

No. 37507-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS MERINO,

Appellant.

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

The Honorable Christine Pomeroy, Judge
Cause No. 07-1-00948-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the charging document was constitutionally defective in that it failed to give Merino notice of the alleged victim of the attempted theft or the conduct that constituted the conspiracy.

2. Whether the State produced sufficient evidence at trial to support the convictions for conspiracy to commit first degree theft and attempted first degree theft.

3. Whether the court improperly admitted statements of an unavailable co-conspirator while excluding other statements offered by Merino to either impeach the unavailable co-conspirator or to attempt to prove that the conspiracy did not involve him.

4. Whether it is a defense to a charge of conspiracy that the defendant withdrew from the conspiracy before the planned crime was completed, and if so, whether Merino in fact withdrew from this conspiracy and the attempted first degree theft.

5. Whether the prosecutor or any jurors committed misconduct.

6. Whether Merino's two convictions constitute same criminal conduct for purposes of determining his offender score.

B. STATEMENT OF THE CASE.

a. Substantive facts.

Jim Varner apparently had a number of business interests, which included acting as a reserve agent with Farmer's Insurance for a period of time. In late November of 2005, Jim Varner approached Eric Snelson, also an agent with Farmer's, about taking

out an insurance policy on an antique automobile. [RP 163-64]¹ A few days later the two men met; Jim Varner was accompanied by his son, Ken Varner. [RP 164, 167] Jim Varner provided Snelson with some photos of the car he wished to insure. Jim Varner told Snelson where the car was located, and Snelson went there to personally inspect the vehicle. [RP 167] When he arrived there he found the building where the car was stored locked. Snelson later told Kamala Wedding, an insurance investigator for Farmer's Insurance, that he had viewed the car through a window, but in fact he had only seen a vague shape of a car, or perhaps just the fender of a car, through a crack in the door. [RP 85-86,168, 177] Even so, he issued a policy on the car; Jim Varner was the primary insured but Ken Varner, Kendra Varner, and Janell Varner were also listed on the policy as insureds. [RP 57] After his unsuccessful trip to inspect the car, Snelson met with Jim and Ken Varner and wrote the policy. In addition to the photographs of a car, the Varners produced an appraisal. [RP 166, 168] The policy was for \$60,000. [RP 71]

On December 8, 2005, Jim Varner contacted the Thurston County Sheriff's Department and reported that the car, a 1949 Chevrolet Woody, had been stolen. He told Deputy Raymond Brady

¹ Unless otherwise noted, all references to the report of proceedings are to the trial transcript.

that he had been driving the car on Littlerock Road in Thurston County the previous evening, December 7. The car experienced electrical problems and wouldn't run, so he parked it alongside the road. Jim Varner valued it at approximately \$50,000, and said he had recently purchased it. [RP 102-04]

The car was reported stolen within days after the insurance policy was issued. That, plus the listed value of \$60,000 and the fact that the insured was "pushy to settle the claim quickly," aroused suspicions, and Wedding was assigned to investigate the claim on December 14, 2005. [RP 58, 80] Wedding met with Ken Varner, who provided, among other documents, a bill of sale for the vehicle, an appraisal, the police report of the theft, and some photographs of an antique vehicle. [RP 59, Exhibits 1-4] The appraisal was signed by Doug Merino, on a form headed "Doug's Kustom Kar Appraisal," and included this language: "The overall condition of this vehicle is excellent. Frame-up restoration on this vehicle was completed in November of 2004." [RP 61, 205] Wedding called Merino on the phone on December 20, told him she was investigating the theft of Ken Varner's '49 Woody wagon, and asked to verify the documents Ken Varner had provided. [RP 63-64] Merino told her he had built the car from the ground up, described the vehicle as completed, and

verified that he had sold it to Ken and Jim Varner. [RP 65] Merino said the car was in excellent condition, fully restored, that Ken Varner had driven it away from his house, and Merino thought he was taking the car to Mexico. [RP 66]

Wedding left her number with Merino and asked him to call if he had additional information. She did not receive a call. [RP 68-9] She called him three or four times, leaving messages, before she was able to speak to him again. [RP 69] Ken Varner had given her two keys, one of which appeared to have nothing to do with the car, and she wanted to know if Merino had given them to Varner. Merino told her he had provided one key with a fob that unlocked the door. [RP 70] In one of her conversations with Merino, he told her Ken Varner had been convicted of fraud, which she apparently already knew. [RP 81] He also told her that it would have been impossible for Snelson to have looked through a window to see the car because the building where the car was stored did not have windows. [RP 86] He spoke in general about restoring cars, but he also talked specifically about restoring the Woody that was at issue in the insurance claim. [RP 88] Wedding specifically asked Merino if he could give an opinion as to whether the insurance claim was false, and he replied that he didn't know Ken Varner very well and couldn't

give an opinion. [RP 92] Merino also told Wedding that Ken and Jim Varner had paid \$59,500 for the car but he could not provide documentation because he did not report it on his income tax. [RP 92-93] He told her about features of the car, such as disc brakes, interior wood paneling, and an alternator system, that were not mentioned in the appraisal. [RP 93]

On February 2, 2006, Jim Varner was found dead of a gunshot wound in Lewis County. [RP 185-86, 200] During the investigation of that death, Lewis County Sheriff's Deputy Bruce Kimsey interviewed Merino on more than one occasion. Over the course of those interviews Merino told Kimsey that Jim Varner had approached him for the title to the Woody so that Jim Varner could borrow money against it. [RP 187] He said he'd lied to the insurance investigator because he did not want to get Varner, his best friend, into trouble. [RP 188] Kimsey accompanied Merino to see the actual car which he had claimed was restored; it was a rusted hulk that Merino valued at \$2500. [RP 189] Thurston County Detective Roland Weiss also viewed the car, which was not in the building Snelson visited but at a rental property Merino owned, [RP 115-16] and verified that it looked nothing like the photographs the Varners provided to the insurance company. [RP 181]] Merino admitted to

signing both the appraisal and a bill of sale to Varner. [RP 118-19] Merino also showed Weiss a report of sale that would normally be filed with the Department of Licensing. Merino had filled out the report indicating he had sold the Woody on November 5, 2005, but had not filed it. [RP 122-23]

Kimsey later referred the fraud case to the Thurston County Sheriff's Office. [RP 193] The investigation into this case apparently generated substantial media attention. Frank Alexander, who lived in Woodland, Washington, saw a story on television about it, which included the photographs of the supposedly restored Woody. He recognized the car as one he owned. [RP 131-32] He identified the photographs that the Varners had provided to the insurance company as ones that were taken of his car when he was exhibiting it at a car show in Portland during the summer of 2004. [RP 135] He recalled three people admiring his car at that show and, after obtaining his permission, they photographed it. [RP 135]

At trial, Mike Varner, Jim's older brother and Ken's uncle, testified that sometime between October and December of 2005, he had gone to Jim Varner's house. There was a car parked in front of the garage, and Mike Varner parked behind that. The garage door was open and Merino was working in the trunk area of a car inside

the garage; the car had been driven in forward, and the trunk was near the door. Mike Varner said hello to Merino. Merino returned the greeting and resumed his work on the car. Mike, Jim, and Ken Varner gathered at the front end of Mike Varner's car. [RP 145-49] Jim and Ken Varner talked about turning a car in for insurance, something about it being stolen, and showed Mike Varner a photograph of a hulk of a car parked underneath a lean-to. [RP 150] Merino was within 30 feet of the conversation, but made no indication that he heard it, nor did he participate in it. [RP 152]

Jim Varner's daughter, Janell, testified at trial that on December 1, 2005, her father had given her a ride from Olympia to her home in Bellingham. At Jim Varner's request, she printed some photographs on equipment she had at her home. She identified the four photographs that were provided to the insurance company by Jim and Ken Varner as copies of the pictures she had printed for her father. [RP 160-62]

b. Procedural facts.

Merino was charged on May 25, 2007, with one count of attempted first degree theft. [CP 5] There were amended informations before trial, and Merino actually went to trial on the fourth amended information charging him with one count of

attempted first degree theft and one count of conspiracy to commit first degree theft. [CP 129] There were numerous pre-trial hearings, plus one after jury selection in which Merino sought unsuccessfully to suppress statements of the co-conspirators, as well as raising various motions in limine. [RP 13-56] Trial began on January 22, 2008 and concluded with a jury verdict of guilty on both charges on January 28. Merino brought a motion for a new trial, which was heard and denied on March 20, 2008. Sentencing was held the same date. [03/20/08 RP]

C. ARGUMENT.

1. The charging documents were constitutionally sufficient, particularly under the standard of review applied when those documents are challenged for the first time on appeal.

Merino was tried on the fourth amended information, which reads:

Count I: ATTEMPTED THEFT IN THE FIRST DEGREE, RCW 9A.28.020(1); RCW 9A.56.030(1)(a) – CLASS C FELONY:

In that the defendant, Douglas Lee Merino, in the State of Washington, on or between December 8, 2005 and April 30, 2006, with intent to commit a specific crime did take a substantial step toward [t]he commission of that crime, by attempting to wrongfully obtain or exert unauthorized control over property or services of another exceeding one thousand five hundred dollars

(\$1,500) in value with the intent to deprive the owner of that property.

Count II: CONSPIRACY TO COMMIT THEFT IN THE FIRST DEGREE, RCW 9A.56.030(1)(a), RCW 9A.28.040 – CLASS C FELONY:

In that the defendant, DOUGLAS LEE MERINO, in the State of Washington, on or between November 1, 2005 and April 30, 2006, as a principal or as an accomplice, did conspire with another to wrongfully obtain or exert unauthorized control over property or services of another or the value thereof, with intent to deprive said person of such property or services, the value of which exceeds one thousand five hundred dollars (\$1,500.00), and took a substantial step toward commission of this offense.

[CP 129]

RCW 9A.56.030(1)(a), with which Merino was charged,

provides:

(1) A person is guilty of theft in the first degree if he or she commits theft of:

(a) Property or services which exceed(s) one thousand five hundred dollars in value other than a firearm as defined in RCW 9.41.010.

An attempt to commit a crime is defined in RCW

9A.28.020(1):

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

Conspiracy is defined in RCW 9A.28.040(1):

(1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

A charging document may be challenged on constitutional grounds for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991) A challenge to the sufficiency of a charging document is reviewed de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). All essential elements of the crime charged must be included in the charging document so that the defendant has notice of the nature of the allegations and can properly prepare a defense. Kjorsvik, *supra*, at 101-02. It is not necessary that the information include every fact the State must prove at trial. State v. Rhode, 63 Wn. App. 630, 635, 821 P.2d 492 (1991) (citing to State v. Sims, 59 Wn. App. 127, 131, 796 P.2d 434 (1990)).

Charging documents challenged after the verdict is entered will be construed more liberally than ones challenged before or during trial. Kjorsvik, *supra*, at 102. The more liberal standard removes any incentive a defendant may have to refrain from challenging the information at a time when the trial court can allow

either amendment of the charges or dismissal and refiling. Id., at 103.

Merino does not claim that he challenged the charging document in the trial court, and therefore the more liberal construction will be applied.

The test for the liberal interpretation of the document is: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?”

Williams, *supra*, at 185, citing to Kjorsvik, 117 Wn.2d at 105-06.

The first prong of the test looks to the face of the charging document itself, but the second “prejudice” prong may look outside the document to determine if the defendant received actual notice. “It is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges.” Kjorsvik, *supra*, at 106.

If the statute defines a crime with reasonable certainty, it is sufficient to charge in the language of the statute. State v. Noltie, 116 Wn.2d 831, 840, 809 P.2d 190 (1991). In Merino’s case, the charging language was taken directly from the statute, and he has not alleged that the statute fails to state a crime. His claim is that

the charging language contained insufficient facts to inform him of the specific victim or acts upon which the State was relying. The defendant in Noltie raised a similar claim. The court noted a long line of cases in which a distinction was made between constitutionally deficient informations and those that were merely vague. In the case of vagueness, the remedy is for the defendant to seek a bill of particulars. “[A] defendant is not entitled to challenge the information on appeal if he or she has failed to timely request a bill of particulars.” Id., at 843-44. The purpose of the bill of particulars is to amplify or clarify any matters that the defense considers essential. Id., at 845.

In any criminal case, the State provides discovery to the defense. It is an obligation under CrR 4.7(a). With the exception of color copies of four photographs, which will be discussed below, Merino has made no claim that he did not receive complete discovery. A review of the trial transcript shows no instance where the defense appeared to be surprised at any evidence. Merino makes no claim that he did not receive a witness list nor have opportunity to interview all of the State’s witnesses. While Merino complains of the inadequacy of the probable cause affidavit, he clearly did not have to rely on that affidavit in preparing to defend

himself against the charges. In any event, a probable cause affidavit, by definition, is designed to establish probable cause for the arrest, not every fact that the State will prove at trial.

The language of the charging document in this case tracked the statute and was constitutionally sufficient. Merino had all the information that the State was required to provide, but if he was in any way confused by the charging language, his remedy was to ask for a bill of particulars. He did not do that.

2. The State produced sufficient evidence at trial to support a conviction for conspiracy to commit first degree theft and for attempted first degree theft.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential

elements of the crime *beyond a reasonable doubt*.
(Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Merino argues that the charge of conspiracy rested upon him having overheard the conversation between Mike, Jim, and Ken

Varner in which the latter two Varners discussed a plan to make a fraudulent insurance claim. [RP 145-158] The testimony was that Merino may have heard the discussion, but Mike Varner did not know, nor did Merino participate in the conversation. Were this the sole piece of evidence upon which the conspiracy charge depended, Merino would be right. However, it is not.

There was evidence, as set forth above in the Statement of the Case, that Merino authored and signed an appraisal of a 1949 Chevrolet Woody, indicating that it was fully restored and worth enough that Farmer's Insurance was willing to insure it for \$60,000, when in fact the Woody was a rusted hulk worth \$2500. He signed a bill of sale to one of the Varners, and filled out a report of sale which he did not file. When questioned by the investigator from Farmer's Insurance, he told her the car was fully restored and even discussed in some detail the non-existent features of this car. He told her he had sold the car for \$59,500. A rational trier of fact could infer that he would not tell these lies and create these fictitious documents unless there was an agreement with Ken Varner, Jim Varner, or both, to perpetrate a fraud upon the insurance company. The likelihood of Merino doing these things in the absence of a plan with one or both of the Varners is nonexistent. "Once the conspiracy

has been established, evidence of a defendant's slight connection to it, if proven beyond a reasonable doubt, is sufficient to convict him of participation in the conspiracy." State v. Barnes, 85 Wn. App 638, 664, 932 P.2d 669 (1997) (citing to State v. Brown, 45 Wn. App. 571, 579, 726 P.2d 60 (1986)).

There was sufficient evidence to support a conviction for conspiracy to commit first degree theft. The acts described above are also sufficient to support a conviction for attempted first degree theft.

3. The court properly admitted statements, offered by the State, made by unavailable co-conspirators. The court was also correct in excluding the evidence offered by Merino to impeach the unavailable co-conspirator or to support his theory that the conspiracy was among the Varners and did not include him.

Out of court statements of a co-conspirator, made in the course of the conspiracy are not hearsay, and thus not inadmissible on that ground. ER 801(d)(2)(v) provides:

(d) A statement is not hearsay if—

(2) The statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Coconspirator statements are an exemption from the hearsay rule rather than an exception. State v. Palomo, 113 Wn.2d 789, 797, 783 P.2d 575 (1989).

A trial court's interpretation of a rule of evidence is reviewed de novo, and the court's application of that rule to the facts of the case is reviewed for abuse of discretion. State v. Sanchez-Guillen, 135 Wn. App. 636, 642, 145 P.3d 406 (2006).

Conspiracy is an inchoate crime, and the focus is on the agreement of the conspirators, not the specific crime to be committed or the intended victim. State v. Williams, 131 Wn. App. 488, 491, 128 P.3d 98 (2006).

Before statements that would otherwise be hearsay can be admitted under ER 801(d)(2)(v), the trial court must find that there is evidence, apart from the statements at issue, that there was a conspiracy and that the defendant was part of it. State v. Guloy, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985). Evidence that the defendant was a member of the conspiracy can be shown by the fact that he implemented one of its primary objectives. Id., at 421.

In this case, the State, by way of an offer of proof contained in its trial brief, [CP 131-36] established the existence of a conspiracy and Merino's participation in it. The court found that the State had met its burden. [RP 53-54].

The State finds Merino's briefing on this issue somewhat confusing, but will respond to what it believes the argument to be.

Merino seems to argue that the bill of sale, title to the car, and the appraisal of the car, all of which were submitted to the insurance company by Ken Varner as part of his claim for payment, were not statements of a coconspirator because they were not sufficiently connected to the Varners. The State maintains that if Ken Varner provided those documents to an insurance agent in furtherance of his claim that his car was stolen and he wanted payment for it, a “sufficient nexus” [Appellant’s Brief 28] exists between the documents and the conduct of the Varners.

Merino also appears to argue that because those documents did not exist at the time that Mike Varner had a conversation with Jim and Ken Varner about making a fraudulent insurance claim, they are not coconspirator statements. He also appears to argue that there was no evidence that he was a member of the conspiracy at the time of Mike Varner’s conversation with Jim and Ken Varner, and thus the documents cannot be statements of a coconspirator. He cites to State v. St. Pierre, 111 Wn.2d 105, 118-19, 759 P.2d 383 (1988). However, St. Pierre merely holds that before the statements can be admitted pursuant to ER 801(d)(2)(v), the State must establish, by substantial evidence independent of the particular statement, that a conspiracy existed. Id. The State does not have to

prove that Merino was a member of the conspiracy from the beginning, and events subsequent to that conversation can be used to prove the existence of a conspiracy. The State did establish that there was such a conspiracy by producing evidence of the actions of Jim and Ken Varner, as well as Merino, and the conversation was clearly in furtherance of it. Whether Merino was a member of the conspiracy at that moment or became one later, the conversation was still in the cause of the same conspiracy. The fact that Merino was within 30 feet of the conversation, and the Varners were willing to discuss it in such close proximity to him, is circumstantial evidence that he was. However, the State was not required to prove the exact time he became a coconspirator.

In State v. King, 113 Wn. App. 243, 54 P.3d 1218 (2002), King and two other men committed a number of home-invasion robberies and then sold jewelry stolen in those robberies to David Israel at his pawnshop. Israel was convicted of conspiracy, and on appeal argued that there was insufficient evidence to prove that he conspired to commit the robberies, or that he intended or even knew that weapons would be used. In affirming his conviction, the court reasoned that even if Israel had not been part of the conspiracy from the beginning, after the first robbery he knew the others were using

weapons to commit the robberies. By continuing to purchase jewelry taken in subsequent robberies, he encouraged their activity, and was thus guilty of conspiracy. *Id.*, at 287. Similarly, even if Merino did not hear the conversation among Jim, Ken, and Mike Varner, he certainly knew that he was providing a fake bill of sale and appraisal to the Varners. He was aware that the Varners were claiming that a non-existent car had been stolen and he assisted them in making that claim. At some point he became a conspirator by helping the Varners in their attempt to achieve the object of the conspiracy.

In his Statement of the Case, Merino recites his own motions in limine regarding the loss form prepared and submitted by Ken Varner to the insurance company. He does not actually argue it in the argument section of his brief that the form was improperly admitted. Error that is not argued is waived. State v. King, 106 Wn.2d 443, 451, 722 P.2d 756 (1986). The State points out, however, that the claim of loss was a statement of a coconspirator made in furtherance of the conspiracy and was admissible on that ground. It was also admissible as a business record.

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian of the record *or other qualified witness* testifies as to its

identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020, emphasis added. Kamala Wedding comes under the heading of “other qualified witness” and the document met all of the other requirements of the statute.

Merino further argues that his right Sixth Amendment right to confront witnesses because he could not cross-examine either of the Varners and his proffered impeachment evidence was excluded.

As a preliminary matter, “[s]tatements in furtherance of a conspiracy are not testimonial, and their admission does not, therefore, implicate the Sixth Amendment.” State v. Sanchez-Guillen, 135 Wn. App. 636, 644-45, 145 P.3d 406 (2006) (citing to Crawford v. Washington, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). The statements of the conspirators are not hearsay because they are admitted to prove the “verbal acts” that form the conspiracy. State v. Miller, 35 Wn. App. 567, 569, 668 P.2d 606 (1983).

In considering this question, we treat testimony by witnesses about statements made by [the alleged conspirators] themselves as part of the independent evidence of their participation in the conspiracy. *Such*

statements by them are not received to establish the truth of what they said, but to show their own verbal acts. A conspiracy is an agreement or understanding, express or implied, between the conspirators. The usual way in which people reach agreements or understandings is by the use of words, oral or written. Indeed, it is difficult to conceive of a conspiracy formed or carried forward without the use of any words.

Id., at 569 (emphasis in original, citing to United States v. Calaway, 524 F.2d 609, 613 (9th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976)). See also, State v. Rangel-Reyes, 119 Wn. App. 494, 498, 81 P.3d 157 (2003), (“Because the statements were not hearsay, their admission did not implicate Mr. Rangel’s right of confrontation.”). If the statements of the Varners were not admitted for the truth of the matter asserted, neither cross-examination nor impeachment would be of any value to the defendant.

Merino cites, on page 29 of his brief, to a few cases which hold that it is reversible error to preclude a defendant from impeaching witnesses against him. Those cases do not involve conspiracy, and the facts of those trials are not similar to Merino’s.

Merino called a private loan officer, Craig Stevenson, who testified that he had met with Ken and Jim Varner, at Merino’s request, to discuss obtaining a loan for them. No loan was made. [RP 236-37] Merino attempted to elicit testimony from Stevenson about statements made by the Varners during his discussions with

them. The State objected and the court sustained on the grounds of hearsay. [RP 237] He now argues that this testimony would have impeached Ken Varner, but that is not at all apparent from the record. The statements of the Varners would clearly have been hearsay. Merino has not identified the statements as having been made during the course or in furtherance of the conspiracy, as required by ER 801(d)(2)(v), nor were they offered against a party. He has not claimed that any statements would not be offered for the truth of the matter asserted. He simply failed to offer any reason why the statements would be admissible, and he did not argue at trial that they would have impeached Ken Varner. By failing to do so, he has waived his right to challenge those rulings of the court. Generally a reviewing court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

Merino also attempted to admit, through Craig Stevenson, his own statements about Jim Varner. The court improperly overruled a hearsay objection. [RP 236] A statement of the defendant is hearsay unless it is offered against him. ER 801; State v.

Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306 (1987) Here, Merino was clearly trying to get in self-serving hearsay without having to be cross-examined about the statements. It didn't matter, however; Stevenson denied that Merino had told him about a loan with Jim Varner. [RP 236]

Merino argues that it was error to exclude his effort to impeach Ken Varner through the testimony of a detective who met with Ken Varner after the car was reported stolen. [Appellant's Brief 30] He does not cite to the portion of the record where this occurred, and it is not apparent from a review of the transcript. Deputy Raymond Brady contacted Ken Varner to take the report of the stolen vehicle [RP 101-05], but there was no attempt to use the deputy to impeach Ken Varner, nor were any questions asked on cross-examination that resulted in excluded testimony. [RP 105] The State cannot respond to this argument without further information.

Merino argues that he should have been allowed to elicit evidence that only the Varners were involved in the conspiracy, and that "a party confronted with hearsay evidence should be entitled to introduce conflicting hearsay conspiracy evidence. . . ." [Appellant's Brief 30] However, the State's evidence was not hearsay. Statements of a conspirator in the course of and in furtherance of

the conspiracy is not hearsay. Further, Merino does not identify specifically what hearsay evidence he was prohibited from offering. In his lengthy recitation of the facts, he refers to the testimony of Detective Kimsey, and says when he asked Kimsey what story Kenneth Varner gave to the officer about the insurance fraud during an interview, the trial court sustained an objection. He cites to page 199 of the Report of Proceedings. [Appellant's Brief 17] However, that portion of the transcript shows that while Merino asked if the detective interviewed any members of the Varner family (which he did); he did not ask what Ken Varner told him. There was no objection, and the court did not exclude any evidence. [RP 198-99] While the State does not disagree that ER 801 and 806 apply to either party, it cannot address the argument if Merino does not identify the evidence he claims was improperly excluded.

4. A defendant cannot withdraw from a conspiracy after the crime is complete, which occurs when any act is done in furtherance of the conspiracy. Similarly, an attempted theft is completed when the defendant takes a substantial step toward committing that crime. In neither instance does the evidence show that Merino withdrew or abandoned the crimes.

Merino argues that he was entitled to a jury instruction explaining the defense of withdrawal from the conspiracy. [CP 193]² He took this instruction from RCW 9A.08.020(5)(b), which provides:

(5) Unless otherwise provided by this title or by law defining the crime, a person is not an accomplice in a crime committed by another person if:

.....
(b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

Merino does not cite to, nor has the State located, any Washington cases that apply this defense to conspiracy. By the very language of the statute, it would not apply. An accomplice must withdraw before the commission of the crime. The crime of conspiracy is complete when there is an agreement, and any one of the conspirators takes a substantial step in pursuance of the agreement. RCW 9A.28.040(1). Conspiracy is “separate, distinct from, and unincorporated in the crime which the conspirators have agreed to commit.” State v. Handley, 115 Wn.2d 275, 293, 796 P.2d 1266 (1990). Here, every member of the conspiracy took substantial steps—Merino falsified a bill of sale and an appraisal;

² The court did allow the withdrawal instruction as it pertained to the attempted first degree theft. [CP 185]

Jim Varner obtained the photographs that were given to the insurance agent as proof of the condition of the car, as well as accompanying Ken Varner to obtain the insurance, and Ken Varner obtained the insurance and reported the car stolen. All of these acts occurred long before Merino gave law enforcement or the insurance investigator any information that the claim was fraudulent.

Similarly, the crime of attempted theft is complete when a defendant takes a substantial step toward the commission of the crime; here, the crime of attempted first degree theft was accomplished when Merino lied to the insurance investigator about the condition and sale of the car with the intent that the theft be completed. Whatever he did later would not change the fact that the crime was committed. He may have had a defense to a completed crime of first degree theft, but that did not happen and he was not so charged.

Further, Merino's so-called actions of withdrawal are not only subject to other interpretations, but were most certainly not "a timely warning to law enforcement authorities" or a "good faith effort to prevent the commission of the crime." RCW 9A.08.020(5)(b). he argues in his brief that he warned the insurance investigator that Ken Varner had a prior conviction for fraud, which she apparently

already knew, but that he lived in Mexico, which she did not. However, in the same conversation with the insurance investigator, Kamala Wedding, he failed to mention that there was no such car as had been reported stolen, he told Wedding that he had built the car from the ground up, he described the disc brakes and an alternator system he said he put on the car, and verified that he had sold it to Ken and Jim Varner. [RP 65] He told her the Woody was in excellent condition and it had wood on both the interior and exterior. [RP 66-67] During a later conversation with Wedding he told her about the key he provided with the car, failing to mention that there was no such car, and presumably no such key. [RP 70]

Merino also argues that he notified Jim Varner that the claim should be dropped because he would tell the truth if deposed. This claim came into evidence by way of Merino's statement to Detective Weiss. [RP 114-15] His conversation with Weiss occurred on February 13, 2006. [RP 107] The car was reported stolen on December 8, 2005, [RP 102-03] Jim Varner was shot to death February 2, 2006, [RP 185] so there is no way he could contradict Merino's assertion. Merino did not take the stand, and so of course he could not be cross-examined about this defense. Even if he did in fact tell Jim Varner to, in effect, abandon ship, it was far too little

and too late to constitute the sort of withdrawal that the statute contemplates. He argues in his brief that he contacted the police and his statements terminated any chance that the insurance claim would be paid. [Appellant's Brief 31] He is presumably referring to this testimony given by Kalama Wedding on cross-examination:

Q. And there was still a potential that claim could be paid?

A. Right.

Q. That was over when Mr. Merino came forward and talked to Detective Kimsey, correct?

A. Well, the claim wasn't over.

Q. The chance of the claim being paid ended at that point, right?

A. Correct.

[RP 90]

The evidence does not support Merino's claim that he came forward voluntarily to speak with Detective Kimsey.

Q. While you were at the scene of the death, did you have occasion to come in contact with Doug Merino?

A. Yes, I did.

Q. Did you approach him or did he approach you?

A. I was advised by Detective Sergeant Pat Smith to talk to Doug Merino.

Q. Okay. When Detective Sergeant Pat Smith told you that, did he indicate who Doug Merino was to you? Or how did you know who Doug Merino was?

A. There were several family members at the scene at the time, and someone pointed out to me who Doug Merino was, or I walked up to a group of them and asked which one Doug Merino was.

[RP 185] On February 7, Kimsey took a taped statement from Merino at Merino's residence, and at that time Merino brought up the subject of the Woody. [RP 186]

Rather than an abandonment of the conspiracy or the attempted theft, these statements sound more like one conspirator abandoning his co-conspirators. By the time Merino spoke to the police about the fraud, Jim Varner was dead of a gunshot wound and an investigation was proceeding into the death. Getting clear of the Varners would seem like a good idea by then, and Merino's statements sound more like an attempt to protect himself than to prevent the theft from happening. Dropping hints to the insurance investigator about Ken Varner's unsavory character while at the same time claiming to have rebuilt and sold the Woody is not a withdrawal from the conspiracy. By the time he spoke to the police, it was more than two months later, and certainly not a good faith attempt to prevent the crime.

Merino cites to U.S. v. Freie, 545 F.2d 1217 (9th Cir. 1976), for the proposition that a person may abandon a criminal enterprise even after all the elements of the crime have been committed. [Appellant's Brief 32] The State does not see that language in that case.

Merino did not abandon the conspiracy or the attempted theft, because both crimes were already completed before he made any statements that contradicted the plan, and because his hints dropped to the insurance investigator were more than offset by the lies he told her. The statements he made months later to police officers were more of an attempt to shift attention away from himself and onto the Varners than an attempt to terminate the crime. He was not entitled to a jury instruction regarding withdrawal from the conspiracy, and thus it was not error for the court to refuse it.

5. There was no juror or prosecutor misconduct. The evidence which Merino cites in support of his claim is a complete misstatement of the facts.

a. Juror misconduct.

Merino claims that the court should have granted him a new trial because he presented declarations from three jurors which show that misconduct might have occurred. He argues that one or

more jurors may have researched the value of Woodies and other antique vehicles on the internet, although he concedes he does not have proof that they did. The State does not disagree that if one or more jurors conducted independent research, it would be misconduct. That did not happen in this case.

A court's refusal to grant a new trial is reviewed for abuse of discretion. State v. Burke, 163 Wn.2d 204, 210, 181 P.3d 1 (2008). The party alleging juror misconduct has the burden to show that the misconduct occurred. State v. Earl, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). Merino has failed to establish even the possibility of juror misconduct. The sum total of his evidence shows that one male juror made a facetious remark to another about looking for information on the internet. The person to whom he spoke responded that jurors were not supposed to do that. [CP 270-71] Another juror heard fellow jurors commenting that they wanted to check the internet when the case was over. [CP 248] This does not even begin to rise to the level of juror misconduct and the court was correct to deny his motion for a new trial.

b. Photographs of the car.

Merino claims that the prosecutor sandbagged him by providing poor-quality black and white photos of Exhibits 1 through

4, which were the photos provided by the Varners to the insurance company. The pictures were represented to be the Woody that Merino claimed to have sold to the Varners, but which were actually pictures of a Woody belonging to Frank Alexander and which were taken at a car show in Portland in 2004. He also claims the prosecutor further hoodwinked the defense by not disclosing to Merino that he had asked Janelle Varner, Jim Varner's daughter whether she could identify any of three distorted images reflected in the front bumper of Alexander's car.

At trial, Janelle Varner testified that her father had asked her to print some photographs for her. Presumably these were from a computer disk or CD, but she did not say so. She used a picture printer she had at her home in Bellingham. She identified Exhibits 1 through 4 as larger copies of the photographs she printed for her father. [RP 160-162] Janelle Varner was not asked at trial about the reflections in the bumper. The defense did not cross-examine her at all. [RP 162] In support of his motion for a new trial, Merino submitted a number of declarations, including one from Janelle Varner, in which she claimed after the trial that while Exhibits 1 through 4 looked like the same car in the photographs she printed for her father, she didn't know if they were taken from the same

angle. She also stated that the prosecutor had asked her if she could identify the people reflected in the front bumper of the car, and she said she could not, nor did she think Merino or either of the Varners was among the people in the reflection. [CP 267-69] The prosecutor, in his response to the motion for a new trial, declared under penalty of perjury that Ms. Varner had said she could not identify the people reflected in the bumper, but she did not assert that they were not the Varners or Merino. [CP 362-63]

Merino also offers the declaration of another of his attorneys, Scott Campbell, who stated that he interviewed Jannell Varner prior to trial and discussed the case with her. "However, soon after the meeting, Janelle Varner informed me that she had an attorney and she would no longer talk to me. My experience was that Janelle Varner and her family were upset with me." [CP 330]

In rebuttal argument, the prosecutor made these statements:

Let's talk about Frank Alexander. He comes up here, testifies that that was his car that was photographed. The fake photographs were his car. He saw them in KIRO television. When were those photographs taken? The summer of '04, June or July. So 17, 16, 18, I'm not sure, we don't know exactly, 18 months before these photographs were developed by Janelle (sic) Varner. Well, remember there were three people that took those photographs. Interesting there's three people in this case. He can't say whether

it was Doug Merino or not, but he remembers it was three people that were really interested in this car.

So when did this conspiracy start? And most importantly of Ken Varner and Jim Varner and of Doug Merino, who would be most interested in taking photographs of a '49 Woody? So who most likely started those photographs in this process? Why would Jim Varner take photographs of a '49 Woody? Who is the man we've heard tons of evidence about this? Who is the man that's really into Woodys? Who is the man who restores them from the beginning? And isn't it remarkably coincidental that this '49 Woody that was photographed 18 months earlier, 12, 16 months earlier was virtually the same car that Doug Merino had his parts out in the backyard, a collection of parts.

[RP 343-44] (The portion of the record that Merino quotes in his brief at page 19 is from an argument held outside the presence of the jury. [RP 213-14])

A prosecutor has wide latitude in making arguments and drawing reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) Merino did not object to the portion of the prosecutor's argument to which he now assigns error. If a defendant does not object and request a curative instruction, his claim of prosecutorial misconduct is waived unless the misconduct was so "flagrant and ill-intentioned" that no instruction could have removed the prejudice. State v. Dennison,

115 Wn.2d 609, 622-23, 810 P.2d 193 (1990). Not only was there no prejudice, there was no objection.

Merino now argues that the prosecutor hid evidence, tampered with a witness, and made arguments that he knew to be false. A review of the record shows that this is a twisting of the facts. Despite his arguments to the contrary, Janelle Varner testified only that the Exhibits 1 through 4, which were indisputably the photographs provided to the insurance company by the Varners, were larger copies of the pictures her father asked her to print out. Even in her declaration, she did not say that they weren't. She is obviously back-pedaling following Merino's conviction, when she apparently mended fences with Merino, but she still does not claim that she perjured herself at trial.

Merino argues that the prosecutor had an obligation to provide him with color copies of Exhibits 1 through 4 rather than black and white copies. Attached to his motion for a new trial, he presented black and white copies which he asserted were so bad that he could not determine anything from them. They were apparently copies that had been recopied multiple times, which does not improve the quality of a photograph; the prosecutor indicated that he had given counsel first generation copies. [03/20/08 RP 30]

The State could not provide the disk from which the photographs were printed because it was never in the State's possession or control. Jim Varner provided it to Janelle Varner, but it never came into the hands of the prosecution.

Merino cites to State v. Boyd, 160 Wn.2d 424, 158 P.3d 54 (2007), for the proposition that the State is required to provide an opportunity to review the actual evidence, as opposed to copies or samples. In Boyd, a consolidated case, the evidence was a computer hard drive containing tens of thousands of images, and numerous photographs and 21 videotapes, all of which contained child pornography. The State had refused to provide copies, but had made the material available for the defense to inspect. The court held that in some instances the defendant has a right to copies of certain kinds of evidence. Id., at 434. That is an entirely different situation from this case, where copies of the four photographs were provided. The prosecutor himself did not have color copies because his office did not have a color copier at the time. [03/20/08 RP 34] He would not provide the originals of the photographs, which were in evidence, any more than a prosecutor would hand over a gun, knife, or other piece of physical evidence to be used at trial. He provided the best copy which he had the ability to provide. There is nothing in

the record to indicate, nor does Merino argue, that he ever asked to see the originals. He does argue that this "reflection in the bumper" evidence, which was critically important and exculpatory, was hidden from him by a dishonest prosecutor. This is a gigantic twisting of the facts; the prosecutor was justifiably outraged at the attack on his character and professionalism.

Merino's argument ignores this basic fact: At no time during the trial was any evidence offered, introduced, or argued that the photograph of the front of Alexander's Woody showed a reflection of three people, one of which was the photographer. Janelle Varner was not asked about the reflections. Alexander was not asked about the reflections. No witness was asked about the reflections. At no time were the reflections pointed out to the jury. During rebuttal the prosecutor argued that three people had admired Alexander's Woody at the 2004 car show and that one of them photographed it. Three people were involved in the conspiracy to defraud the insurance company. He argued that Merino had more of a motive to photograph the car than the Varners did at the time, but he did not claim that Merino was the photographer nor did he claim that Merino was reflected in the bumper of the Woody. There is not one mention of the reflections in the bumper in any evidence before the jury. The

prosecutor cannot be expected to advise the defense of a statement Janelle Varner claims she made to him but which he denies was in fact made. It wasn't until after the trial that Janelle Varner made this claim; prior to trial she obtained an attorney and refused to speak with defense counsel after the first interview. [CP 330]

Despite his strenuous argument, this "evidence" probably did not exist and certainly was not exculpatory, particularly since the prosecutor denied that Janelle Varner told him those people could not be the three conspirators. Janelle Varner has not been cross-examined about this claim; Merino has only made an offer of proof. But even if she did, the issue was still never before the jury. This is, as the prosecutor argued at the motion for a new trial, "nonevidence." [03/20/08 RP 34] Merino cites to Boyd, *supra*, for the principal that the State must disclose evidence it intends to use. [Appellant's Brief 36] Here, the prosecutor did not intend to use it, and he did not use it.

Merino further claims that the prosecutor essentially tampered with Janelle Varner's testimony by pressuring her to say that Exhibits 1 through 4 were the same photographs she printed for her father. That is also a misstatement of the facts. At trial, Janelle Varner testified that the exhibits were copies of photographs she

printed for Jim Varner. [RP 161-62] In her declaration, she says that she doesn't know if the pictures were taken at the same angle as the ones she printed, but that they looked like the same car. [CP 269] In her declaration she states that the prosecutor wanted her to answer "yes" to the question "do those look like the pictures that you printed or representations of them?", even though the exhibits were larger. At trial she said that the exhibits were bigger than the pictures she printed out. [RP 161] It is not tampering with a witness to ask questions which clarify what the witness can and can't truthfully testify to. Merino does not explain how getting the witness to say the word "yes" somehow tricked the jury into believing false testimony. Janelle Varner's testimony was completely consistent with her declaration.

6. The court did not abuse its discretion by refusing to find that the two convictions constitute the same criminal conduct for purposes of calculating Merino's offender score.

Whether sentences are consecutive or concurrent is determined by RCW 9.94A.589(1):

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that

some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

To constitute the same criminal conduct, the separate crimes must involve all three of the elements listed in the statute--(1) the same criminal intent, (2) the same time and place, and (3) the same victim. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). "This court must narrowly construe RCW [9.94A.589(1)] to disallow most assertions of same criminal conduct." State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999). The trial court's ruling will be reversed only if it abused its discretion or misapplied the law. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The same criminal conduct analysis involves both factual determinations and trial court discretion. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002). To be considered the same criminal conduct, the two crimes must have the same objective, not subjective, intent. State v. Dunaway, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987).

In this case, while the victim was the same for both the conspiracy and attempted theft, and arguably the intent was the

same, the time and place were not. The conspiracy comprised the agreement among Merino and the two Varners, plus a substantial step or steps in pursuance of that agreement. The evidence was that the conspiracy began as early as the conversation between Jim, Ken, and Mike Varner, and possibly even as early as the summer of 2004, when Alexander's Woody was photographed. Substantial steps included the printing of the photographs and taking out an insurance policy using falsified documents. The conspiracy was complete even if the theft had never been attempted. The conspiracy occurred at the place and time where the preparations were made. The attempted theft, on the other hand, did not occur until Ken Varner reported the car stolen and took steps to collect on the insurance policy. Merino assisted in that attempt by lying to the insurance investigator about having restored, appraised, and sold the Woody. Since these two crimes occurred at different times, the trial court did not abuse its discretion by counting the convictions separately for sentencing purposes. Conspiracy is "separate, distinct from, and unincorporated in the crime which the conspirators have agreed to commit." State v. Handley, *supra*, at 293. The court correctly treated them separately.

D. CONCLUSION.

None of Merino's assignments of error have merit, and the State respectfully asks this court to affirm his convictions and sentence.

Respectfully submitted this 21st day of July, 2009.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: CHRISTOPHER W. BAWN
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of July, 2009, at Olympia, Washington.


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STATE OF WASHINGTON
BY 
COUNTY OF THURSTON