would be improper.

2RP 21-22.

Prior conviction evidence is by its nature "very prejudicial." *State v.*

Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). The trial court granted the State's request to exclude "other suspect" evidence under the authority of *State v. Mak*, 105 Wn.2d 692, 716, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). 2RP 11-21. Smith has not challenged that ruling. Yet the only apparent purpose of admitting the robbery conviction was to paint Jesse as more of a criminal than Smith. This would encourage the jury to reach a verdict on the basis of improper considerations rather than the evidence. The trial court did not abuse its discretion in excluding this prejudicial, irrelevant evidence.

In any event, even if the statement had been admissible under ER 106, that provision remains subject to ER 403, under which the trial court excluded the evidence. *See Walker v. Bangs*, 92 Wn.2d 854, 862, 601 P.2d 1279 (1979). As just discussed, the trial court acted well within its discretion in excluding it as more prejudicial than probative.

Finally, Smith asserts that the evidence was admissible under ER 609 because a non-testifying witness may be impeached if the witness's hearsay statements are admitted. Brief of Appellant at 22 (*citing* ER 806). While the State has no quarrel with this theory as a matter of law, it cannot identify where any hearsay uttered by Jesse was admitted at trial. As such this contention is also without merit.

Finally, for the same reasons as discussed above, even if the trial court erred, given that the evidence of Smith's fear, and the source of that fear were of marginal relevance at best, any error would be harmless.

IV. CONCLUSION

For the foregoing reasons, Smith's conviction and sentence should be affirmed.

DATED June 28, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R. D. Hauge', written over a vertical line.

RANDALL AVERY SUTTON
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