

FILED
Court of Appeals
Division II
State of Washington

NO. 52172-5
1/7/2019 9:43 AM
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint of
LA'JUANTA LE'VEAR CONNER,
Petitioner.

REGARDING THE JUDGMENT AND SENTENCE ENTERED BY
THE SUPERIOR COURT OF KITSAP COUNTY
Superior Court No. 11-1-00435-8

BRIEF OF RESPONDENT

CHAD M. ENRIGHT
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Corey Evan Parker
1001 4th Avenue, Suite 3200
Seattle, WA 98154
Email: corey@parkerlawseattle.com

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED January 7, 2019, Port Orchard, WA *Elizabeth Allen*
Original e-filed at the Court of Appeals; Copy to counsel listed at left.
Office ID #91103 kcpa@co.kitsap.wa.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
I. COUNTERSTATEMENT OF THE ISSUES.....	1
II. RESPONSE.....	2
III. STATEMENT OF THE CASE.....	2
IV. AUTHORITY FOR PETITIONER’S RESTRAINT	6
V. ARGUMENT	7
A. THE PETITION IS UNTIMELY AND SHOULD BE DISMISSED.	7
1. The petition is not timely under RCW 10.73.090.....	7
2. The petition does not meet the definition of newly discovered evidence as set forth in RCW 10.73.100(1).....	7
a. Conner fails to show his “new evidence” would change the result.	8
b. The information was known to Conner before trial.	10
c. Conner has not shown he exercised due diligence.	10
d. Longacre’s declaration is not material.	10
e. Longacre’s declaration, if it supported Conner’s claim, would be merely cumulative.....	11
3. State v. O’Dell is not a significant change in the law for the purposes of the exception set forth in RCW 10.73.100(6).....	11
4. The petition would be mixed	12

B.	STANDARD OF REVIEW	13
1.	Standards governing personal restraint petitions.....	13
2.	Ineffective assistance of counsel.....	16
C.	CONNER’S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE WITH REGARD TO THE STATE’S PLEA OFFER REMAINS FRIVOLOUS.....	17
D.	CONNER FAILS TO SHOW TRIAL OR APPELLATE COUNSEL WERE INEFFECTIVE WITH REGARD TO HIS FRIVOLOUS PLEA NEGOTIATION CLAIM.	20
1.	Conner fails to show deficient performance.	20
2.	Conner fails to show prejudice.	21
E.	CONTRARY TO CONNER’S CLAIM, THE RESENTENCING COURT DID CONSIDER WHETHER HIS RELATIVE YOUTH WOULD JUSTIFY A MITIGATED SENTENCE, BUT FOUND THAT HIS IMMATUREITY DID NOT JUSTIFY SUCH A SENTENCE.....	22
F.	NO COURT HAS APPLIED <i>HOUSTON-SCONIERS</i> TO AN ADULT DEFENDANT.	25
1.	Houston-Sconiers does not apply to adult defendants.	25
2.	Conner fails to show Article I, Section 14 requires the application of Houston-Sconiers to adults.....	28
G.	CONNER FAILS TO SHOW THAT RESENTENCING COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE OF HIS IMMATUREITY WHERE HE PRESENTS NO SUCH EVIDENCE NOW, AND WHERE THE TRIAL COURT FOUND THAT HIS ACTIONS REFLECTED A LEVEL OF MATURITY THAT DID NOT WARRANT A MITIGATED SENTENCE.....	32

H.	CONNER CANNOT SHOW THE RESENTENCING COURT ABUSED ITS DISCRETION IN NOT CONSIDERING HIS SAME CRIMINAL CONDUCT CLAIM ON REMAND WHERE NONE OF THE OFFENSES WERE THE SAME CRIMINAL CONDUCT.	34
1.	Burglaries.....	35
2.	12 th Street (Counts VII-XV)	36
3.	Shore Drive (Counts XVI-XVIII).....	37
4.	Weatherstone Apartments (Counts XIX-XX).....	37
5.	Wedgwood (Counts XXI-XXV).....	37
I.	THE TRIAL COURT PROPERLY FOLLOWED THIS COURT’S MANDATE AND STRUCK THE FIREARM ENHANCEMENT ASSOCIATED WITH COUNT XIX ON REMAND.	38
J.	CONNER CANNOT SHOW POST-RESENTENCING APPELLATE COUNSEL WAS INEFFECTIVE WHERE HIS UNDERLYING CLAIMS ARE WITHOUT MERIT.	40
VI.	CONCLUSION.....	41

TABLE OF AUTHORITIES

CASES

<i>Graham v. Florida</i> , 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).....	30, 31
<i>In re Cook</i> , 114 Wn.2d 802, 792 P.2d 506 (1990).....	14, 15
<i>In re Crow</i> , 187 Wn. App. 414, 349 P.3d 902 (2015).....	13
<i>In re Dalluge</i> , 152 Wn.2d 772, 100 P.3d 279 (2004).....	40
<i>In re Dyer</i> , 143 Wn.2d 384, 20 P.3d 907 (2001).....	15
<i>In re Fero</i> , 190 Wn.2d 1, 409 P.3d 214 (2018).....	8
<i>In Re Gentry</i> , 137 Wn.2d 378, 972 P.2d 1250 (1999).....	20
<i>In re Hagler</i> , 97 Wn.2d 818, 650 P.2d 1103 (1982).....	14
<i>In re Hankerson</i> , 149 Wn.2d 695, 72 P.3d 703 (2003).....	12
<i>In re Light-Roth</i> , 191 Wn.2d 328, 422 P.3d 444 (2018).....	12
<i>In re Light-Roth</i> , 200 Wn. App. 149, 401 P.3d 459 (2017).....	11
<i>In re Maxfield</i> , 133 Wn.2d 332, 945 P.2d 196 (1997).....	40
<i>In re Music</i> , 104 Wn.2d 189, 704 P.2d 144 (1985).....	14
<i>In re Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	16
<i>In re Schreiber</i> , 189 Wn. App. 110, 357 P.3d 668 (2015).....	14
<i>In re Stenson</i> , 150 Wn.2d 207, 76 P.3d 241 (2003).....	13
<i>In re Stoudmire</i> , 141 Wn.2d 342, 5 P.3d 1240 (2000).....	12
<i>In re Woods</i> , 154 Wn.2d 400, 114 P.3d 607 (2005).....	14
<i>In re Yates</i> , 177 Wn.2d 1, 296 P.3d 872 (2013).....	15, 16

<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).....	26
<i>Pennsylvania v. Finley</i> , 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).....	20
<i>Smith v. Robbins</i> , 528 U.S. 259, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).....	40
<i>State v. Avalos</i> , 1 Wn. App. 2d 1022, 2017 WL 5452961 (2017).....	27
<i>State v. Brown</i> , ___ Wn. App. 2d ___, 2018 WL 4959959 (2018).....	27
<i>State v. Brown</i> , 139 Wn.2d 20, 983 P.2d 608 (1999).....	25
<i>State v. Burton</i> , 1 Wn. App. 2d 1015, 2017 WL 5195175 (2017).....	28
<i>State v. Fain</i> , 94 Wn.2d 387, 617 P.2d 720 (1980).....	30
<i>State v. Gore</i> , 101 Wn.2d 481, 681 P.2d 227 (1984).....	26
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	28, 29
<i>State v. Gurske</i> , 155 Wn.2d 134, 118 P.3d 333 (2005).....	31
<i>State v. Haddock</i> , 141 Wn.2d 103, 3 P.3d 733 (2000).....	35
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	16, 17
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017).....	25, 26, 27, 28, 29, 32
<i>State v. Langford</i> , 67 Wn. App. 572, 837 P.2d 1037 (1992).....	37
<i>State v. Lessley</i> , 118 Wn.2d 773, 827 P.2d 996 (1992).....	36, 37
<i>State v. Linville</i> , 191 Wn.2d 513, 423 P.3d 842 (2018).....	21
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	16
<i>State v. Lust</i> , 174 Wn. App. 887, 300 P.3d 846 (2013).....	38
<i>State v. Maxfield</i> , 125 Wn.2d 378, 886 P.2d 123 (1994).....	35
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	16

<i>State v. Moretti</i> , 1 Wn. App. 2d 1007, 2017 WL 4899567 (2017)	28
<i>State v. O’Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015)	11, 12, 22, 23, 24, 32
<i>State v. Ramos</i> , 187 Wn.2d 420, 387 P.3d 650 (2017)	29
<i>State v. Smith</i> , 99 Wn. App. 510, 990 P.2d 468 (2000)	36
<i>State v. Sweet</i> , 138 Wn.2d 466, 980 P.2d 1223 (1999)	36
<i>State v. Williams</i> , 152 Wn. App. 937, 219 P.3d 978 (2009)	21
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981)	8
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	16, 17, 20

STATUTORY AUTHORITIES

Cal. Penal Code § 3051	31
RCW 9.94A.535(2)(c)	4
RCW 9.94A.535(3)(u)	4, 5
RCW 9.94A.589(1)(a)	35, 37
RCW 9.94A.602	4
RCW 9A.52.050	35, 36
RCW 10.73.090	7
RCW 10.73.090	8, 11, 12, 13
RCW 10.73.090(1)	7
RCW 10.73.090(3)(b)	7
RCW 10.73.100	12
RCW 10.73.100(1)	7, 8
RCW 10.73.100(6)	11

RULES AND REGULATIONS

RAP 16.7(a)(2)	15
----------------	----

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the petition should be dismissed as untimely?
2. Whether Conner's claim that trial counsel was ineffective with regard to the state's plea offer remains frivolous?
3. Whether Conner fails to show trial or appellate counsel were ineffective with regard to his frivolous plea negotiation claim?
4. Whether, contrary to Conner's claim, the resentencing court did consider whether his relative youth would justify a mitigated sentence, but found that his immaturity did not justify such a sentence?
5. Whether Conner fails to show that *Houston-Sconiers* applies to adult defendants?
6. Whether Conner fails to show that resentencing counsel was ineffective for failing to present evidence of his immaturity where he presents no such evidence now, and where the trial court found that his actions reflected a level of maturity that did not warrant a mitigated sentence?
7. Whether Conner fails to show that the resentencing court abused its discretion in not considering his same criminal conduct claim on remand where none of the offenses were the same criminal conduct?
8. Whether The trial court properly followed this Court's

mandate and struck the firearm enhancement associated with count XIX on remand?

9. Whether Conner fails to show post-resentencing appellate counsel was ineffective where his underlying claims are without merit?

II. RESPONSE

The State respectfully moves this court for an order dismissing the petition with prejudice because it is untimely and substantively without merit.

III. STATEMENT OF THE CASE

La’Juanta Conner was charged in Kitsap County Superior Court with twenty-six separate offenses based on a string of interrelated home-invasion robberies and burglaries in Bremerton and nearby unincorporated Kitsap County. The first six counts were based on offenses that occurred the day he was arrested, November 17, 2010:

- 1 Conspiracy to commit first-degree burglary
- 2 Second-degree unlawful possession of a firearm (a Hi-Point .40 revolver)
- 3 Possession of a stolen firearm (the Hi-Point)
- 4 Second-degree unlawful possession of a firearm (a Taurus .44 semiautomatic)
- 5 Possession of a stolen firearm (the Taurus)
- 6 Possession of marijuana

CP 208-12.¹ The second four were based on a home invasion on Twelfth Street on September 9, 2010:

- 7 First-degree robbery of Robert Dato
- 8 First-degree robbery of Aaron Dato
- 9 First-degree burglary
- 10 Second-degree theft

CP 212-15. The third group involved a second home invasion of the same Twelfth Street residence on September 28, 2010:

- 11 First-degree robbery of Robert Dato
- 12 First-degree robbery of Aaron Dato
- 13 First-degree robbery of Jeffrey Turner
- 14 First-degree burglary
- 15 Second-degree theft

CP 216-20. The next three charges were related to a home invasion on Shore Drive, also on September 28:

- 16 First-degree robbery Brett Cummings
- 17 First-degree burglary
- 18 Third-degree theft from Cummings (GM)

CP 220-22. On the night of October 2-3, 2010, Conner participated in a burglary at the Weatherstone Apartments, resulting in the following charges:

¹ The State has moved to transfer the record from Conner's two direct appeals. "CP" refers to the Clerk's Papers from the original appeal, No. 43762-7-II. "CP2" refers to those from the second appeal, No. 48846-9-II. The Reports of Proceedings from the first appeal will be referenced using the scheme Conner used in his direct appeal brief. *See* App. A. There was only a single report from the second appeal, and it will be referred to as "RP2."

- 19 First-degree burglary
- 20 Second-degree theft from Kimberly Birkett

CP 223-24. The final home invasion took place on the evening of November 3-4, 2010, at a home on Wedgwood Lane:

- 21 First-degree robbery of Aaron Tucheck
- 22 First-degree robbery of Keefe Jackson
- 23 First-degree burglary
- 24 Theft of a firearm
- 25 Second-degree theft of an access device, a debit card belonging to Ann Marie Tucheck

CP 224-28. Finally, a post-arrest search of the apartment of Conner's girlfriend, Rachel Duckworth, on November 19, 2010, resulted in Count 26, a charge of third-degree possession of stolen property. CP 228.

All burglary and robbery counts included a special allegation that Conner or an accomplice were armed with a firearm under RCW 9.94A.602. All felony counts included special allegations of the multiple current offense aggravating circumstance under RCW 9.94A.535(2)(c). Counts 9, 14, 17 and 23 included special allegations of the aggravating circumstance that a victim was present during a burglary under RCW 9.94A.535(3)(u). CP 209-28.

After a trial, the jury acquitted Conner on Counts 6 and 26, and did not find that he was armed with a firearm as to Count 9. CP 302, 308, 312. On all other counts and special allegations, Conner was convicted as

charged. CP 300-15, 325. The trial court imposed a standard-range sentence of 1148.5 months. CP 333.

Conner appealed. *State v. Conner*, No. 43762-7-II. While the appeal was pending, Conner filed his first personal restraint petition. *In re Conner*, No. 45418-1-II. This Court consolidated these two proceedings. The Court vacated his third-degree theft conviction (Count 18), on double jeopardy grounds. *State v. Conner*, No. 43762-7-II, Opinion, at 26 (Jun. 4, 2015) (App. B). The Court also reversed the firearm enhancement associated with Count 19 because there was no jury finding supporting it. *Id.*, at 18. The Supreme Court denied review. *State v. Conner*, No. 92031-1 (Jan. 6, 2016) (App. C). The mandate issued on January 26, 2016. App. D).

On remand, before resentencing Conner filed a pro se CrR 7.8 motion alleging counsel was ineffective with regard to plea negotiations. CP2 107. At the resentencing hearing, counsel asked the court not to consider the motion because he was unprepared to address it. RP2 7, 29. The trial court therefore declined to address it. RP2 30.

Proceeding to the resentencing, the trial court reimposed the same sentence. CP2 141. The theft third did not affect the standard range and the trial court once again counted 13 firearm enhancements. CP2 138-39.

On appeal, the only issue Conner raised was the trial court's

refusal to rule on his CrR 7.8 motion. *State v. Conner*, No. 34973-0-III,² Opinion, at 5 (May 30, 2017) (App. E). The mandate issued on July 12, 2017. App. F.

After the mandate issued, the trial court found that Conner had failed to make a substantial showing that he was entitled to relief and transferred the CrR 7.8 motion to this Court as a PRP. App. G. This Court ordered a response, and ultimately found that the petition was frivolous and dismissed. *In re Conner*, No. 50779-0-II, Order Dismissing Petition (Feb. 27, 2018) (App. H).

On July 17, 2018, Conner filed his third PRP, which forms the basis of the current proceeding.

IV. AUTHORITY FOR PETITIONER'S RESTRAINT

The authority for the restraint of La'Juanta Le'Veear Conner lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on March 25, 2016, in cause number 11-1-00435-8, upon Conner's conviction of conspiracy to commit first-degree burglary, two counts of second-degree unlawful possession of a firearm, two counts of possession of a stolen firearm, eight counts of first-degree robbery, five counts of first-degree burglary, four counts of

² After briefing, the appeal was transferred on January 12, 2017, to Division III for resolution. The pre-transfer cause number was 48846-9-II.

second-degree theft, theft of a firearm, and one count of third-degree possession of stolen property.

V. ARGUMENT

A. THE PETITION IS UNTIMELY AND SHOULD BE DISMISSED.

1. *The petition is not timely under RCW 10.73.090.*

RCW 10.73.090(1) provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

A Washington court judgment becomes final when the mandate from the direct appeal issues. *See* RCW 10.73.090(3)(b). The mandate issued in Conner's second direct appeal on July 12, 2017. Thus to be timely, his petition should have been filed by July 12, 2018. Because his present petition was filed by counsel on July 17, 2018, it was not timely and should be dismissed.

2. *The petition does not meet the definition of newly discovered evidence as set forth in RCW 10.73.100(1).*

Conner asserts that his first claim, regarding the alleged ineffectiveness of counsel for not advising him of the State's plea offer, falls with the exception set forth in RCW 10.73.100(1). Nevertheless, he fails to meet the standards for application of that section.

RCW 10.73.100(1) provides:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

To establish that this exception applies, “a personal restraint petitioner must show evidence that (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching.” *In re Fero*, 190 Wn.2d 1, 15, 409 P.3d 214, 222 (2018) (citing *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)). If *any* of these factors is missing, the petitioner is not entitled to relief. *Id.* Conner fails to meet these elements. As such RCW 10.73.100(1) does not apply.

a. Conner fails to show his “new evidence” would change the result.

The only comments in Longacre’s declaration that pertain to whether he advised Conner of the implications of the plea do not actually support Conner’s claim.³ To the contrary, in them Longacre asserts that he did advise Conner regarding the offer, and the likely outcome of trial:

4. Before my entering the case, Mr. Conner was

³ The remainder of Longacre’s comments largely are utterly unsubstantiated accusations regarding the integrity of the judge, the police, and the prosecutor’s office.

previously represented by a public defender. In my initial discussion with Mr. Conner, I understood that the public defender had already discussed with him the prosecutor's plea offer of 150 months. *He told me the public defender wished him to take the plea and Mr. Conner refused. I also discussed the offer, and told him that if he wished to plea, he would not need to expend the extra money for my services as the public defender could handle that plea well.* Mr. Conner insisted he was innocent and wished to go to trial.

* * *

11. *So I agreed to represent Mr. Conner, telling him, with him being black and the juries in Kitsap County almost always white, and that the civilian witness was white, it was an uphill battle at best.*
12. It became a harder battle when a second robber (I also cannot remember his name) agreed to testify against Mr. Conner for a reduction in charges and his sentence. ...
13. *I let Mr. Conner know it would be only by the grace of God if we won against the two robber witnesses and the shylock: ten years was a whole lot less than never seeing the light of day again (the sentence with the added charges and enhancements would give him essentially life without parole). However, he maintained his innocense [sic] and insisted on going to trial. ...*

* * *

15. It has always been my professional philosophy to give clients the decision making authority to choose between accepting a plea or going to trial. When a client maintains their innocence, as Mr. Conner has, *I do not try to talk them into a plea, but I do tell them the consequences, that no matter how rosy their case might look (and Mr. Conner's did not look rosy), jurors are unpredictable and have many times been known to convict innocent people. I further let them know that jurors come into a case prone to conviction, rather than presuming*

innocence. Mr. Conner still wanted to go forward.

Petition, Att. U (emphasis supplied). In short nothing in Longacre's declaration adds to Conner's previously asserted claim, which this Court found was "frivolous": that Longacre failed to advise Conner of the plea offer. Clearly this evidence would not change the outcome of the claim.

b. The information was known to Conner before trial.

Conner asserts, based on the date of Longacre's declaration, that the basis of this claim was not known until July 2018. However, even if Longacre's statements could be read as supportive of Conner's claim, the alleged facts regarding the plea offer were known to Conner before trial, and certainly known to him by the time of resentencing when he himself raised the claim at that time.

c. Conner has not shown he exercised due diligence.

Likewise Conner fails to show due diligence. He was aware of the claim itself at least as early as 2016, when he filed his CrR 7.8 motion regarding the issue. He utterly fails to offer any evidence as to why Longacre could not have been contacted at any time before or since then.

d. Longacre's declaration is not material.

As noted previously, Longacre's declaration fails to support the claim that he failed to advise Conner of the consequences of going to trial.

As such it is not material to the claim.

e. Longacre's declaration, if it supported Conner's claim, would be merely cumulative.

As noted, Longacre's declaration actually supports this Court's previous finding that Conner's claim was frivolous. If it actually did support Conner's version of the events, the declaration would then be cumulative to Conner's own (highly contradictory) prior statements, and would thus be merely cumulative. As it stands, Longacre's declaration actually contradicts Conner's claim and is therefore merely impeaching.

In view of the foregoing, it is clear that Longacre's declaration does not qualify as newly-discovered evidence. As such RCW 10.73.090 applies, and Conner's petition should be dismissed as untimely.

3. *State v. O'Dell is not a significant change in the law for the purposes of the exception set forth in RCW 10.73.100(6).*

In his second claim, Conner asserts that he resentencing court erred in not considering his youth as a mitigating factor, citing *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). Conner does not explicitly address why this claim should be deemed timely. He does, however, rely on the Court of Appeals decision in *In re Light-Roth*, 200 Wn. App. 149, 401 P.3d 459 (2017), *see* Petition at 33-34, which held that *O'Dell* was a significant change in the law, allowing the petitioner to raise the issue in an untimely PRP. *Light-Roth*, 200 Wn. App. at 163.

The Supreme Court, however, reversed the Court of Appeals, and held that *O'Dell* was not a significant change in the law, and that Light-Roth was not entitled to relief in his untimely personal restraint petition. *In re Light-Roth*, 191 Wn.2d 328, 338, 422 P.3d 444 (2018).⁴ Like Light-Roth, Conner's petition is untimely, and this issue is not subject to any exception set forth in RCW 10.73.100.

4. *The petition would be mixed.*

In addition to the two claims just discussed, Conner also claims resentencing and appellate counsel were ineffective, and that the trial court should have run his firearm enhancements concurrently. Conner cites no exception to RCW 10.73.090 for these claims. Thus, even were the above-discussed claim regarding Longacre timely, the petition would be mixed and would still have to be dismissed.

Where a petition contains some claims that are within the time-bar set forth in RCW 10.73.090, and some that are not, the entire petition must be dismissed as mixed. *In re Stoudmire*, 141 Wn.2d 342, 5 P.3d 1240 (2000). The Supreme Court has continued to uphold the validity of the rule:

We recently affirmed our holding in *Stoudmire* in *In re Hankerson*, 149 Wn.2d 695, 72 P.3d 703 (2003), indicating that “if a personal restraint petition claiming multiple

⁴ The opinion was issued after Conner filed his petition.

grounds for relief is filed after the one-year period of RCW 10.73.090 expires, and the court determines that at least one of the claims is time barred, the petition must be dismissed.”

In re Stenson, 150 Wn.2d 207, 220, 76 P.3d 241 (2003); accord *In re Domingo*, 155 Wn.2d 356, ¶ 37 n.10, 119 P.3d 816 (2005). Although the Court recognized that the petitioner could file a new petition raising only the non-time-barred claim, it nevertheless held that dismissal was the proper resolution, so as to avoid undermining its jurisprudence regarding mixed petitions. *Stenson*, 150 Wn.2d at 221. Thus, even were the claim regarding the allegedly newly discovered evidence deemed timely, Conner’s remaining claims are not, and the petition would have to be dismissed as mixed.

B. STANDARD OF REVIEW

Even were his petition timely, Conner fails to show he would be entitled to either relief in this Court or to a reference hearing. The merits of his claims will be addressed in the following sections of this brief. The following standards of review apply to all his claims.

1. Standards governing personal restraint petitions.

The petitioner in a PRP must first prove error by a preponderance of the evidence. *In re Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015). Then, if the petitioner is able to show error, he must also prove

prejudice. *Crow*, 187 Wn. App. at 421.

To obtain relief, the petitioner must show either constitutional or nonconstitutional error. *In re Cook*, 114 Wn.2d 802, 810-11, 792 P.2d 506 (1990). If the error is constitutional, the petitioner must demonstrate that it resulted in actual and substantial prejudice. *In re Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). “Actual and substantial prejudice, which ‘must be determined in light of the totality of circumstances,’ exists if the error ‘so infected petitioner’s entire trial that the resulting conviction violates due process.’” *Crow*, 187 Wn. App. at 421 (quoting *In re Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985)).

This actual prejudice standard places the burden upon the petitioner, as opposed to the harmless error standard on direct appeal, because “[c]ollateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *In re Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). If the error is nonconstitutional, the petitioner must meet a stricter standard and demonstrate that the error resulted in a fundamental defect which inherently resulted in a complete miscarriage of justice. *In re Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015).

In addition, the petitioner must state with particularity facts that, if

proven, would entitle him to relief, and he must present evidence showing his factual allegations are based on more than speculation and conjecture. RAP 16.7(a)(2); *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). A petitioner cannot rely on conclusory allegations. *Cook*, 114 Wn.2d at 813-14. To support a request for a reference hearing, the petitioner must state with particularity facts which, if proven, would entitle him to relief. *In re Dyer*, 143 Wn.2d 384, 397, 20 P.3d 907 (2001). If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief *Id.* If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. *Id.*

If the petitioner fails to make a prima facie showing of either actual or substantial prejudice or a fundamental defect, the Court should deny the PRP. *In re Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). If the petitioner makes such a showing, but the record is not sufficient to determine the merits, the Court should remand for a reference hearing. *Yates*, 177 Wn.2d at 18. But if the Court is convinced that the petitioner has proven actual and substantial prejudice or a fundamental defect, the petition should be

granted. *Id.*

2. *Ineffective assistance of counsel.*

Many of Conner's claims allege that trial counsel was ineffective. In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a

reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687. Conner fails to meet these standards, and for the following reasons his petition should be dismissed.

C. CONNER'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE WITH REGARD TO THE STATE'S PLEA OFFER REMAINS FRIVOLOUS.

Conner first substantive claim is that trial counsel failed to adequately advise him about whether he should accept the State's plea offer. Conner previously raised this claim in his second PRP. This Court found that the claim "frivolous." App. B, at 2. The Court explained its conclusion:

La'Juanta Conner seeks relief from personal restraint imposed following his 2012 convictions for 23 counts related to robberies and burglaries, for which he was resentenced in 2016. In this, his second petition, he argues that he received ineffective assistance of trial counsel when that counsel failed to advise him of (1) the standard range sentence he was facing, (2) the mandatory firearm sentencing enhancements he was facing, and (3) the State's plea offer. But the record contradicts his claims. As to the advice regarding the sentence range and firearm enhancements, the record from his direct appeal establishes that he was advised of the standard range and the firearm enhancements. And as to the plea offer, in his prior petition he argued that he had been subjected to vindictive prosecution after he rejected the State's plea offer. This demonstrates that he had been advised of the offer. Conner's arguments are frivolous.

App. B, at 1-2 (footnote omitted); *see also*, 1RP 3-4 (counsel discussed in open court the seriousness of the charges and firearm enhancements); 6RP 38-43 (trial court advised Conner of sentencing and enhancement ranges); App. I, at 14 (Conner alleged in his first PRP that he was subjected to vindictive prosecution after he rejected the State's plea offer).

The only evidence Conner adds to his resurrected claim is Longacre's declaration. Conner reads that declaration in a manner that is contrary to what Longacre actually said. Petition, at 22-25. As discussed above, according to Longacre, he told Conner that he was facing a likely conviction, but deferred to Conner's wishes to go to trial:

4. Before my entering the case, Mr. Conner was previously represented by a public defender. In my initial discussion with Mr. Conner, I understood that the public defender had already discussed with him the prosecutor's plea offer of 150 months. *He told me the public defender wished him to take the plea and Mr. Conner refused. I also discussed the offer, and told him that if he wished to plea, he would not need to expend the extra money for my services as the public defender could handle that plea well.* Mr. Conner insisted he was innocent and wished to go to trial.

* * *

11. *So I agreed to represent Mr. Conner, telling him, with him being black and the juries in Kitsap County almost always white, and that the civilian witness was white, it was an uphill battle at best.*
12. It became a harder battle when a second robber (I also cannot remember his name) agreed to testify against Mr. Conner for a reduction in charges and his sentence. ...

13. *I let Mr. Conner know it would be only by the grace of God if we won against the two robber witnesses and the shylock: ten years was a whole lot less than never seeing the light of day again (the sentence with the added charges and enhancements would give him essentially life without parole). However, he maintained his innocence [sic] and insisted on going to trial. ...*

* * *

15. It has always been my professional philosophy to give clients the decision making authority to choose between accepting a plea or going to trial. When a client maintains their innocence, as Mr. Conner has, *I do not try to talk them into a plea, but I do tell them the consequences, that no matter how rosy their case might look (and Mr. Conner's did not look rosy), jurors are unpredictable and have many times been known to convict innocent people. I further let them know that jurors come into a case prone to conviction, rather than presuming innocence. Mr. Conner still wanted to go forward.*

Petition, Att. U (emphasis supplied). Contrary to Conner's selective parsing of the declaration, Longacre's account of his representation does not show that Conner was not advised of what he was facing or what the odds were of success. Rather, it shows that Longacre advised Conner that his chances of prevailing at trial were slim. Nevertheless, Longacre properly deferred to his client's wishes to go to trial. *See* RPC 1.2 ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered"). This claim, even if it were timely, remains frivolous and should be dismissed.

D. CONNER FAILS TO SHOW TRIAL OR APPELLATE COUNSEL WERE INEFFECTIVE WITH REGARD TO HIS FRIVOLOUS PLEA NEGOTIATION CLAIM.

Conner next claims that trial and appellate counsel following remand were ineffective for failing to investigate and raise the issue of ineffectiveness in plea bargaining within one year of the mandate following the first appellate order. Conner fails to show either deficient performance or prejudice.

1. Conner fails to show deficient performance.

First, Conner presents no authority that an ineffective assistance of counsel claim may be raised regarding the conduct of a collateral attack, which this claim most assuredly is. The precedent is to the contrary. It is well-established that there is no constitutional right to counsel in postconviction proceedings, other than the first direct appeal of right. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *In Re Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999) (“There is no constitutional right to counsel in postconviction proceedings”). A claim of ineffectiveness is premised on the constitutional right to counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (deficient performance “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”). If there

was no right to counsel, there can be no constitutional ineffective assistance claim. Conner fails to show that resentencing counsel, who was appointed to handle a resentencing, had any duty to prosecute a pro se motion regarding matters that occurred before the original direct appeal.

Moreover, Conner fails to point out what precisely resentencing counsel should have done to advance this claim that was ultimately found to be frivolous. Counsel has no duty to pursue a frivolous claim. *State v. Williams*, 152 Wn. App. 937, 944-45, 219 P.3d 978 (2009), *rev'd on other grounds*, 171 Wn.2d 474 (2011).

Likewise, counsel on the second direct appeal *did* raise this issue. Of course, appellate counsel is limited to the record on appeal. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018). That record was found not to support the claim. App. B. Conner fails to state what else counsel should have done. In view of the foregoing, Conner fails to establish deficient performance.

2. Conner fails to show prejudice.

As noted previously, this Court has found that this claim is frivolous. As further discussed above, Conner's purported new evidence does nothing to disturb that conclusion. He thus fails to show how resentencing or appellate counsels' allegedly deficient performance could have prejudiced him. This claim must fail.

E. CONTRARY TO CONNER’S CLAIM, THE RESENTENCING COURT DID CONSIDER WHETHER HIS RELATIVE YOUTH WOULD JUSTIFY A MITIGATED SENTENCE, BUT FOUND THAT HIS IMMATURITY DID NOT JUSTIFY SUCH A SENTENCE.

Conner next claims that the resentencing court erred in not considering imposing a mitigated sentence under the authority of *State v. O’Dell*. As noted above, this claim is untimely and may not now be considered. Even were the claim timely, it would be without merit because the trial court did consider whether a mitigated sentence was warranted under *O’Dell*, but found that it was not.

Conner again parses the record, leaving out important factors in the resentencing court’s decision.⁵ The court did not refuse to consider a sentence pursuant to *O’Dell*. Nor, as he claims, did it base its decision on Conner’s age at the time of resentencing. To the contrary, it considered counsel’s request thoroughly, and explained why it did not think a mitigated sentence was warranted. RP2 31-33. The court concluded that a standard-range sentence was appropriate:

So even at Mr. Conner’s age at the time of the commission of the crimes, balanced against the aggravating factors, I would find in any event that that does not constitute a mitigating factor such that a sentence below the standard range would be appropriate.

⁵ It should be noted that the resentencing judge tried the case and imposed the original sentence, and recalled the circumstances of both. RP2 32.

Likewise, I did not find that the aggravators, though proven, I didn't find that they justified a sentence above the standard range. In fact, I sentenced Mr. Conner to the midpoint of the standard range, which is my charge. I am constrained by statute and by the legislators.

RP2 32-33.

As the Supreme Court noted, “[i]t remains true that age is not a *per se* mitigating factor automatically entitling every youthful defendant to an exceptional sentence.” *O’Dell*, 183 Wn.2d at 695. The Court went on to note that while expert testimony is not required, there must be evidence tying the defendant’s alleged immaturity to the circumstances of the crime. *O’Dell*, 183 Wn.2d at 697-98 (citing record evidence of defendant’s immaturity).

Here, there was no such evidence of immaturity. Indeed the trial court found the opposite:

I do want to note for the record that the issue of youth did not come up at [the first] sentencing. Even if it had, however, the record with respect to *O’Dell* is not the same kind of record that was presented here in terms of the robberies. In *O’Dell*, it was a juvenile,^[6] an unsophisticated individual.

In this case, Mr. Conner had been before the Court before for the exact same offense and the jury verdict is what it is. There were two aggravating factors that the jury found. And even if the Court were to balance that against the defendant’s youth -- and, by the way, he was an adult at the time -- I don’t think that Mr. Conner is unsophisticated.

⁶ *O’Dell* committed his offense 10 days after his 18th birthday. *O’Dell*, 183 Wn.2d at 683.

I don't think Mr. Conner was the kind of individual that was easily led, given the testimony that was adduced at trial.

He's a father. His children were present in the courtroom frequently, as they are today. And he does want to live up to that responsibility as a father to these children, and that's always been the case with him from day one.

At the very beginning of this case, that was primarily his concern. At the end of this case, when he was first sentenced, I still remember that day very clearly, and I do remember that he was most concerned about the children that would grow up without him.

And those are not the kinds of remarks from an unsophisticated child. Those are the kinds of remarks that one would expect from someone who wants to honor their obligation as a man in the community.

RP2 31-32. These conclusions are supported by the testimony of the witnesses who spoke on Conner's behalf at the original sentencing, who all commented on Conner's good judgment and community-oriented actions. 38RP 2769-76.

Moreover, the circumstances of Conner's crimes do not reflect youthful impulsivity. Conner, unlike O'Dell, was not barely 18. He was 21 years old. He participated in *five* separate pre-organized home-invasion robberies, and was on his way to a sixth when he was arrested. Additionally, as noted at the original sentencing, and as recollected by the trial court at resentencing, Conner had participated in a similar crime in King County when he was 19. 38RP 2762-63; App. J., at 7-21.

Contrary to Conner's claims, the trial court did consider *O'Dell*. It

simply found that he had failed to meet his burden of establishing that his youthfulness was a factor that warranted a mitigated sentence. Thus, even were this claim timely, it would be substantively without merit.

F. NO COURT HAS APPLIED *HOUSTON-SCONIERS* TO AN ADULT DEFENDANT.

Conner next claims, citing *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), that the trial court erred in refusing to consider running his firearm enhancements concurrently. This claim, in addition to being untimely is without merit because no Washington Court has applied *Houston-Sconiers* to a defendant who was an adult at the time the offense was committed.

1. Houston-Sconiers does not apply to adult defendants.

It has long been the law in Washington that trial courts lack discretion with regard to the imposition of firearm enhancements. *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608, 613 (1999). Recently, the Supreme Court overruled *Brown* as it applies to juvenile offenders. *Houston-Sconiers*, 188 Wn.2d at 21 (“To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled.”).

Houston-Sconiers and co-defendant Treson Roberts were juveniles when they committed a series of armed robberies. Tried in adult court,

their convictions included seven and six firearm enhancements, respectively, with the Supreme Court noting that ordinarily the enhancements would be mandatory and must be served consecutively. However, with the defendants being juveniles, the Court had to determine the impact of the United States Supreme Court decision in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

In *Miller*, the Supreme Court held that under the Eighth Amendment, trial courts must consider the difference between children and adults in imposing sentence. *Houston-Sconiers*, 188 Wn.2d at 17-19. Thus, the Washington Supreme Court held that:

In accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion *with regard to juveniles*, they are overruled.

Houston-Sconiers, 188 Wn.2d at 21 (emphasis added, footnote omitted).

The Supreme Court has never held that *Brown* was not still controlling as to adult defendants like Conner, who was 21 at the time of the offenses in this case. As such, this Court is bound by *Brown*. *See State v. Gore*, 101 Wn.2d 481, 681 P.2d 227 (1984) (once the Washington State Supreme Court decides an issue of state law, that interpretation is binding on all lower courts until overruled by the Supreme Court).

Further, all three divisions of this Court have rejected claims that *Houston-Sconiers* applies to adult defendants.⁷ *State v. Brown*, ___ Wn. App. 2d ___, 2018 WL 4959959 at *5 (Oct. 15, 2018) (rejecting application of *Houston-Sconiers* to an adult offender); *State v. Hem*, 3 Wn. App. 2d 1035, 2018 WL 1920638 at *5, *review denied*, 191 Wn.2d 1009 (2018) (declining to address adult defendant’s unpreserved claim under *Houston-Sconiers* because claim did not affect a constitutional right); *State v. Rife*, 3 Wn. App. 2d 1024, 2018 WL 1831137 at *4, *review denied*, 191 Wn.2d 1008 (2018) (“the mandatory rule stated in *Houston-Sconiers* appears to apply only to juveniles, and not to young adults like Rife.”); *State v. Berhe*, 2 Wn. App. 2d 1024, 2018 WL 704724 at *16, *review granted on other grounds*, 191 Wn.2d 1026 (2018) (“Berhe asserts that *Brown* is no longer good law and that *State v. Houston-Sconiers*, provides such discretion [to run enhancements concurrently] to sentencing courts. He is wrong. *Houston–Sconiers* holds that ‘sentencing courts must have complete discretion to consider mitigating circumstances *associated with the youth of any juvenile defendant*.’ Accordingly, *Houston–Sconiers* overruled the holding in *Brown* ‘with regard to juveniles.’”) (citations omitted; emphasis added by Court of Appeals); *State v. Avalos*, 1 Wn. App. 2d 1022, 2017 WL 5452961 at *3 (2017) (“Avalos has failed to

⁷ All cases are unpublished. *See* GR 14.1(a).

show that *Houston–Sconiers* provides a constitutional basis for requiring sentencing courts to consider the defendant’s youthfulness as a mitigating factor at sentencing when the defendant is a legal adult rather than a juvenile”); *State v. Burton*, 1 Wn. App. 2d 1015, 2017 WL 5195175 at *16 (2017), *review denied*, 190 Wn.2d 1010 (2018) (“Our Supreme Court recently overruled the holding of *Brown* as it applies to juveniles. *State v. Houston–Sconiers*, 188 Wn.2d 1 (2017). This recent decision, however, does not undermine the applicability of *Brown* for an adult.”); *see also State v. Moretti*, 1 Wn. App. 2d 1007, 2017 WL 4899567, at *17 (2017) (Judge Bjorgen, dissenting, would have applied *Houston-Sconiers* to POAA sentence of adult offender; however, the majority affirmed the sentence without mention of *Houston-Sconiers*).

2. *Conner fails to show Article I, Section 14 requires the application of Houston-Sconiers to adults.*

Conner also argues that even though the Eighth Amendment, which was the provision on which *Houston-Sconiers* was based,⁸ may not require its application to adults, the Washington Constitution should. Conner fails to provide an adequate analysis pursuant to *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), and this Court should therefore decline to consider the issue. Moreover, the claim lacks merit.

⁸ *See Houston-Sconiers*, 188 Wn.2d at 21 n.6. (declining to address issue under Const. art. I, § 14).

Conner purports to satisfy the requirements of *Gunwall* by baldly asserting that “Washington interprets its Constitution as providing greater protections than its federal counterpart, including with respect to protections from cruel punishment.” Petition, at 37-38. While true in a global sense, the Supreme Court has “recently indicated that the *Gunwall* analysis should be conducted in the specific context” presented and that “[e]ven where it is already established that the Washington Constitution may provide enhanced protections on a general topic, parties are still required to explain why enhanced protections are appropriate in specific applications.” *State v. Bassett*, ___ Wn.2d ___, 428 P.3d 343, 349 (quoting *State v. Ramos*, 187 Wn.2d 420, 453-54, 387 P.3d 650 (2017) (editing the Court’s)). Conner fails to explain why art. I, § 14 should be interpreted more broadly than the Eighth Amendment with regard to the imposition of consecutive firearm enhancements on younger adult offenders.

Bassett concluded that in the context presented in that case, Const. art. I, § 14, did provide greater protection than the Eight Amendment. Notably, however, like *Houston-Sconiers*, *Bassett* by its terms applied “in the context of juvenile sentencing.” *Bassett*, 428 P.3d at 350. Nothing in that case addressed adult offenders like Conner.

Moreover, after blithely assuming the greater protection under art.

I, § 14, applies to the issue raised, Conner relies on the *Fain*⁹ test for his argument. However, *Bassett*¹⁰ rejected the use of the that test for “categorical” claims of cruel punishment such as the one Conner presents.

The Court explained why *Fain* was inapposite:

The *Fain* framework does not include significant consideration of the characteristics of the offender class. Instead, it weighs the offense with the punishment. This makes it ill suited to analyze Bassett’s claim because he asserts a categorical challenge based on the characteristics of the offender class—children. The categorical bar analysis, on the other hand, directs us to consider the nature of children.

Bassett, 428 P.3d at 351. Conner is claiming that the mandatory application of firearms enhancements consecutively to the sentencing of younger adult offenders constitutes cruel punishment. This is clearly a categorical claim.

The first step in the categorical bar analysis is to determine whether there is a national consensus against the sentencing practice by examining “objective indicia of society’s standards, as expressed in legislative enactments and state practice.” *Bassett*, 428 P.3d at 352 (quoting *Graham v. Florida*, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). Conner points to no statute or caselaw that supports his position that sentencing youthful adults to consecutive firearm

⁹ *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980).

¹⁰ The opinion in *Bassett* was filed after Conner’s petition.

enhancements is cruel punishment. The State has found no trend indicating that other states are heading that way.¹¹ At the very least, there is no evidence of a national consensus against the imposition of consecutive firearm enhancements on younger adult offenders.

The second step in the analysis is determination by the Court of whether the punishment serves legitimate penological goals. *Bassett*, 428 P.3d at 352 (citing *Graham*, 560 U.S. at 67). “When the legislature enacted the ‘Hard Time for Armed Crime Act of 1995’ (Initiative 159), it expressly recognized that ‘[a]rmed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death.’” *State v. Gurske*, 155 Wn.2d 134, 139, 118 P.3d 333 (2005) (quoting Laws of 1995, ch. 129, § 1(1)(a)). Firearm sentencing enhancements serve a specific penological goal of punishing and removing from the general public *adult* individuals that pose a heightened threat to public safety due to their willingness to use firearms while committing crimes. It also serves a deterrence purpose.

Neither factor under the categorical bar test supports the conclusion that mandatory consecutive firearm enhancements constitute cruel punishment as applied to younger adult offenders.

¹¹ California has provided for parole hearings for defendants who committed crimes when they were under age 25. The timing of the hearing depends on the sentence imposed. Cal. Penal Code § 3051. The section does not single out firearms enhancements.

Finally, even if the Washington Constitution did prohibit the imposition of mandatory consecutive firearm enhancements, Conner cannot show prejudice, which is the predicate to collateral relief. *Houston-Sconiers* only held that trial courts had to have discretion with regard to the imposition of such sentences. *Houston-Sconiers*, 188 Wn.2d at 34. Here, as discussed above, the trial court considered Conner's youth under *O'Dell*, and determined that a standard-range sentence including the consecutive firearm enhancements was appropriate. There is absolutely no reason to believe that it would have run Conner's enhancements concurrently if it had that option. Thus even were this claim timely, Conner would fail to show any error. This claim should be rejected.

G. CONNER FAILS TO SHOW THAT RESENTENCING COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE OF HIS IMMATURITY WHERE HE PRESENTS NO SUCH EVIDENCE NOW, AND WHERE THE TRIAL COURT FOUND THAT HIS ACTIONS REFLECTED A LEVEL OF MATURITY THAT DID NOT WARRANT A MITIGATED SENTENCE.

Conner next claims that counsel was ineffective for not presenting evidence supportive of a mitigated sentence based on his youth. Even now, Conner fails to present any such evidence beyond his own self-serving declaration. This claim, even were it timely, would be without merit because Conner fails to show that any such evidence exists, or that

the court would have imposed an exceptional sentence had it heard such evidence.

As discussed above, on collateral review, the defendant bears the responsibility of producing evidence supporting his claim for relief. He has produced only his self-serving declaration that his actions were all due to his immaturity and peer pressure. Petition, Att. V. That document fails to show counsel was deficient.

To the contrary, at resentencing Conner continued to maintain his innocence. It is difficult to see how counsel could have argued that Conner's actions were due to his immaturity based on Conner's personal statements when Conner was still asserting that the crimes were "something I didn't even do, regardless of what the jury felt, period." RP2 25.

Nor does Conner show prejudice. The trial court was clearly unpersuaded that Conner's alleged immaturity was mitigating as a factual matter:

I do want to note for the record that the issue of youth did not come up at sentencing. Even if it had, however, the record with respect to *O'Dell* is not the same kind of record that was presented here in terms of the robberies. In *O'Dell*, it was a juvenile, an unsophisticated individual.

In this case, Mr. Conner had been before the Court before for the exact same offense and the jury verdict is what it is. There were two aggravating factors that the jury

found. And even if the Court were to balance that against the defendant's youth -- and, by the way, he was an adult at the time -- I don't think that Mr. Conner is unsophisticated. I don't think Mr. Conner was the kind of individual that was easily led, given the testimony that was adduced at trial.

He's a father. His children were present in the courtroom frequently, as they are today. And he does want to live up to that responsibility as a father to these children, and that's always been the case with him from day one.

At the very beginning of this case, that was primarily his concern. At the end of this case, when he was first sentenced, I still remember that day very clearly, and I do remember that he was most concerned about the children that would grow up without him.

And those are not the kinds of remarks from an unsophisticated child. Those are the kinds of remarks that one would expect from someone who wants to honor their obligation as a man in the community.

So even at Mr. Conner's age at the time of the commission of the crimes, balanced against the aggravating factors, I would find in any event that that does not constitute a mitigating factor such that a sentence below the standard range would be appropriate.

RP2 31-32. This untimely claim should be denied.

H. CONNER CANNOT SHOW THE RESENTENCING COURT ABUSED ITS DISCRETION IN NOT CONSIDERING HIS SAME CRIMINAL CONDUCT CLAIM ON REMAND WHERE NONE OF THE OFFENSES WERE THE SAME CRIMINAL CONDUCT.

Conner next claims that the resentencing court abused its discretion on remand in failing to conduct a same criminal conduct analysis. Even if the claim were timely, it would be without substantive

merit.

Regardless of whether Conner is correct that the resentencing court had discretion to consider his claim regarding same criminal conduct in remand, his claim must fail because he cannot meet his burden on collateral review of showing prejudice. This is because none of the offenses were same criminal conduct.

Matters of sentencing are largely within the trial court's discretion, and this Court will not disturb the trial court's determination absent a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). Where two or more offenses encompass the same criminal conduct, the sentencing court counts them as a single crime when calculating the defendant's offender score. RCW 9.94A.589(1)(a). "Same criminal conduct" means "two or more crimes that require the same criminal intent, [were] committed at the same time and place, and involve[d] the same victim." RCW 9.94A.589(1)(a). If any one of these elements is missing, the sentencing court *must* count the offenses separately in calculating the offender score. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

1. Burglaries

Under RCW 9A.52.050, "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as

well as for the burglary, and may be prosecuted for each crime separately.” Thus, the anti-merger statute contains both sentencing and charging language. *State v. Smith*, 99 Wn. App. 510, 517, 990 P.2d 468 (2000). The Supreme Court has specifically held that “[t]he plain language of RCW 9A.52.050 expresses the intent of the Legislature that ‘any other crime’ committed in the commission of a burglary would not merge with the offense of first-degree burglary when a defendant is convicted of both.” *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999). Even if the burglary and other crime involve the same criminal conduct, the trial court has discretion to punish burglary separately from the other crime. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). It follows that the trial court did not abuse its discretion in treating any of the burglaries as separate criminal conduct for sentencing purposes.

2. 12th Street (Counts VII-XV)

Both the 12th Street thefts involved victims different than the robberies. In the first home invasion the robbery,¹² the victims were Aaron and Robert Dato. CP 212-13. The evidence showed that the two televisions and the laptop taken were the property of Thomas Halverson and/or Aaron Rents. 20RP 1045, 21RP 1093-96. In the second incident,¹³ the robbery victims were again the Dato brothers and additionally Jeffrey

¹² Counts VII-X.

Turner. CP 216-18. The theft victim (of two televisions) was Thomas Halverson and/or Quality Rentals. 20RP 1045, 21RP 1102-03. These crimes were thus not the same criminal conduct. *Lessley*, 118 Wn.2d at 779 (“crimes affecting multiple victims are not to be considered the same criminal conduct”).

3. *Shore Drive (Counts XVI-XVIII)*

The theft here was a misdemeanor charge and as such was not included in the offender score, CP 331-32, and was also was not subject to RCW 9.94A.589(1)(a) in any event. *State v. Langford*, 67 Wn. App. 572, 587-88, 837 P.2d 1037 (1992) (Sentencing Reform Act does not apply to misdemeanor sentences).¹⁴

4. *Weatherstone Apartments (Counts XIX-XX)*

This incident only involved a burglary and a theft. As previously discussed, the burglary anti-merger statute permitted the trial court to count this offense as separate criminal conduct.

5. *Wedgwood (Counts XXI-XXV)*

The Wedgwood¹⁵ thefts involved a different victim than the robberies, which also involved different victims. Additionally, while the

¹³ Counts XI-XV.

¹⁴ However, the third-degree theft conviction was vacated under double-jeopardy principles.

¹⁵ Counts XXI-XXV.

thefts involved the same victim, they involved different criminal intents. The robbery victims were Aaron Tucheck and Keefe Jackson. CP 224-25. The victim of the thefts was Ann-Marie Tucheck. CP 227; 22RP 1316, 1327, 1337, 1371. Although they involved the same victim, the thefts were not the same criminal conduct. The criminal intent for second-degree theft of an access device differs from that of other theft crimes and therefore it is not the same criminal conduct. *State v. Lust*, 174 Wn. App. 887, 891-92, 300 P.3d 846 (2013). This untimely claim should be dismissed.

I. THE TRIAL COURT PROPERLY FOLLOWED THIS COURT'S MANDATE AND STRUCK THE FIREARM ENHANCEMENT ASSOCIATED WITH COUNT XIX ON REMAND.

Conner next claims that his sentence is unlawful because the court on remand violated this Court's mandate by imposing 13 firearm enhancements, instead of 12. Petition, at 48. Conner's claim is based on a typographical error in the original direct appeal opinion. The resentencing court followed this Court's substantive command.

The only substantive discussion of firearm enhancements in the opinion was as follows:

Conner argues, and the State concedes, that the trial court erred when it imposed a 60 month firearm enhancement on his burglary in the first degree conviction arising from the Weatherstone Apartment incident. The jury did not find beyond a reasonable doubt that Conner

was armed with a firearm during the commission of burglary in the first degree of the Weatherstone Apartment; therefore, we accept the State's concession and remand to the trial court to strike the firearm enhancement and to resentence Conner.

App. B, at 18. No other firearm enhancement was addressed in the opinion. The Court concluded the opinion as follows:

We vacate Conner's theft in the third degree conviction and affirm his remaining convictions. We remand for resentencing on the remaining convictions and twelve firearm enhancements.

App. B, at 30.

The record shows, however, that the trial court originally imposed 14 firearm enhancements. *See* CP 332 (enhancements imposed on Counts I, VII, VIII, IX, XI, XII, XIII, XIV, XVI, XVII, XIX, XXI, XXII & XXIII). On remand, per this Court's mandate, the trial court struck the enhancement for the Weatherstone incident (Count XIX), leaving the complained-of 13 enhancements. *See* CP2 140 (enhancements imposed on Counts I, VII, VIII, IX, XI, XII, XIII, XIV, XVI, XVII, XXI, XXII & XXIII). Thus, it is clear from the record that this Court's reference to twelve enhancements was the result of either a typo or a miscounting. Regardless, what the Court substantively ordered was for the enhancement associated with Count XIX, and only Count XIX, to be stricken. The trial court complied with this mandate. This claim is thus without merit.

J. CONNER CANNOT SHOW POST-RESENTENCING APPELLATE COUNSEL WAS INEFFECTIVE WHERE HIS UNDERLYING CLAIMS ARE WITHOUT MERIT.

Conner's final claim is that appellate counsel following resentencing was ineffective for failing to appeal various issues. This untimely claim is also without merit, largely for the reasons already discussed.

To establish appellate ineffective assistance of counsel, Conner must show that the legal issues that his appellate counsel failed to raise had merit and that the failure to raise these issues was prejudicial. *See In re Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). Moreover, the failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance, and the exercise of independent judgment in deciding what issues may lead to success is the heart of the appellate attorney's role. *In re Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004). Further to demonstrate prejudice, "he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed *on his appeal*." *Dalluge*, 152 Wn.2d at 788 (*quoting Smith v. Robbins*, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000) (emphasis the Washington Supreme Court's)). Conner fails to meet these standards.

Conner alleges counsel should have raised the following issues in the second appeal:

(1) whether the trial court erred in failing to impose an exceptional sentence based on the mitigating factor of youth; (2) whether the trial court erred in failing to consider concurrent imposition of the firearm enhancements; (3) whether trial counsel was ineffective for failing to put on evidence of Mr. Conner's youth at sentencing; and (4) whether the trial court erred in failing to treat various offenses as comprising the same criminal conduct.

Petition at 49-50. As previously discussed these claims substantively lack merit. As such, appellate counsel cannot be deemed ineffective for not raising them. This claim should be rejected.

VI. CONCLUSION

For the foregoing reasons, Conner's petition should be denied.

DATED January 7, 2019.

Respectfully submitted,
CHAD M. ENRIGHT
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal line extending to the right.

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney
kcpa@co.kitsap.wa.us

APPENDIX A

¹ The verbatim report of proceedings is designated as follows: 1RP—10/6/11; 2RP—12/2/11, 1/20/12; 3RP—12/16/11; 4RP—4/9/12; 5RP—4/11/12; 6RP—4/12/12; 7RP—4/16/12; 8RP—4/19/12; 9RP—4/20/12; 10RP—4/23/12 a.m.; 11RP—4/23/12 p.m.; 12RP—4/24/12; 13RP—4/25/12; 14RP—4/26/12; 15RP—5/3/12; 16RP—5/7/12; 17RP—5/8/12; 18RP—5/9/12; 19RP—5/10/12; 20RP—5/14/12; 21RP—5/15/12; 22RP—5/16/12; 23RP—5/17/12; 24RP—5/17/12; 25RP—5/21/12; 26RP—5/22/12; 27RP—5/23/12; 28RP—5/24/12; 29RP—5/29/12; 30RP—5/30/12; 31RP—5/31/12; 32RP—6/4/12; 33RP—6/5/12; 34RP—6/6/12; 35RP—6/7/12; 36RP—6/8/12; 37RP—6/11/12; 38RP—7/27/12; 39RP—5/7/12 (opening statements).

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
COURT OF APPEALS
DIVISION II

2015 JUN -4 AM 8:34

STATE OF WASHINGTON,
Respondent,

v.

LA'JUANTA LE'VEAR CONNER,
Appellant.

No. 43762-7-II
consolidated with
No. 45418-1-II

STATE OF WASHINGTON

DEPUTY

UNPUBLISHED OPINION

MELNICK, J. — La'Juanita Le'Vear Conner appeals his 24 convictions based on, or related to, a series of home invasion robberies and burglaries.¹ Conner argues (1) the trial court abused its discretion when it allowed the State to exercise a peremptory challenge after the trial started, (2) the trial court erred by allowing improper opinion testimony, (3) his attorney's failure to object to improper opinion testimony provided him ineffective assistance of counsel, (4) the trial court erred when it provided a missing witness instruction to the jury, (5) the trial court improperly commented on the evidence, and (6) the trial court erroneously imposed a fourteenth firearm enhancement related to a charge of which Conner was acquitted. In his statement of additional grounds (SAG), Conner asserts insufficient evidence exists to support his convictions of unlawful possession of a firearm and possession of a stolen firearm. He further asserts prosecutorial misconduct.

Conner filed a personal restraint petition (PRP) that is consolidated with this direct appeal. In his PRP, Conner argues (a) the State's second amended information is invalid because the State

¹ Conner was convicted of one count of conspiracy to commit burglary in the first degree, two counts of unlawful possession of a firearm in the second degree, two counts of possession of a stolen firearm, eight counts of robbery in the first degree, five counts of burglary in the first degree, four counts of theft in the second degree, one count of theft in the third degree, and one count of theft of a firearm.

did not file an amended statement of probable cause, (b) the jury instructions relieved the State of its burden to prove all elements of the crimes beyond a reasonable doubt, (c) the State vindictively prosecuted him, (d) the trial court erred when it sentenced him by imposing an exceptional sentencing without findings, by failing to conduct a same criminal conduct analysis, and by violating his double jeopardy rights.

We hold that the trial court erred when it allowed the State to exercise a peremptory challenge after the jury was sworn, but that the error did not prejudice Conner. We also hold that the trial court erred by instructing the jury using a missing witness instruction, but that the error was harmless. We vacate Conner's theft in the third degree conviction because it violates the prohibition against double jeopardy. We affirm Conner's remaining convictions. Additionally, we hold that the trial court erroneously sentenced Conner on one firearm enhancement related to a charge of which he was acquitted. We remand for resentencing on the remaining convictions and twelve firearm enhancements.

FACTS

I. HOME INVASIONS AND ARREST

The State, by second amended information, charged Conner with 26 separate offenses based on a series of home invasion robberies and burglaries in Kitsap County, 14 of which included firearm enhancements.

A. Twelfth Street (I)

On September 15, 2010, Robert and Aaron Dato were present at their apartment on Twelfth Street in Bremerton that they shared with Thomas Harveson, who was not home at the time. Conner, Kevion Alexander, Anthony Adams, and Troy Brown entered the apartment wearing bandanas, carrying guns, and making demands for property. They took the Datos' personal

property from their persons or in their presence, and they took property that belonged to Harveson. Conner carried a Hi-Point .40 pistol during the commission of this crime. Based on this incident, the State charged Conner with two counts of robbery in the first degree, one count of burglary in the first degree, and one count of theft in the second degree. The State alleged three firearm enhancements.

B. Twelfth Street (II)

On September 28, 2010, the Datos and a friend, Jeffrey Turner, were at the Twelfth Street apartment in Bremerton. Harveson was not at home. Conner, Alexander, and Adams entered the apartment wearing bandanas, carrying guns, and making demands for money. They took personal property from the Datos. They also took personal property belonging to Harveson. Based on this incident, the State charged Conner with three counts of robbery in the first degree, one count of burglary in the first degree, and one count of theft in the second degree. The State alleged four firearm enhancements.

C. Shore Drive

On September 28, 2010, Brett Cummings was in his studio apartment on Shore Drive in Bremerton. Conner stood outside while Alexander and Adams entered Cummings's apartment carrying guns and making demands for property. Either Alexander or Adams pushed Cummings to the ground and Conner and Adams hit him over the head with the butt of their guns. They took Cummings's personal property. Conner carried a Hi-Point .40 pistol during the commission of this home invasion. Based on this incident, the State charged Conner with one count of robbery in the first degree, one count of burglary in the first degree, and one count of theft in the third degree. The State alleged two firearm enhancements.

D. Weatherstone Apartments

On the night of October 2, 2010, Conner, Alexander, Adams, and Jerrell Smith entered Kimberly Birkett's apartment at the Weatherstone Apartments. They took Birkett's personal property. Conner carried a Hi-Point .40 pistol. Based on this incident, the State charged Conner with one count of burglary in the first degree and one count of theft in the second degree. The State alleged one firearm enhancement.

E. Wedgewood Lane

On the night of November 3, 2010, Aaron Tucheck, Ann Tucheck, and Keefe Jackson, were at their residence on Wedgewood Lane. Conner, Alexander, and Brown entered the residence carrying guns, making demands for property, and ordering Aaron to open a safe. They took personal property, including a firearm and a debit card, belonging to the Tuchecks and Jackson. Conner carried a Hi-Point .40 pistol during the commission of these crimes. A co-defendant carried a Taurus .44 revolver during the commission of the Wedgewood Lane home invasion. Based on this incident, the State charged Conner with two counts of robbery in the first degree, one count of burglary in the first degree, one count of theft of a firearm, and one count of theft of an access device in the second degree. The State alleged three firearm enhancements.

F. Arrest

On November 17, 2010, the police arrested Conner during a high-risk traffic stop. Conner was a passenger in the truck occupied by two of his co-defendants. Prior to the stop, Conner sat in the passenger seat when the driver of the vehicle said, "[W]e got two gats locked and loaded ready to go." VI Report of Proceedings (RP) at 869. Law enforcement executed a search warrant on the truck and found a bag in the bed of the truck containing two loaded firearms, a Hi-Point .40 pistol with a filed off serial number and a Taurus .44 revolver. Law enforcement also located a

baggies of marijuana in the cab of the truck where a co-defendant had been sitting. Based on this incident, the State charged Conner with one count of conspiracy to commit burglary in the first degree, two counts of unlawful possession of a firearm in the second degree, two counts of unlawful possession of a stolen firearm, and one count of possession of marijuana. The State alleged one firearm enhancement.

Law enforcement subsequently searched the apartment of Conner's romantic partner, Rachel Duckworth, and found stolen property from the crimes described above. Based on this search and seizure, the State charged Conner with one count of possession of stolen property in the third degree.

II. TRIAL

A. Peremptory Challenge

After the parties selected a jury but before the court swore them in, juror 4 stated that she remembered that the judge had presided over the trial where her son was convicted of attempted murder. The State asked the trial court, but not the juror, whether the juror testified at her son's trial. The trial court replied in the negative. Following additional questioning, the trial court found that juror 4 showed no bias or prejudice. The State neither challenged the juror for cause nor exercised its remaining peremptory challenge. The judge swore in juror 4 with the rest of the panel.

The State began its case in chief and presented witnesses. Two days later, the State informed the trial court it learned juror 4 had testified in her son's trial and that the prosecutor had accused her of lying and manipulating testimony. The State also asserted that the juror indicated she had talked to a family member about Conner's trial, which caused her to remember that the judge presided over her son's trial. The State moved to excuse the juror, but the trial court ruled

that the juror had not clearly violated the trial court's orders and that it "[could not] excuse her for cause based upon answers to questions that she provided earlier because we had already addressed that issue before impaneling her." VI RP at 651. The trial court took the State's motion under advisement.

The next day, the State asked to exercise its remaining peremptory challenge to excuse juror 4. Conner objected. The State argued that it relied on the trial court's faulty recollection that the juror had not been a witness in her son's trial and it would have struck her if the State had been aware she testified. Relying on *State v. Williamson*, 100 Wn. App. 248, 996 P.2d 1097 (2000), the trial court allowed the State to exercise its remaining peremptory challenge and it excused juror 4. Following this juror's excusal, 12 jurors and one alternate remained.

B. Opinion Testimony

Detective Mike Davis testified about his post-arrest questioning of Conner. During cross-examination, Conner elicited from Detective Davis that he used a "ruse" when questioning Conner. V RP at 605. On redirect, Detective Davis explained he employs a ruse when questioning suspects "[t]o elicit the truth" and when he "believe[s] that [the facts say] otherwise what the person is telling me." VI RP at 730. Detective Davis said he uses a ruse "to get the facts. That is what I am is a fact-finder." VI RP at 730. Conner did not object to this testimony.

C. Missing Witness Instruction

The State presented evidence that Duckworth exhibited hostility towards Detective Davis. The State also played recordings of jail calls between Conner and Duckworth in which Conner made many comments including that he was "done with all that [explicative]" and "changing [his] ways." Supp. Clerk's Papers (CP) at 355, 360. Conner testified that the recordings meant he would be leaving the streets behind and quit selling drugs.

The State requested a missing witness instruction. It argued that Duckworth, identified as a defense witness, exhibited hostility to law enforcement, could have supported Conner's version of the jail calls, and could have testified regarding the stolen property found in her apartment. Conner argued that the State could have called Duckworth.

The trial court found that Duckworth's testimony would have been material and not cumulative, Duckworth's absence was not adequately explained, Duckworth was particularly within Conner's control; Conner did not adequately explain Duckworth's absence, and Duckworth's testimony would neither have infringed on Conner's constitutional rights to remain silent nor shifted the burden to Conner to prove his innocence. Thus, the trial court instructed the jury using a missing witness instruction and permitted the State to argue Duckworth's absence in its closing argument.

D. Closing Argument

During closing argument, Conner argued that the police and prosecutor's office coached witnesses regarding their testimony. The State objected:

[DEFENSE COUNSEL:] Mr. Smith is no fool. Like any kid, he's just been told what direction to take with his lies. Mook Alexander went through the same thing, whether he got it from the prosecutor's office, when they interviewed him from the detectives, from his own lawyer—

[PROSECUTOR]: Objection, Your Honor. These are facts not in evidence.

THE COURT: Sustained. Move on, [Defense Counsel].

[DEFENSE COUNSEL]: Mr. Alexander knew which way that he needed to go. At the time that he came forth in March, and they needed to cut his sentence way down, he knew, and in trial the only person that they had to get was Mr. Conner.

[PROSECUTOR]: Objection, Your Honor. Move to strike.

THE COURT: Members of the jury, you will disregard the last argument of Counsel.

[DEFENSE COUNSEL]: Mr. Conner was the person left that they did not have the evidence that they needed, and Mook Alexander—

[PROSECUTOR]: Objection, Your Honor. Move to strike.

THE COURT: Sustained. Move on, [Defense Counsel].

XVII RP at 2590-91. Conner later argued that Smith and Alexander changed their stories because they are experienced liars. The State objected:

[DEFENSE COUNSEL:] Once they start lying, they don't stop lying. . . . So they are very quick, and they move very quick. So it's almost like shadow boxing because they know how to do it because they are experienced in it. They have been doing it a long time.

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained. Move on.

[DEFENSE COUNSEL]: I submit that the evidence shows that when you look in your record in terms of what Mr. Mook Alexander's record is, that he talks about on the stand—

[PROSECUTOR]: Objection, Your Honor. Facts not in evidence.

XVIII RP at 2613-2614.

Outside of the jury's presence, the State argued that the record contained nothing to suggest Alexander has been a liar for a long time. Conner argued that Alexander's prior crimes of dishonesty meant that he was an experienced liar. The trial court sustained the objection because the statement "'they have been lying for a long time' is improper argument based upon the facts that are in evidence." XVIII RP at 2616. The trial court noted that Smith had no prior convictions and that "one can be a theft [sic], which is dishonest, and one can be a liar." XVIII RP at 2615-16. The trial court sustained the objection and instructed the jury to disregard Conner's counsel's last remarks.

E. Verdict and Sentencing

The jury found Conner guilty on all counts except possession of marijuana and possession of stolen property in the third degree. Additionally, the jury specially found that Conner was armed with a firearm on all but one count alleged. The trial court imposed a standard range sentence of 1148.5 months. Conner appeals. He also filed a PRP that is consolidated with this direct appeal.

ANALYSIS

I. PEREMPTORY CHALLENGE

Conner argues that the trial court erred by allowing the State to exercise a peremptory challenge after the jury had been sworn and witnesses had testified. He argues that the trial court did not follow proper procedures. We hold that the trial court abused its discretion by allowing to State to exercise its remaining peremptory challenge on juror 4, but no prejudice resulted.

We review a trial court's decision to excuse a juror for abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 768, 781, 123 P.3d 72 (2005); *State v. Ashcraft*, 71 Wn. App. 444, 461, 859 P.2d 60 (1993). "A discretionary determination will not be disturbed on appeal without a clear showing of abuse of discretion, that is, discretion that is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons." *State v. Smith*, 90 Wn. App. 856, 859-60, 954 P.2d 362 (1998). A trial court abuses its discretion if its decision is based on a misunderstanding of the underlying law. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008).

CrR 6.4(e) sets forth the procedures for exercising peremptory challenges in criminal trials. "After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately." CrR 6.4(e)(2). Once a party accepts the jury as presently constituted, that party may only peremptorily challenge jurors later added to that group. CrR 6.4(e)(2). Here, the parties had already accepted the jury; therefore, the State could not use a peremptory challenge on juror 4. Because the trial court misapplied the court rule, it abused its discretion.²

² The trial court relied on *Williamson*, 100 Wn. App. at 253. In that case, unforeseen circumstances existed to justify the court's action because a juror did not disclose that she knew the victim until after the trial court swore in the jury and the State's first witness began to testify. *Williamson*, 100 Wn. App. at 252. We do not have unforeseen circumstances in this case because juror 4 informed the trial court that the judge presided over her son's trial before the sworn jury started hearing the case.

However, the trial court's error caused no prejudice. The Sixth Amendment of the United States Constitution and article 1, section 22 of the Washington Constitution guarantee a defendant the right to a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62–63, 667 P.2d 56 (1983). But the “[d]efendant has no right to be tried by a particular juror or by a particular jury.” *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995). The constitutional requirement of a randomly selected jury is “satisfied by the initial random selection of jurors and alternate jurors from the jury pool.” *State v. Coe*, 109 Wn.2d 832, 842, 750 P.2d 208 (1988).

If a juror becomes unable to perform his or her duty after formation of the jury, the trial court may discharge the juror. CrR 6.1(c). In such instance, an alternate juror may replace the discharged juror. CrR 6.5. Here, following juror 4's excusal, 12 jurors plus an alternate remained. The State and Conner selected all of the jurors and alternate jurors. Conner makes no showing and does not argue that a biased jury heard his case. Therefore, no violation of Conner's right to an impartial jury occurred and he has demonstrated no prejudice that resulted from the excusal of juror 4. The error was harmless.

II. OPINION TESTIMONY

Conner argues that the trial court erred by admitting Detective Davis's testimony regarding his use of a ruse. He argues that this testimony prejudiced him by allowing opinion testimony on an ultimate issue for the jury and therefore his guilt. Conner initially elicited the testimony on use of a ruse. Additionally, Conner did not object, move to strike, or ask that the jury be instructed to disregard Detective Davis's testimony on redirect. Therefore, Conner failed to preserve any challenge to this testimony and we decline to review it. RAP 2.5(a).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Conner contends that he received ineffective assistance of counsel because his attorney did not object to Detective Davis's testimony regarding his use of a ruse. He argues that this failure to object resulted in prejudice because "there was nothing preventing the jury from considering that opinion [that Conner was untruthful] when evaluating Conner's credibility." Appellant's Br. at 40. We disagree and hold that Conner did not receive ineffective assistance of counsel.

A. Standard of Review

Ineffective assistance of counsel is a mixed question of law and fact we review de novo. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland*, 466 U.S. at 687. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

An attorney's performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance prejudices a defendant if there is a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Grier*, 171 Wn.2d at 33.

B. No Ineffective Assistance of Counsel

Even assuming, without deciding, that Detective Davis's opinion testimony went to an ultimate issue for the jury, Conner has not established the absence of any legitimate trial tactic to explain his counsel's performance. Conner's lawyer first raised Detective Davis's use of a ruse on cross-examination. He asked Detective Davis if he lied to Conner when he told him that Smith and Perez accused Conner of handling the Hi-Point .40 pistol. Detective Davis responded that he used a ruse. Conner's counsel followed up by asking, "That is something that you do in police work . . . you make people think that you have something when you don't have something?" V RP at 608. Detective Davis answered, "That is correct." V RP at 608. On redirect, the State asked Detective Davis to define ruse, and Conner's counsel did not object. Conner fails to show that no conceivable legitimate trial tactic explains his counsel's performance. *See Grier*, 171 Wn.2d at 33. In fact, this line of questioning was consistent with Conner's overall defense strategy of denying his involvement in the crimes while implying that Conner became a target of the police. Conner cannot demonstrate deficient performance; therefore, we need not address the second prong. *See Grier*, 171 Wn.2d at 33.

IV. MISSING WITNESS INSTRUCTION

Conner argues that his convictions should be reversed because the trial court misapplied the missing witness doctrine and improperly instructed the jury. He also argues that the trial court improperly permitted the prosecutor to argue this doctrine. We hold that that the trial court misapplied the missing witness doctrine, but the error was harmless.

A. Standard of Review

"[W]hether legal error in jury instructions could have misled the jury is a question of law, which we review de novo." *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). We

review a trial court's rulings on improper prosecutorial argument for abuse of discretion. *Montgomery*, 163 Wn.2d at 597. "A discretionary determination will not be disturbed on appeal without a clear showing of abuse of discretion, that is, discretion that is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons." *Smith*, 90 Wn. App. at 859-60.

B. Missing Witness Doctrine

In general, the State may not comment on the defendant's lack of evidence because the defendant has no duty to present evidence. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The missing witness doctrine is an exception: it applies where a party failed to produce a witness particularly within its control. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). When applicable, this doctrine permits both a prosecutor to comment on a defendant's failure to produce evidence and a jury to infer that the missing evidence or testimony would have been unfavorable to the party who failed to produce it. *Blair*, 117 Wn.2d at 485-86.

The missing witness doctrine applies in a criminal case when: (1) the absent witness is particularly within the defense's ability to produce, (2) the missing testimony is not merely cumulative, (3) the witness's absence is not otherwise explained, (4) the witness is not incompetent or her testimony privileged, and (5) the testimony does not infringe on the defendant's constitutional rights. *Cheatam*, 150 Wn.2d at 652-53. The doctrine does *not* apply where the missing witness's testimony, if favorable to the party who would naturally have called the witness, would necessarily be self-incriminatory. *Blair*, 117 Wn.2d at 489-90. The State may only comment on the defendant's failure to call a witness where the defendant has unequivocally implied that the missing witness would have corroborated his theory of the case and it is clear the defendant could produce the witness. *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

C. The Trial Court Misapplied the Missing Witness Doctrine

Over Conner's objection, the trial court allowed the State to argue that Duckworth would have provided unfavorable testimony and it gave a missing witness instruction to that effect. The trial court misapplied the missing witness doctrine.³

Conner never unequivocally implied that Duckworth would have corroborated his theory of the case or his version of the recorded jail phone calls. The record does not demonstrate that Duckworth was peculiarly within the defendant's ability to produce. Despite her romantic relationship with Conner and hostility towards the State, the record contains no evidence that the State could not have called her as a witness. The record also does not demonstrate that Duckworth could provide material testimony. Although she could have testified about what Conner meant when he stated he was "done with all that" and "changing [his] ways" in the jail calls with Duckworth, she could have only testified as to her understanding of Conner's statements. Supp. CP at 355, 360. Duckworth's absence was adequately explained: she did not want to incriminate herself. Therefore, relying on all the *Cheatam* factors, the trial court misapplied the missing witness doctrine and erred by instructing the jury using the missing witness instruction. 150 Wn.2d at 652-53.

³ The parties both argue that the trial court based its ruling in part on a mistaken belief that Conner's counsel stated in opening that Duckworth would testify. While the trial court did ask Conner's counsel why he said Duckworth was going to testify, implying a mistaken belief that he had done so, the trial court's ruling the next day does not indicate that this was a factor in its decision. The trial court stated:

[Conner's counsel] argued in his opening statement that the jury would hear *about* Rachel Duckworth and would hear about the safe that was found in her apartment.

XVI RP at 2415-16 (emphasis added). From this statement, it is clear that the trial court did not actually base its ruling on a mistaken belief that Conner's counsel argued Duckworth would testify.

D. The Error is Harmless

Although the trial court erred by allowing the missing witness instruction, the error was harmless. As long as the jury is properly instructed on the State's burden, an improper jury instruction may be harmless error. *Montgomery*, 163 Wn.2d at 600. "An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' Whether a flawed jury instruction is harmless error depends on the facts of a particular case." *Montgomery*, 163 Wn.2d at 600 (quoting *State v. Carter*, 154 Wn.2d 71, 81, 109 P.3d 823 (2005)).

Here, the trial court properly instructed the jury on the State's burden. The State emphasized its burden during closing arguments. And the State did not make repeated references to Duckworth's absence.

Because other evidence tied Conner to each of the home invasion robberies and burglaries, we hold the instructional error was harmless.⁴ It did not contribute to the verdict. Conner's co-defendant, Alexander, testified about Conner's involvement in the Twelfth Street (I) and (II) crimes. Alexander testified Conner wore a bandana and carried a Hi-Point .40 pistol during both incidents. Another co-defendant, Smith, testified that Conner stored stolen property from both incidents with Smith. Though the victims did not identify Conner at trial, one of them corroborated Alexander's testimony.

⁴ We summarized only a portion of the evidence that inculpates Conner. Additional evidence of Conner's guilt also exists in the record.

Alexander also testified as to Conner's involvement in the Shore Drive crime. He related how Conner participated in using force against Cummings. Smith also testified that Conner told him about the incident and how it did not go as planned because the victim was home. Although Cummings did not identify Conner at trial, he corroborated the events.

Smith testified that he participated in the crime at the Weatherstone Apartments at Conner's invitation. Alexander related that they targeted this residence because Conner knew the victim, and that Conner carried the victim's personal property from the apartment.

Alexander also testified about Conner's involvement in the Wedgewood Lane crime. He related that Conner helped plan the crime and that Conner participated by scoping out the apartment earlier in the day. Conner wore a black hoodie and bandana, and carried the Hi-Point .40 pistol. The victims corroborated this testimony. The record contains overwhelming evidence of Conner's guilt, and the erroneous instruction did not contribute to the verdict.

V. COMMENT ON THE EVIDENCE

Conner argues that the trial court improperly commented on the evidence when it sustained some of the State's objections during closing arguments. We disagree.

A. Judicial Comments on the Evidence Prohibited

Article 4, section 16 of the Washington Constitution prohibits judges from commenting on the evidence. *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). A court's conduct violates the constitution only if its attitudes are "reasonably inferable from the nature or manner of the court's statements." *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999)

(quoting *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974)). “A court does not comment on the evidence simply by giving its reasons for a ruling.” *In re Det. of Pouncy*, 144 Wn. App. 609, 622, 184 P.3d 651 (2008), *aff’d*, 169 Wn.2d 382 (2010).

B. No Comment on the Evidence

Conner argues that there are two instances where the trial court commented on the evidence when it sustained the State’s objections during Conner’s closing argument. First, Conner argued to the jury that the police and prosecutor’s office directed Conner’s co-defendants to lie. The State objected and the trial court sustained the objection. In ruling, the trial court simply stated, “Sustained. Move on, [Conner’s counsel].” XVII RP at 2591. Following this ruling, Conner almost immediately made another argument that implied the State manipulated a co-defendant’s testimony. In ruling on that objection, the trial court stated, “Members of the jury, you will disregard the last argument of [c]ounsel.” XVII RP at 2591. Because the trial court judge did not convey to the jury her personal opinion regarding the truth or falsity of any evidence introduced at trial, it did not impermissibly comment on the evidence. *See Lane*, 125 Wn.2d at 838. The trial court merely ruled on the objections.

Second, the trial court sustained the State’s objection to Conner’s argument that two of the co-defendants were experienced liars. In ruling on that objection, the trial court stated, “I have sustained the objection, and you are instructed to disregard the last remarks of [c]ounsel.” XVIII RP at 2616-17. Again, the trial court did not convey to the jury its personal opinion regarding merits of the case or its evaluation of disputed evidence. We hold that the trial court did not

impermissibly comment on the evidence and, therefore, did not violate Conner's constitutional rights.⁵

VI. Firearm Enhancement on Weatherstone Apartment Incident

Conner argues, and the State concedes, that the trial court erred when it imposed a 60 month firearm enhancement on his burglary in the first degree conviction arising from the Weatherstone Apartment incident. The jury did not find beyond a reasonable doubt that Conner was armed with a firearm during the commission of burglary in the first degree of the Weatherstone Apartment; therefore, we accept the State's concession and remand to the trial court to strike the firearm enhancement and to resentence Conner.

VII. STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Conner asserts that insufficient evidence exists to support two convictions for unlawful possession of a firearm in the second degree and two convictions for possession of a stolen firearm. He also asserts the prosecutor committed misconduct by relying on coerced and false testimony. We hold that sufficient evidence exists for the unlawful possession of a firearm convictions and the possession of a stolen firearm convictions and that the prosecutor did not commit misconduct.

A. SUBSTANTIAL EVIDENCE

Conner asserts that his convictions for unlawful possession of a firearm in the second degree (Hi-Point .40 pistol), possession of a stolen firearm (Hi-Point .40 pistol), unlawful possession of a firearm in the second degree (Taurus .44 revolver), and possession of a stolen

⁵ To the extent that Conner argues that the trial court's rulings on the State's objections amounted to instructing the jury to disregard Conner's defense theory, this claim is without merit. The trial court instructed the jury only to disregard an improper statement by defense counsel during closing argument, not to disregard the defendant's theory of the case.

firearm (Taurus .44 revolver) are not supported by substantial evidence. Specifically, he argues that sufficient evidence does not support the jury's finding that he possessed the firearms or that he knew they were stolen. Viewed in the light most favorable to the State, the evidence is sufficient to convince the jury beyond a reasonable doubt that Conner possessed the Hi Point .40 pistol and the Taurus .44 revolver, and that Conner knew both firearms were stolen.

1. Standard of Review

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

2. Possession

Conner first asserts that the State failed to prove beyond a reasonable doubt that he possessed both firearms. Possession can be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession means the firearms were in Conner's personal custody. *Staley*, 123 Wn.2d at 798. Constructive possession means that Conner had dominion and control over the firearms. *Staley*, 123 Wn.2d at 798; *State v. Summers*, 107 Wn. App. 373, 384, 28 P.3d 780 (2001). Dominion and control over the premises where the item was found creates a rebuttable inference of dominion and control over the item itself. *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). The State must show more than mere proximity, but need

not show exclusive control. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). However, knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession. *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983). The trial court instructed the jury, without objection, that “[a]ctual possession occurs when the item is in the actual physical custody of the person charged” and that “[c]onstructive possession occurs when . . . there is dominion and control over the item.” CP at 258.

a. Hi-Point .40 Pistol

To convict Conner of unlawful possession of the Hi-Point .40 pistol, the State needed to prove that he possessed it “on or between September 15, 2010 and November 17, 2010.” CP at 262. Viewed in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Conner actually possessed the Hi-Point .40 pistol between September 15 and November 17. Testimony established that Conner carried the Hi-Point .40 pistol on his person during the commission of four of the home invasion robberies and burglaries. Therefore, sufficient evidence exists to uphold this conviction.

b. Taurus .44 Revolver

To convict Conner of unlawful possession of the Taurus .44 revolver, the State needed to prove that Conner possessed it “on or between November 1, 2010 and November 17, 2010.” CP at 264. Viewed in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Conner actually possessed the Taurus .44 revolver between November 1 and November 17. The State presented evidence that the Taurus .44 revolver was stolen on November 1. Testimony established that Conner actually possessed and handled the Taurus .44 revolver on numerous occasions, including when Adams initially showed it to him after

it was stolen and when Conner held it while sitting in the front seat of Adams's truck. Therefore, sufficient evidence exists to uphold this conviction.

3. Knowledge that the Firearms were Stolen

Conner next asserts that the State failed to prove beyond a reasonable doubt that he knew both firearms were stolen. "Knowledge" means that a person "is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or . . . has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense." RCW 9A.08.010(1)(b).

a. Hi-Point .40 Pistol

Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Conner knew the Hi-Point .40 pistol was stolen. The firearm's true owner testified that the firearm went missing after Brown and Conner visited his home. Alexander testified that the Hi-Point .40 pistol was "stolen" and that another co-defendant gave it to Conner on September 5 as "payment" for broken property. XII RP at 1683, 1685. The serial number was filed off. Detective Davis testified that in his training and experience, the only reason to file a serial number off any weapon is to conceal its stolen identity. Conner carried this firearm during the majority of the home invasion robberies and burglaries. The State produced sufficient evidence to convince a rational jury beyond a reasonable doubt that Conner had knowledge the firearm was stolen at the time he possessed it.

b. Taurus .44 Revolver

Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Conner knew the Taurus .44 revolver was stolen. The firearm's true owner testified that the firearm went missing after his home was burglarized on

November 1. The firearm's true owner also identified the firearm at trial by its appearance and serial number. Alexander testified that Conner was present when Adams discussed acquiring the Taurus .44 semiautomatic by stealing it in "a lick [which is] [a] burglary or robbery, some type of breaking and entering." XII RP at 1685. The State produced sufficient evidence to convince a rational jury beyond a reasonable doubt that Conner had knowledge the firearm was stolen at the time he possessed it.

C. PROSECUTORIAL MISCONDUCT

Conner asserts the prosecutor committed misconduct by relying on Smith's "false and coerced testimony" and Alexander's false testimony.⁶ SAG at 11. We disagree and hold that no prosecutorial misconduct occurred.

The due process clause of the Fourteenth Amendment to the United States Constitution imposes on prosecutors a duty not to introduce perjured testimony or use evidence known to be false to convict a defendant. *State v. Finnegan*, 6 Wn. App. 612, 616, 495 P.2d 674 (1972). This duty requires the prosecutor to correct State witnesses who testify falsely. *Finnegan*, 6 Wn. App. at 616 (citing *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). To succeed on his claim that the prosecutor used false evidence to convict him, Conner must show that "(1) the testimony (or evidence) was actually false, (2) the prosecutor knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003). Conner fails to make the necessary showing for the first of these elements regarding both Smith's and Alexander's testimony.

⁶ Additionally, Conner argues that the police coerced Smith into making a statement. Any fact related to Smith's custodial interrogation is outside of this record on appeal. We do not address issues relying on facts outside the record on direct appeal. *McFarland*, 127 Wn.2d at 338 n.5.

The record does not support any of Conner's assertions that the State relied on false testimony. Conner offers no evidence to demonstrate the falsity of Smith's or Alexander's testimony other than his own version of events. Conflicting testimony is not evidence of falsity. *See Camarillo*, 151 Wn.2d at 71 (Credibility determinations are for the trier of fact and are not subject to review.). Because there is no support in the record that the State introduced false testimony, Conner's assertion relating to prosecutorial misconduct is without merit.

VI PERSONAL RESTRAINT PETITION

In his PRP, Conner argues (a) the State's second amended information is invalid because the State did not file an amended statement of probable cause, (b) the jury instructions relieved the State of its burden to prove all elements of the crimes beyond a reasonable doubt, (c) the State vindictively prosecuted Conner, and (d) the trial court erred by imposing an exceptional sentence without findings, by failing to conduct a same criminal conduct analysis, and by violating his double jeopardy rights. We vacate Conner's theft in the third degree conviction on double jeopardy grounds and remand for resentencing, but hold that the remainder of his claims are without merit. Because we remand for resentencing, we do not reach Conner's same criminal conduct claim.

A. Standard of Review

We consider the arguments raised in a PRP under one of two different standards, depending on whether the argument is based on constitutional or nonconstitutional grounds. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004). A petitioner raising constitutional error must show that the error caused actual and substantial prejudice. *Davis*, 152 Wn.2d at 672. In contrast, a petitioner raising nonconstitutional error must show a fundamental defect resulting in a complete miscarriage of justice. *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007). Additionally, Conner must support his claims of error with a statement of the

facts on which his claim of unlawful restraint is based and the evidence available to support his factual allegations. RAP 16.7(a)(2); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *see also In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990). Conner must present evidence showing his factual allegations are based on more than mere speculation, conjecture, or inadmissible hearsay. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Bald assertions and conclusory allegations are not sufficient. *Rice*, 118 Wn.2d at 886.

B. Probable Cause

Conner argues that the State's second amended information is invalid because the State did not file an amended statement of probable cause. Conner fails to cite any authority for this proposition, and we could find none. Thus, Conner cannot demonstrate a fundamental defect resulting in a complete miscarriage of justice.

C. Jury Instructions

Conner argues that the "to convict" instructions relieved the State of its burden to prove all elements of the crimes beyond a reasonable doubt because some instructions lacked the specific names of co-conspirators, names of victims, and addresses. We disagree.

We review de novo allegations of constitutional violations or instructional errors. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013); *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997). Jury instructions suffice where, when taken as a whole "they correctly state applicable law, are not misleading, and permit counsel to argue their theory of the case." *Brown*, 132 Wn.2d at 618.

Conner first argues that instruction 10, the "to convict" instruction for conspiracy to commit burglary, is defective because it does not name co-conspirators. We disagree. A

conspiracy instruction may not be more far-reaching than the charge in the information. *State v. Brown*, 45 Wn. App. 571, 575-76, 726 P.2d 60 (1986). The naming of co-conspirators is not an element of the crime. *See* RCW 9A.28.040. Therefore, the instruction need not name specific co-conspirators. The instruction included all of the elements.

Conner next argues that several of the instructions for burglary and theft are deficient because they do not name the victims or contain addresses. We disagree. The names of victims and addresses are not essential elements of the crimes charged. Therefore, we hold that these claims are without merit.

D. Prosecutorial Vindictiveness

Conner argues that the prosecutor acted vindictively and retaliated against Conner by adding charges in the second amended information. The crux of Conner's argument is that the prosecutor deprived of him of his right to a fair trial because adding additional criminal counts and sentencing enhancements amounted to prosecutorial vindictiveness. We disagree.

We will reverse a conviction due to prosecutorial misconduct only if the defendant establishes that the conduct was both improper and prejudicial. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). "Constitutional due process principles prohibit prosecutorial vindictiveness." *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). "[A] prosecutorial action is vindictive only if *designed* to penalize a defendant for invoking legally protected rights." *Korum*, 157 Wn.2d at 614 (quoting *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987)). Actual vindictiveness must be shown by the defendant through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights. *Meyer*, 810 F.2d at 1245. A presumption of vindictiveness arises when a defendant can prove that "all of the circumstances, when taken together, support a realistic likelihood of vindictiveness." *Korum*, 157 Wn.2d at 627

(quoting *Meyer*, 810 F.2d at 1245). The mere filing of additional charges after a defendant refuses a guilty plea cannot, without more, support a finding of vindictiveness. *Korum*, 157 Wn.2d at 629, 631.

Here, the State's filing of the amended information does not support Conner's assertion of vindictiveness. The prosecutor has discretion to determine the number and severity of charges to bring against a defendant. *State v. Rice*, 174 Wn.2d 884, 901, 279 P.3d 849 (2012). Conner has failed to show the State acted vindictively by filing additional charges. Therefore, we hold that the prosecutor did not act vindictively or retaliate against Conner.

E. Sentencing⁷

1. Exceptional Sentence

Conner argues that the trial court imposed an exceptional sentence without entering written findings in support of that exceptional sentence. However, the trial court did not impose an exceptional sentence. Conner's sentences were within the standard range, and the trial court ran the underlying offense sentences concurrent with each other. Because the trial court did not impose an exceptional sentence, no findings were required and this claim is without merit.

2. Double Jeopardy

Conner argues that the trial court violated his right to be free from double jeopardy under the United States Constitution and the Washington Constitution. The State correctly concedes that the robbery and theft from Cummings, during the Shore Drive incident, were the same in law and fact. We accept the State's concession, reverse Conner's conviction of theft in the third degree, and remand for resentencing. We disagree with Conner regarding to all other charges.

⁷ Conner also argues that the trial court erred by not conducting a same criminal conduct analysis. Because we remand for resentencing, we do not address this issue.

Double jeopardy violations are questions of law we review de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). The federal and state constitutions prohibit being punished twice for the same crime. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005). Multiple convictions whose sentences are served concurrently may still violate the rule against double jeopardy. *State v. Turner*, 169 Wn.2d 448, 454-55, 238 P.3d 461 (2010). Absent clear legislative intent to the contrary, two convictions constitute double jeopardy when the evidence required to support a conviction for one charge is also sufficient to support a conviction for the other charge, even if the more serious charge has additional elements. *See Freeman*, 153 Wn.2d at 776-77. Thus, two convictions constitute the same offense if they are the same in law and in fact. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). If each conviction includes elements not included in the other, or requires proof of a fact that the other does not, the offenses are different. *Calle*, 125 Wn.2d at 777.

Conner first argues that his burglary convictions should be reversed because they were the same in law and in fact as the thefts and robberies. We disagree. A trial court does not violate double jeopardy protections if it enters convictions for multiple crimes that the legislature expressly intends to punish separately. *State v. Elmore*, 154 Wn. App. 885, 900, 228 P.3d 760 (2010). The legislature enacted the burglary antimerger statute that expressly allows for a defendant to be convicted and punished separately for burglary and all crimes committed during that burglary. RCW 9A.52.050; *Elmore*, 154 Wn. App. at 900. The fact that the State can establish multiple offenses with the same conduct does not alone violate double jeopardy. *State v. Mandanas*, 163 Wn. App. 712, 720 n.3, 262 P.3d 522 (2011). Therefore, the trial court may punish burglary separately from other crimes because of the plain language of RCW 9A.52.050.

Accordingly, the trial court did not violate Conner's right to be free from double jeopardy when it treated the burglaries as separate criminal conduct for sentencing purposes.

Conner next argues that we should vacate his separate convictions of three counts of theft in the second degree and one count of theft in the third degree because they were the same in law and in fact as his convictions of eight counts of robbery in the first degree. We vacate only Conner's conviction of theft in the third degree because this theft was the functional equivalent of a lesser included of robbery in the first degree of Cummings.

A person is guilty of robbery in the first degree if

[i]n the commission of a robbery or of immediate flight therefrom, he . . . [i]s armed with a deadly weapon; or [d]isplays what appears to be a firearm or other deadly weapon; or [i]nflicts bodily injury.

RCW 9A.56.200. RCW 9A.56.190 defines "robbery," in pertinent part, as follows:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

A person is guilty of theft in the second degree if he commits theft of property which exceeds \$750 in value but does not exceed \$5,000 in value, or an access device. RCW 9A.56.040(1)(a) and (d). A person is guilty of theft in the third degree if he commits theft of property that does not exceed \$750 in value. RCW 9A.56.050. RCW 9A.56.020(1)(a) defines "theft," in pertinent part, as follows:

To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.

A person is guilty of theft of a firearm if he commits a theft of any firearm, regardless of the value of the firearm. RCW 9A.56.300.

Conner's convictions arising from the Twelfth Street (I) incident were robbery in the first degree and theft in the second degree. Conner's convictions do not constitute double jeopardy. Although both crimes require the taking of another person's property, the victims in this incident were different. Robert Dato and Aaron Dato were both victims of the robberies. Harveson, who was not present during the home invasion, was not a robbery victim. However, because Conner took Harveson's property, he was a theft victim. The crimes were different in fact because proof of one offense would not necessarily prove the other. *State v. Lust*, 174 Wn. App. 887, 891, 300 P.3d 846 (2013); *State v. Smith*, 124 Wn. App. 417, 432, 102 P.3d 158 (2004) *aff'd*, 159 W.2d 778 (2007) (for purposes of double jeopardy analysis, the same criminal conduct cannot occur where there are multiple victims). We hold that these convictions do not constitute double jeopardy.

Conner's convictions from the Twelfth Street (II) incident, robbery in the first degree and theft in the second degree do not constitute double jeopardy because, again, the victims were different. Robert Dato, Aaron Dato, and Turner, were robbery victims. Harveson, a victim of theft but not robbery, was not present during the home invasion. The crimes were different in fact because proof of one offense would not necessarily prove the other. We hold that these convictions do not constitute double jeopardy.

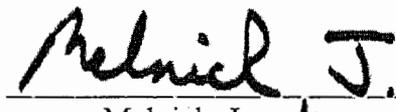
The State concedes that Conner's convictions from the Shore Drive incident, robbery in the first degree and theft in the third degree, constituted a violation of double jeopardy. Even though the statutory elements differ, under the facts of this incident, both crimes involved the taking of property from the same victim at the same time. We accept the State's concession and reverse the theft in the third degree conviction.

Conner's convictions from the Wedgewood Lane incident, robbery in the first degree, theft of a firearm, and theft in the second degree by taking a debit card, do not constitute a violation of

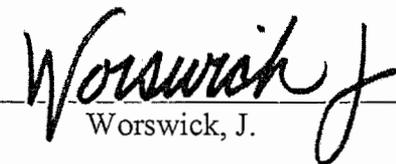
double jeopardy. Different people were victims. Aaron Tucheck and Keefe Jackson were robbery victims. Conner took Ann Tucheck's property, the firearm and debit card, but not in her presence, and not with force or the threatened use of force. Therefore, she was a theft victim and not a robbery victim. Additionally, theft of a firearm and theft of a debit card are neither factually nor legally identical because proof of one offense would not necessarily prove the other. We hold that these convictions do not constitute double jeopardy.

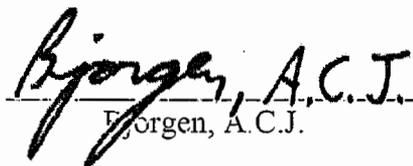
We vacate Conner's theft in the third degree conviction and affirm his remaining convictions. We remand for resentencing on the remaining convictions and twelve firearm enhancements.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Melnick, J.

We concur:


Worswick, J.


Bjorgen, A.C.J.

APPENDIX C

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 92031-1
)	
Respondent,	)	ORDER
)	
v.	)	C/A NO. 43762-7-II
	)	(consol. w/ 45418-1-II)
LA'JUANTA LE'VEAR CONNER,)	
)	
Petitioner.)	
)	
)	
)	

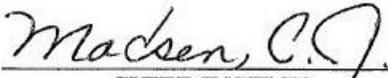
Department II of the Court, composed of Chief Justice Madsen and Justices Owens, Stephens, González and Yu, considered at its January 5, 2016, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th day of January, 2016.

For the Court



CHIEF JUSTICE

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LA'JUANTA LE'VEAR CONNER,

Appellant.

No. 43762-7-II
Consolidated with 45418-1-II

MANDATE

Kitsap County Cause No.
11-1-00435-8

Court Action Required

The State of Washington to: The Superior Court of the State of Washington
in and for Kitsap County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on June 4, 2015 became the decision terminating review of this court of the above entitled case on January 6, 2016. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Court Action Required: The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 26th day of January, 2016.


Clerk of the Court of Appeals,
State of Washington, Div. II

APPENDIX E

FILED
MAY 30, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 34973-0-III
)	
Respondent,)	
)	
v.	)	UNPUBLISHED OPINION
)	
LA'JUANTA LE'VEAR CONNER,)	
)	
Appellant.)	

LAWRENCE-BERREY, A.C.J. — La'Juanta Le'Vear Conner appeals his sentence and assigns error to the trial court's refusal to rule on his CrR 7.8(b) motion. Because Mr. Conner failed to properly note his motion, we conclude the trial court did not err.

FACTS

In 2012, a jury found Mr. Conner guilty of several crimes relating to a series of home invasions. He appealed his convictions and filed a personal restrain petition (PRP). Among other theories, Mr. Conner asserted in his PRP that the State vindictively prosecuted him for refusing to accept a plea bargain. Division Two of this court vacated one conviction and remanded to the trial court for resentencing on the remaining convictions and 12 firearm enhancements.

To accommodate transport, the trial court scheduled Mr. Conner's resentencing hearing for March 18, 2016. Prior to the hearing, Mr. Conner mailed a handwritten CrR 7.8(b)(2) motion to the sentencing court. On February 29, 2016, the sentencing court filed that motion on behalf of Mr. Conner. The trial court also appointed new defense counsel for Mr. Conner.

In the motion, Mr. Conner alleged his original trial counsel was ineffective for not informing him of the State's plea offer, and requested the sentencing court to schedule an evidentiary hearing. Mr. Conner attached a sworn declaration describing his lack of knowledge of any plea offer and noting that his original trial counsel had been disbarred for failing to inform clients of plea offers.

Defense counsel requested a continuance of the resentencing hearing for additional time to research and brief various sentencing theories, as well as time to investigate Mr. Conner's allegation raised in his CrR 7.8(b)(2) motion. The trial court continued the resentencing hearing to March 18, 2016, but defense counsel was unavailable on that date and did not attend. The trial court again continued the resentencing hearing to March 25, 2016.

Defense counsel submitted a brief that argued various sentencing theories not at issue in this appeal. At the hearing, the State acknowledged that Mr. Conner had filed a

CrR 7.8(b)(2) motion requesting relief from judgment because of newly discovered evidence. The State acknowledged that Mr. Conner's prior counsel had a history of failing to report plea bargains to clients. According to the State, because of this history, it had placed its plea offer on the record in the original trial.

The sentencing court read the clerk's minutes from the original trial and commented: "[T]he indication was that the State would provide a plea agreement to [original defense counsel] before the next hearing. So that was actually incorporated in the minute entry on September 16. The next hearing is September 21. There's simply no mention one way or the other of the plea agreement." Report of Proceedings (RP) at 5. The State maintained that it had presented the offer on the record.

Defense counsel briefly addressed the CrR 7.8 motion. "I'll start by noting my client and I have discussed that. Mr. Conner was aware that he didn't note that motion, but I don't feel that we're prejudiced." RP at 7.

The parties then addressed the resentencing issues. Prior to sentencing, the court provided Mr. Conner his right of allocution. Mr. Conner discussed his sentencing concerns and then began discussing his CrR 7.8(b)(2) motion. He argued his original trial counsel was ineffective for failing to inform him of a plea offer from the State. He

maintained that his counsel had neither informed him of his potential maximum sentence nor communicated an offer to him.

Defense counsel then addressed the CrR 7.8(b)(2) motion. Backtracking on his previous statement, defense counsel said he was *not* prepared to argue the motion, and reiterated that the motion was not properly noted. Defense counsel said that a more formal hearing was necessary, and told the court, “I’m asking that the Court not address the [CrR] 7.8 motion I want to withdraw all that and simply state this proposition.” RP at 29. Counsel ended by saying, “I should not have said I was prepared to represent him on the 7.8. I wasn’t hired to do it. I haven’t done any work on it. My request is that we set that over pursuant to the rule.”¹ RP at 30.

The sentencing court treated the motion as withdrawn and stated, “I’m not going to address the 7.8.” RP at 30. The court explained:

[THE COURT:] Mr. Conner, I can’t possibly know what occurred between you and [former counsel] in terms of your discussions with him and your trial strategy, how much of this was him, how much of this was you, and that is not in any record before me. Given that, I’m not going to address it so that you still have the opportunity to perfect that issue, if you wish.

[Mr. Conner]: Referring to the 7.8; right?

THE COURT: Right. But this is not the place to start that issue.

[Mr. Conner]: Okay. That’s why I sent you the motion.

¹ Because defense counsel did not represent Mr. Conner in connection with the CrR 7.8 motion, we determine the doctrine of invited error does not apply.

THE COURT: I'm not going to address it because it's not properly before me.

RP at 33. The court said it could not give Mr. Conner legal advice and told him if he had questions, he should talk to defense counsel.

The court sentenced Mr. Conner to 1,148.5 months of incarceration. Mr. Conner timely appealed.

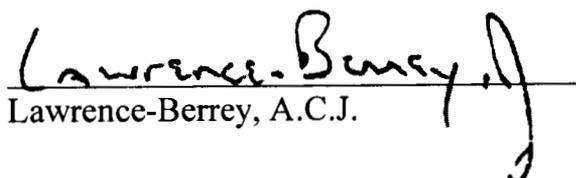
ANALYSIS

Mr. Conner contends the trial court erred by refusing to rule on his motion. He contends that CrR 7.8(c) requires the trial court to determine if the motion is time barred by RCW 10.73.090; and if it is not time barred, to either set a hearing if the motion is meritorious or to transfer the motion to the Court of Appeals. The State responds that the trial court set the motion over because Mr. Conner failed to properly note it and, for this reason, there is no decision for this court to review.

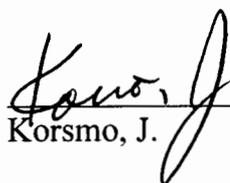
CrR 7.8(b)(2) authorizes a trial court, on motion, to relieve a criminal defendant from a judgment of guilty on the basis of newly discovery evidence. CrR 8.2 provides that CrR 3.5, CrR 3.6, and CR 7(b) governs motions in criminal cases. CR 7(b) describes the process and form for motions. Although CR 7(b) does not explicitly require motions to be noted for a specific date and time, local rules throughout the state, including Kitsap County, contain this supplemental requirement.

A trial court has discretion whether to waive or enforce its local rules. *Ashley v. Superior Court*, 83 Wn.2d 630, 636, 521 P.2d 711 (1974). We cannot find that the trial court abused its discretion when insisting on compliance with its local rule. The trial court insisted on compliance so further information could be provided to assist in its analysis of whether to retain the motion for the reasons set forth in CrR 7.8(c) or to transfer the motion to us. We, therefore, affirm the sentencing court's decision allowing Mr. Conner to properly note his motion.

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


Lawrence-Berrey, A.C.J.

WE CONCUR:


Korsmo, J.


Siddoway, J.

APPENDIX F

FILED
Jul 12, 2017
Court of Appeals
Division III
State of Washington

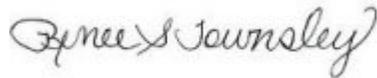
COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,	)	<u>MANDATE</u>
)	
v.	)	No. 34973-0-III
)	
LA'JUANTA LE'VEAR CONNOR,	)	Kitsap County No. 11-1-00435-8
Appellant.)	
_____)	

The State of Washington to: The Superior Court of the State of Washington,
in and for **Kitsap** County

This is to certify that the Opinion of the Court of Appeals of the State of Washington, Division III, filed on **May 30, 2017** became the decision terminating review of this court in the above-entitled case on **June 29, 2017**. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at **Spokane**, this **12th** day of **July, 2017**.



Clerk of the Court of Appeals, State of Washington
Division III

cc: La' Juanta Le'Vear Connor
John A. Hays
John L. Cross
Hon. Jeanette M. Dalton
Department of Corrections

APPENDIX G

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

RECEIVED AND FILED
IN OPEN COURT
AUG 11 2017
DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
	)	No. 11-1-00435-8
Plaintiff,)	
	)	ORDER TRANSFERRING CrR 7.8 MOTION
v.	)	TO COURT OF APPEALS
)	
LA'JUANTA LE'VEAR CONNER,)	
Age: 28; DOB: 04/22/1989,)	
)	
Defendant.)	

****CLERK'S ACTION REQUIRED****

This matter came on regularly for hearing before the undersigned Judge of the above-entitled Court on the motion of the defendant for relief pursuant to CrR 7.8. Mr. Conner appeared pro se and the state was represented by deputy prosecuting attorney John L. Cross. The Court considered the motion, briefing, argument of counsel and the records and files herein.

Mr. Conner sought relief pursuant to CrR 7.8 (b) (2) alleging that newly discovered evidence warrants relief from the judgment in this matter and a seeking a new trial. During oral argument, Mr. Conner supplemented his claim by also alleging that he received ineffective assistance of counsel, which claim is cognizable under CrR 7.8 (b) (5). By order of the Court of Appeals, Mr. Conner was resentenced on this matter on ***. The present motion was filed on February 29, 2016, which is within one year from resentencing and is not therefore time barred. RCW 10.73.090.

ORDER; Page 1 of 3



Tina R. Robinson, Prosecuting Attorney
Adult Criminal and Administrative Divisions
614 Division Street, MS-35
Port Orchard, WA 98366-4681
(360) 337-7174; Fax (360) 337-4949
<https://spf.kitsapgov.com/pros>

1 Mr. Conner's claims that he has discovered that his trial counsel (1) failed to advise him
2 that there were firearms enhancements in his case, (2) failed to advise him of the possible length
3 of his sentence, and (3) failed to advise him of the state's plea offer. The state responded with
4 regard to claims (1) and (2), by directing the court to passages in the report of proceeding
5 prepared for appeal. One passage shows that Mr. Conner was told on the record in open court the
6 possible amount of time he could serve if convicted. Another passage shows that on the record in
7 open court the trial judge specifically addressed each one of the alleged firearm enhancements
8 and that Mr. Conner said as to each enhancement that he understood.

9
10 With regard to the third claim, the state presented an authenticated email exchange
11 between the trial deputy prosecutor and defense counsel wherein defense counsel asserts that he
12 had communicated the state's offer to Mr. Conner and that Mr. Conner had rejected the offer.
13 Further, in a previously filed post-conviction motion, Mr. Conner, acting pro se, had written that
14 his charges constitute vindictive prosecution because he had refused to accept the plea offer. This
15 court finds that this evidence is adequate for the court to find that Mr. Conner's defense attorney
16 did in fact advise him of the state's plea offer and that he in fact rejected the same.

17
18 The court therefore finds that Mr. Conner's allegations (1) and (2) herein have no
19 credibility because they are directly contradicted by the record. Further, the court finds with
20 regard to Mr. Conner's third claim that adequate circumstantial evidence presented shows that
21 this claim also lacks credibility. Moreover, the court notes that Mr. Conner has asserted no
22 declaration or affidavit in support of his claims and that the factual averments in the motion are
23 not verified as required by CrR 7.8 (c) (1).

24
25 In the context of a newly discovered evidence claim, this court is charged with
26 considering "the credibility, significance, and cogency of the proffered evidence." *State v.*
27 *Glassman*, 160 Wn. App. 600, 609, 248 P.3d 155 (2011), *rev. denied*, 172 Wn.2d 1002 (2011).
28 Here, Mr. Conner did not properly assert facts in support of his motion. However, even had he
29 properly asserted his factual allegations, this court finds that those allegations are not credible.

30 Now therefore it is
31

ORDER; Page 2 of 3



Tina R. Robinson, Prosecuting Attorney
Adult Criminal and Administrative Divisions
614 Division Street, MS-35
Port Orchard, WA 98366-4681
(360) 337-7174; Fax (360) 337-4949
<https://spf.kitsapgov.com/pros>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

ORDERED, ADJUDGED, AND DECREED that Mr. Conner has failed to make a substantial showing that he is entitled to relief and no factual hearing is necessary and therefore pursuant to CrR 7.8 (c) (2) this matter must be transferred to the Washington Court of Appeals , Division II, for consideration as a personal restraint petition.

DATED this 11 day of August, 2017.

Sally F. Olsen

JUDGE

APPROVED FOR ENTRY- **SALLY F. OLSEN**

PRESENTED BY- *[Signature]*
STATE OF WASHINGTON

JOHN L. CROSS, WSBA No. 20142
Deputy Prosecuting Attorney

_____, WSBA No. _____
Attorney for Defendant

Prosecutor's File Number-10-184374-3



APPENDIX H

February 27, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint
Petition of

LA'JUANTA LE'VEAR CONNER,

Petitioner.

No. 50779-0-II

ORDER DISMISSING PETITION

La'Juanta Conner seeks relief from personal restraint imposed following his 2012 convictions for 23 counts related to robberies and burglaries, for which he was resentenced in 2016. In this, his second petition,¹ he argues that he received ineffective assistance of trial counsel when that counsel failed to advise him of (1) the standard range sentence he was facing, (2) the mandatory firearm sentencing enhancements he was facing, and (3) the State's plea offer.² But the record contradicts his claims. As to the advice regarding the sentence range and firearm enhancements, the record from his direct appeal establishes that he was advised of the standard range and the firearm enhancements. And as to the plea

¹ See *State v. Conner*, Nos. 43762-7-II, consolidated with 45418-1-II (Wash. Ct. App. June 4, 2015) (unpublished).

² Conner filed a motion to modify his judgment and sentence in the trial court under CrR 7.8. That court transferred his motion to us to be considered as a personal restraint petition under CrR 7.8(c). Because he filed his motion on February 29, 2016, prior to his March 25, 2016 resentencing, his petition is timely filed. For reasons unknown, the trial court did not transfer his motion to us until August 11, 2017.

offer, in his prior petition he argued that he had been subjected to vindictive prosecution after he rejected the State's plea offer. This demonstrates that he had been advised of the offer. Conner's arguments are frivolous. Accordingly, it is hereby

ORDERED that Conner's petition is dismissed under RAP 16.11(b).³


Acting Chief Judge Pro Tempore

cc: La'Juanta L. Conner
John L. Cross
Kitsap County Clerk
County Cause No. 11-1-00435-8

³ Although Conner's petition is successive, we dismiss it rather than transfer it to our Supreme Court because Conner does not present any competent evidence in support of his claim. *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 86-87, 74 P.3d 1194 (2003).

APPENDIX I

NO. 11-1-00435-8

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

IN RE PERSONAL RESTRAINT PETITION OF:

LA'JUANTA LE'VEAR CONNER,
Petitioner.

FILED
COURT OF APPEALS
DIVISION II
2013 SEP 26 AM 11:25
STATE OF WASHINGTON
BY _____
DEPUTY

PERSONAL RESTRAINT PETITION

BRIEF

La'Juanta L. Conner Pro Se
#359680 F-E-205
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

A. STATUS OF PETITIONER

La'Juanta Le'Vear Conner, challenges his 2012 Kitsap County convictions for one count of Conspiracy to Commit First Burglary, five counts of First Degree Burglary, eight counts of First Degree Robbery, four counts of Second Degree Theft, one count of Theft of a Firearm and one count of Third Degree Theft.

Conner is currently in custody as a result of these convictions, and is serving a 95 year sentence. The two counts of Unlawful Possession of a Firearm, and two counts of Possession of a Stolen Firearm are being brought on direct appeal. COA. No. 43762-7-II. See Judgment and Sentence attached as App.A.

B. FACTS

On November 18, 2010 a Certificate Of Probable Cause was received and filed in Kitsap County Superior Court, City of Bremerton, WA, alleging that Conner had conspired with a confidential informant, Joe Perez, and Jerrell Smith to commit a home-invasion robbery (address and victim(s) unknown).

In Sum, according to the statement of probable cause, a series of robberies were being committed in the Bremerton area. On November 17, 2010, confidential informant later to be determined as Chris Devenere, informed the police that he had information of a certain robbery that had taken place with Joe Perez, and that Perez was planning to commit another robbery.

With Devenere's help the police devised a plan to capture Perez, by creating a fake profile or address that would be given to Perez, with the assumption that Perez would go for the bait.

When Perez, showed up to the predetermined location to meet with Devenere, Perez was accompanied by Conner, and Smith. While the information was being exchanged between Perez, and Devenere, unbeknownst to Perez, Conner, and Smith they were being surveilled by the police. After Perez, Conner, and Smith drove out of the parking lot and in the direction or location of the address, the police conducted a high risk traffic stop, and arrested Perez, Conner and Smith for Conspiracy to commit Robbery. See Probable Cause attached as App.B.

Approximately eight months after the arrest, on June 8, 2011, the Kitsap County Attorney charged Conner with Conspiracy to Commit, First Degree Burglary and First Degree Robbery, and Second Degree Unlawful Possession of a Firearm. See Information attached as App.C.

When Conner chose to exercise his constitutional right to a fair and speedy trial, the Prosecutor amended the information and charged a total of 26 counts originating from the September 15, 12th Street Robbery, September 29, Shore Drive Robbery, October 3, Weatherstone Burglary, November 3, Wedgewood Robbery, and the November 17, 2010, Conspiracy. See Amended

Information App.C.

Subsequent to the first amended information, on June 6, 2012, the Prosecutor amended the information for a second time omitting the Conspiracy to Commit Robbery as stated on the probable cause and adding Conspiracy to Commit First Degree Burglary which is not in the probable cause.

The probable cause supported the charges of Unlawful Possession of a Firearm, Possession of Stolen Firearms, and Conspiracy to Commit First Degree Robbery, but it did not support the filing of the additional counts that stemmed from separate incidents, which are not contained within the body of the statement of probable cause, including Conspiracy to Commit Burglary. See Second Amended Information App.C.

Prior to trial the Prosecutor did not produce a second certificate of probable cause containing the information of the 20 charges found in the second amended information, which was a violation of Prosecution Standards.

At trial, the court instructed the jury on Conspiracy to Commit Burglary in the First Degree. Instruction #10 does not name the co-conspirators, found in the information and probable cause, thus submitted defective instructions to the jury. See Jury Instructions App.D.

During sentencing, the Prosecutor urged the court to look beyond the standard range and sentence Conner to 95

years because Conner "[sic] knowingly assumed the risk of going to trial on 26 counts of very serious offense class A and class B felonies, despite the fact that we had two cooperating codefendants who had already been deemed credible by one jury in the case of State v. Brown, and now he must face the consequences of that decision." RP July 27, 2012. Pg. 2767 Lines 4-9.

The court agreed with the Prosecutor and stated..."[sic] If there isn't a case which dramatically emphasizes that point, I don't know that one doesn't exist. So in this particular case, I am satisfied -- easily satisfied by clear, cogent, and convincing evidence that the aggravator that there are multiple current offenses that go unpunished is here satisfied." RP July 27, 2012. Pg. 2761 Lines 11-17. See Report Of Proceedings App.E.

The above shows prosecutor vindictiveness at its best and the court allowed it without considering State v. Korum. Moreover, while the court failed to make the Korum, analogy the court did not enter its written findings of fact and conclusions of law separately when it imposed the exceptional sentence far beyond the standard range, therefore depriving Conner of his right to a fair trial as he demonstrates below.

C. ARGUMENT/SUPPORTING AUTHORITY

1. Introduction

a) Ineffective Charging Document.

The Due Process Clause of the United States Const. Amendment 14, and Washington State Const. Art 1 § 22 (amend 10), provides the principle standard for the charging decision is the prosecution's ability to prove all elements of the charge. State v. Campbell, 103 Wash.2d. 1, 26, 691 P.2d 929 (1984).

The requirement of ability to prove the crime is also set forth in Standard 3-3.9 of the American Bar Association standards on the prosecution function.

[It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause]

Here, the charge of Conspiracy to Commit Burglary in the First Degree is not supported by the probable cause. The probable cause states that Conner conspired to commit Robbery in the First Degree on November 17, 2010. Equally troubling is the additional charges found in the second amended information with the exception of the Unlawful Possession of a Firearm, and Possession of Stolen Firearms and Possession of Marijuana is not contained in the body of the Statement of Probable cause.

The State alleged that Conner committed specific crimes of Burglary, Robbery, and Theft, at specific locations in the Information/Charging Document. However, the names of the victims, addresses, and crimes are not stated in the probable cause to arrest. See Probable Cause. App.B. and Information. App.C.

The State may contend that the additional charges were incorporated into the probable cause of Conspiracy due to the scheme of the people involved. However, that argument fails for the following reason. Whenever, charges are brought the body bringing the charges must have probable cause to arrest.

If the information/charging document is not in accordance with the probable cause issued, the prosecutor simply cannot manufacture a probable cause and attach it to the information. Amending the charges up or down, or in the alternative is not the same as adding new charges, that are separate from the probable cause and where the elements are not found in the probable cause to match the elements found in the information.

Here, the probable cause states that Conner, Smith, and Perez conspired to commit robbery in the first degree. The probable cause also states that additional charges were pending. See App.B. True to form the additional charges the author was talking about was the Unlawful Possession of Firearm, because upon arrest of the conspiracy on the 17th of November, 2010 guns and drugs were found inside of the vehicle.

The home invasion crime that is mentioned in the probable cause on page 1 and 4, did not involve Conner, nor was it remotely close to the crimes referenced in the second amended information. The testimony of Conner's co-conspirators

does not cure the defect, for there is established law on the matter of charging documents and probable cause. When the State chose to amend the information and add 26 counts of crimes that stemmed from robbery's that occurred on September 15, September 28, October 3, and November 3, 2010, the State should have produced a separate Certificate of Probable Cause to Arrest on those specific charges, because the additional charges surely was not supported by the current probable cause to arrest on Conspiracy alone.

[A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction] absent a supporting probable cause referencing all the facts and elements the attached charging document is therefore ineffective. And where there is an ineffective charging document as is in this case, all charges contained in the information "shall be dismissed without prejudice." State v. Knapstad, 107 Wash.2d. 346, 729 P.2d 51 (1986). Every material element of the charge, along with all essential supporting facts must be put forth with clarity. CrR 2.1(a)(1).

b) Improper Instructions.

Judicial Misconduct deprived Conner of his inherent 6th amendment right to a fair trial when the court improperly

instructed the jury on the crime of Conspiracy.

Due process requires that the State prove each element of its criminal case beyond a reasonable doubt. In re Pers. Restraint of Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970).

Conner, did not object to the instructions found herein, that he now contends were erroneous however, a manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3) State v. Kronich, 160 Wash.2d 893, 899, 161 P.3d 982 (2007) (quoting State v. Kirkpatrick, 160 Wash.2d. 873, 880, 161 P.3d 990 (2007); State v. Stein, 144 Wash.2d. 236, 240, 27 P.3d 184 (2001) (a jury instruction that relieves the State of its burden to prove every element of the crime is an error of constitutional magnitude).

Here, instruction #10 the to convict instruction states the following;

To convict the defendant of the crime of conspiracy to commit burglary in the first degree, as charged in Count I, each of the following elements of the crime of conspiracy must be proved beyond a reasonable doubt:

(1) That ~~the defendant~~ on or about November 17, 2010 the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of burglary in the first degree;

(2) That the defendant made the agreement with the intent that such conduct be performed;

(3) That any one of the persons involved in the agreement took a substantial step in pursuance of the agreement; and

(4) That any of these acts occurred in the State of

Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one these elements, then it will be your duty to return a verdict of not guilty.

See Jury Instructions App.D.

This instruction failed to name the co-conspirators and allowed Conner to be found guilty if he "agreed with one or more persons" to commit the crime.

Similar to Conner, the Court held in State v. Brown, 45 Wash.App. 571, 726 P.2d 60 (1986)(an instructional error is harmless if it is "trivial, or formal, or merely academic, was not prejudicial to the substantial right of the party assigning it, and in no way affected the outcome of the case. Id. at 576.(citing State v. Rice, 102 Wash.2d. 120, 123, 683 P.2d 199 (1984). Like Brown, the failure to include Conner's co-conspirators named in the Second Amended Information in the "to convict" is prejudicial and not trivial because evidence was presented that would have allowed the conviction based upon conspiracy.

To show prejudice however, Conner does not necessarily have to prove that he would have been acquitted but for the error. Rather, as courts have noted in other contexts a defendant is prejudiced by a trial error if there is a "reasonable

probability" that the error affected the trials outcome and the error undermines the courts confidence in the trials fairness Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Because parties are entitled to instructions that when taken as "a whole" properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case. State v. Redmond, 150 Wash.2d. 489, 493, 78 P.3d 1001 (2003) Conner is inviting this Court to look at other to convict instructions found in Appendix D, with the same error, to determine their deficiency.

For example, the "to convict" instructions for #39, 45, and 56, for the crime of theft does not name the victims of whom Conner had allegedly took from. While instructions #49, 51, and 57, name the victims.

To further complicate matters, the "to convict" instructions for #37, 47, 50, and 54, for the crime of burglary in the first degree also does not contain the address of the building Conner, had allegedly burglarized. While instruction #44 cites the address.

According to the Statute on the Bill of Particulars, State may be required to furnish a bill of particulars in burglary prosecution, where an information does not specify the nature, and extent of the crime with sufficient exactness

to enable the accused to properly defend, 'as where the crime intended to be committed in the allegedly burglarized premises is shown by the accused to be material to the defense of the case. See RCW 9A.52.020,030.

Here, Conner was charged with 6 counts of Burglary, 8 counts of Robbery, and 7 counts of theft in varying degrees. Because the State's theory of the case was the burglary's were committed to execute the robbery's and the theft's were part of the robbery's, the State then cannot contend that not naming the co-conspirators, victims, and address of the buildings did not confuse the jury, nor was not improper. State v. Brown, supra.

U.S. Const. amend. 6 requires that "[i]n all criminal prosecutions, the accused shall..be informed of the nature and cause of the accusation..." Const. art. 1 § 22 (amend. 10) further states that "[i]n criminal prosecutions the accused shall have the right...to demand the nature and cause of the accusation against him..." Therefore an accused has a protected right, under our State and Federal charters to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial. State v. Bergeron, 105 Wash.2d 1, 18, 711 P.2d 1000 (1985).

Since it is presumed that juries follow all instructions given. Degroot v. Berkley Constr.Inc., 83 Wash.App. 125, 131,

920 P.2d 619 (1996)(citing State v. Lord, 117 Wash.2d. 829, 861, 822 P.2d 177 (1991) cert.denied 506 U.S. 856 (1992), "the standard for clarity in a jury instruction is higher than for a statute. State v. Bland, 128 Wash.App. 511, 116 P.3d 428 (2005) A defendant cannot be said to have a fair trial if the jury might assume that an essential element need not be proved. State v. Smith, 131 Wash.2d 258, 263, 930 P.2d 917 (1997)(failure to instruct on an essential element of the crime requires automatic reversal).

See State v. Stein, 144 Wash.2d. 236, 27 P.3d 184 (2001); Also State v. McCarty, 140 Wash.2d 420, 998 P.2d 296 (2000)(citing State v. Brown, 45 Wash.App. 571, 726 P.2d 60 (1986); Maddox v. City of L.A., 792 F.2d 1408, 1412 (9th Cir. 1986)("When reviewing a claim of error relating to jury instructions, the court must give consideration to the entire charge as a whole to determine whether the instruction is misleading or incorrectly states the law to the prejudice of the objecting party"). "An erroneous instruction is not otherwise reversible unless the court is left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations". Binks Mfg.Co. v. Nat'l Presto Indus., Inc., 709 F.2d 1109, 1117 (7th Cir. 1983)(quoting Miller v. Universal City Studios.Inc, 650 F.2d 1365, 1372 (5th Cir 1981) "The

question on appeal is not whether an instruction was faultless in every respect, but whether the jury, considering the instruction as a whole was misled." See In re Pers. Restraint of Lile, supra. Given the fact that the States case relied solely on the testimony of Conner's co-conspirators/co-defendants, which was shown and proved on direct appeal that they weren't always truthful about Conner's involvement, it is without question the jury should have been properly instructed as to who and what was victimized.

Actual and Substantial Prejudice had occurred when the jury convicted Conner of theft of a person without naming who Conner actually stole from. And actual and Substantial Prejudice had occurred when the jury convicted Conner of burglary in the first degree of a building and person without naming the person or the addresses of the buildings that Conner allegedly burglarized.

Because of the errors found in the "to convict" instructions, complained of herein, where the co-conspirators, and victims were not named, instructions #1, 37 39, 45, 47, 50, 54, and 57 which are defective requires this Court to reverse and remand for new trial. State v. Brown, 45 Wash.App. 571, 726 p.2d 60 (1986). Controls.

2. Vindictive Prosecution.

Prosecutor Misconduct deprived Conner of his inherent 6th amendment right to a fair trial when she excessively charged Conner with 6 counts of first degree burglary, 8 counts of first Robbery, 2 counts of unlawful possession of a firearm, 2 counts of possession of a stolen firearm, 1 count of possession of marijuana, 4 counts of second degree theft, 1 count of third degree theft, 1 count of theft of a firearm, and 1 count of third degree possession of stolen property. See Second Amended Information. App.C.

Based on the Certificate Of Probable Cause, the State originally charged Conner with 1 count of conspiracy to commit burglary in the first degree, 1 count of conspiracy to commit robbery in the first degree, and 1 count of unlawful possession of a firearm in the second degree. See Information. App.C.

The probable cause to arrest was filed in Superior Court of Kitsap County, November 18, 2010. App.B.

The State did not bring charges until well into the next year, where the prosecutor filed the information on June 8, 2011, charging only 3 counts.

When Conner refused to plead guilty to the 3 counts like his coconspirators/codefendants, the State amended the charges to a total of 26 counts based on criminal conduct that was not supported by probable cause.

Once a prosecutor exercises his discretion to bring certain charges against a defendant neither he nor his successor may without explanation increase the number of or severity of those charges in circumstances which suggest that the increase is retaliation for the defendants assertion of statutory or constitutional rights. State v. Korum, 120 Wash.App. 686, 86 P.3d 166 (2004).

The only explanation given by the prosecutor was during the sentencing phase, where the prosecutor stated her reasons for the excessive charges were that Conner's codefendant Jerrell Smith "[sic]...took this deal and came forward because he wants nothing more to do with this life...the defendant has never, to date, made this realization. RP July 27, 2012. Lines 3-6 Pg. 2766.

...Admittedly, there is a vast discrepancy between the defendant's range and the range that Mr. Smith and Mr Alexander faced, but the major difference in that discrepancy in the range is that they were willing to take responsibility for their actions. RP July 27, 2012. Lines 21-25 Pg. 2766.

...He knowingly assumed the risk of going to trial on 26 counts...and now he must face the consequences of that decision. RP July 27, 2012. Lines 4,5,8,9. Pg.2767.

The above language is clear that the state retaliated

against Conner for not pleading guilty like his codefendants Smith and Alexander.

"[A public prosecutor is a quasi-judicial officer" who represents the State and must act "impartially". A prosecutors duty to do justice on behalf of the public transcends mere advocacy of the State's case. The prosecutors ethical duty is to seek the fairest rather than necessarily the most severe outcome. Id. at 701

In this case, there was nothing fair about what the prosecutor had chosen to do. Breaking down five burglary's into 26 crimes where the majority of the crimes either merged or contained exact elements of other crimes, such as theft and robbery were the exact reasoning the Korum, court emphasized the prosecutors duty when it comes to filing charges:

1. The prosecutor should file charges which adequately describe the nature of the defendants conduct, as shown above in the introduction, with the exception of the conspiracy to commit robbery, which is properly stated in the probable cause the defined the defendants conduct on the 17th of November, the additional charges does not describe Conner's conduct on that day.

2. The prosecutor should not overcharge to obtain a guilty plea.

Overcharging includes:

- (a) Charging a higher degree
- (b) Charging additional counts

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

Like Conner, Korum, was charged with a series of home invasion robberies. When Korum, exercised his right to trial on the 3 charges, the State stacked multiple charges against him which were clearly incidental to the robberies. This Court reversed (holding; Prosecutor acted vindictively following defendant's withdrawal of his guilty plea...) However, the State Supreme Court reversed this Courts decision on petition for review; 157 Wash.2d. 614, (holding; adding charges did not give rise to presumption of prosecutorial vindictiveness based on the fact that the additional charges related to crimes where Korum personally entered the invaded homes and hence was identifiable by non participants in the crime).

In contrast to the Supreme Court's reasoning, 1). Conner was not identified by non of the victims, 2). The State

relied solely on the testimony of Conner's accomplices, where it was established on record that Smith, and Alexander had lied about Conner's involvement. COA. NO. 43762-7-II, and 3). Where Korum's, probable cause to arrest accurately depict the nature of his conduct and name the victims whom he had allegedly robbed. Conner's probable cause do not name the victims and addresses of the additional charges of home invasion robberies, nor does the probable cause depict the nature of Conner's conduct in relation to the 26 additional counts. Therefore this Court should reconsider Korum's, applicability to this instant case.

"Governmental misconduct or arbitrary action by the prosecutor warrants dismissal of criminal charges" CrR. 8.3(b). See State v. Korum, 157 Wash.2d 614, n.15.

3. Invalid Exceptional Sentence.

The purpose of the SRA is to "[develop] a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentencing." RCW 9.94A.010. In coming up with the standard range for any particular offense, the Legislature specifically "recognized that not all exceptional fact patterns can be anticipated, and that the sentencing court must be permitted to tailor the sentence to the facts of each particular case."

Although the Legislature acknowledged that the trial

court had the discretion to impose an exceptional sentence either downward or upward, RCW 9.94A.120, the Legislature did not intend for the court to abuse this discretion by violating the statute.

a) Same Criminal Conduct.

The Trial Court abuses its discretion if it does not do a "same criminal conduct" analysis. State v. Haddock, 141 Wash.2d. 103 (2000). Here, the twenty-four crimes for which Conner, was convicted fourteen of them should have been treated as one crime in determining his presumptive range because the acts encompassed the "same criminal conduct".

For example: with the exception of the 2 counts of unlawful possession of a firearm, 2 counts of possession of a stolen firearm, and 1 count of conspiracy to commit burglary, which all occurred on the 17th of November, 2010. The remaining 19 crimes stemmed from five separate first degree burglary's, and one residential burglary.

Of the five first degree burglary's 8 counts of first degree robbery, and 6 counts of theft in varying degrees were attached. The robbery's and theft's were all a part of the "same criminal conduct" the crimes should have merged to avoid the double jeopardy clause of the 5th amendment, or the court should have counted the crimes as one. See Second Amended Information App.C. and Judgment and Sentence App.A.

The "same criminal conduct standard was put in place to satisfy the double jeopardy clause of the Fifth Amendment and Constitution Article 1 § 9 to protect a defendant against multiple punishments for the same offense.

In order to be the "same offense" for purposes of Double Jeopardy the offense must be the same in law and in fact. If there is an element in each offense which is not included in the other and proof of one offense would not necessarily prove the other the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses. U.S.C.A. Const. Amend.5.

Since, in order to prove robbery, the State must prove a taking of property, which is an element of theft. Therefore equal protection here, is violated when two statutes declare the same acts to be crimes, but the penalty is more severe under one statute than the other. State v. leech, 114 Wash.2d. 700, 711, 790 P.2d 160 (1990); State v. Williams, 62 Wash.App. 748, 754, 815 P.2d 825 (1991).

Moreover, when a person is convicted of two or more offenses the sentence range for each offense "shall" be determined by using all other current and prior convictions as criminal history. All sentences so determined "shall" be served concurrently. Separate crimes encompassing the same

criminal conduct "shall" be counted as one crime in determining criminal history. See RCW 9A.52.050, 9.94A.525. In re Pers. Restraint of Vehlewald, 92 Wash.App. 197, 199, 963 P.3d 903 (1998).

During sentencing the court did consider the aggravating factors on multiple current offenses that go unpunished, which was submitted to the jury. RP July 27, 2012 Pg's 2761-62. However, generally "[a] trial courts oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law and judgment". State v. kilburn, 151 Wash.2d. 36, 39 n.1, 84 P.3d 1215 (2004).

b) Consecutive Sentences.

Pursuant to the SRA, all charges that are not ran consecutively, "shall" be ran concurrently. [I]f the charges are ran consecutively, the sentence is therefore treated as an exceptional sentence, thus mandating the court to enter written findings separately and attach them to the judgment and sentence. RCW 9.94A.120(2)(3), RCW 9.94A.525, RCW 9.94A.589.

Whenever a judge imposes an exceptional sentence, he or she must set forth the reasons for that sentence in written findings of fact and conclusions of law. In re Pers. Restraint of Vandervlugt, 120 Wash.2d. 427, 842 P.2d 950 (1992).

Because the court orally opined the facts of the case

at sentencing, does not cure the defect of the exceptional sentence box on the preprinted judgment and sentence going unchecked, and the courts failure to enter its written findings separately. Rule 52(1), In re Pers. Restraint of Hall, 181 P.3d 799 (2008) (The court may impose a sentence outside the standard sentence range for that offense if it finds...that there are substantial and compelling reasons justifying an exceptional sentence)... See In re Pers. Restraint of Cashaw, 123 Wash.2d. 138, 866 P.2d 8 (1994)(The court denied defendant due process when it failed to enter written findings separately to impose the exceptional sentence. The courts own regulation imposed by statute, requires written findings of facts and conclusions of law. Implementing this regulation raise an expectation cognizable under the due process clause that the court will abide by the statute. Because the trial court did not then due process attaches to Conner.

Furthermore, because the trial court failed to adhere to the statute governing exceptional sentences, the court therefore lacked the power/authority to impose the consecutive sentences totaling 1145 months. See State v. Davis, 47 Wash.App. 91, 734 P.2d 500 (1987). Thus absent the Written Findings Of Fact And Conclusions Of Law, Cooner's 1145 month sentence is invalid on its face. Vandervlugt, controls.

c) Facially Invalid.

The Supreme Court first discussed the term "invalid on its face" in State v. Ammons, 105 Wash.2d. 175, 713 P.2d 719 (1986). There the court stated "[c]onstitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude." Id. at 188.

Although the Ammons, court considered the phrase in terms of whether the State must prove the constitutional validity of a prior convictions before they could be used for sentencing purposes, which they concluded the State did not!. Many courts have adopted the phrase to determine infirmities on judgment and sentences. See In re Pers. Restraint of Goodwin, 146 Wash.2d. 861, 866, 50 P.3d 618 (2002); In re Pers. Restraint of Hemenway, 147 Wash.2d. 529, 532, 55 P.3d 615 (2002); In re Pers. Restraint of Hinton, 152 Wash.2d. 853, 861, 100 P.3d 801 (2004); In re Pers. Restraint of La'Chapelle, 153 Wash.2d. 1, 100 P.2d 805 (2004); In re Pers. Restraint of Thompson, 141 Wash.2d. 712, 718-19, 10 P.3d 380 (2000); Also In re Pers. Restraint of Coats, WL 5593063 Nov. 17, 2011, on the Supreme Courts discussion of what makes a sentence invalid. For example the Court have found judgment and sentences invalid when the trial judge has imposed an unlawful sentence. The same should apply here for Conner. When the trial court failed to enter its written findings of

fact and conclusions of law, the court therefore had no authority to impose the consecutive exceptional sentence.

This Court may opine, the trial courts failure to check the "box" indicating that an exceptional sentence was imposed is a scrivener's error that can easily be corrected and not render the judgment invalid as held in McKiernan, supra. However, any error of law such as an error concerning determinate sentences converts an otherwise valid judgment into an invalid one. In re Pers. Restraint of Coats, supra.

When the court imposed the exceptional sentence without entering its findings separately the sentence therefore became unlawful because it was imposed contrary to statute. The court could not hand down a 1145 month sentence without the findings. this error cannot be simply corrected, the court cannot go back in time and issue its written findings of fact and conclusions of law to satisfy the harmless error doctrine. In re Pers. Restraint of McKiernan, 165 Wash.2d. at 783, 203 P.3d 375. A sentence not authorized by law is a non constitutional defect that results in a complete miscarriage of justice. In re Pers. Restraint of Breedlove, 138 Wash.2d 298 (1999); In re Pers. Restraint of Thompson, supra.

In this case the written findings of fact and conclusions of law was not submitted by the court revealing the fundamental error that led in this case to a miscarriage

of justice as Conner have demonstrated.

4. Remedy.

As shown above, because the second amended information was not supported by probable cause, thus making the charging document ineffective, 2) the "to convict instructions on conspiracy, burglary and theft do not name the victims, 3) the prosecutor was vindictive in overcharging, 4) the court abused its discretion for failing to conduct a "same criminal conduct" analysis, and 5) the court failed to enter written findings of fact and conclusions of law. It can be said that Conner's entire "trial was so infected that the resulting conviction violates due process." In re Pers. Restraint of Lile, 100 Wash.2d 224, 229, 668 P.2d 581 (1983).

Based on the multiple errors found herein, the only remedy is for this Court to vacate all convictions with prejudice in accord to CrR. 8.3(b), State v. Knapstad, supra State v. Korum, supra State v. Brown, supra, or remand to Kitsap County for further proceedings in accord to State v. Haddock, supra State v. Leech, supra and In re Pers. Restraint of Vandervlugt, supra.

If the State objects, then this Court should require the State to make a prima facie showing of any compelling reason not to allow this remedy. If the State cannot do so then this

Court should grant Conner's Personal Restraint Petition. Lile, at 230. supra.

5. Pro Se Brief.

a) Conner's PRP is to be construed liberally and held to less stringent standards than formal briefs drafted by lawyers Hains v. Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972); Boag v. MacDougall, 454 U.S. 364, 70 L.Ed.2d 551, 102 S.Ct. 700 (1982); Tally v. Lane, 13 F.3d 1031 (7th Cir. 1994); U.S. v. Sanchez, 88 F.3d 1243 (D.C. Cir. 1996) ("Court's will go to particular pains to protect Pro Se litigants against consequences of technical errors if injustice would otherwise result.").

6. Appointment Of Counsel.

When this Court have determined that Conner's Personal Restraint Petition is not **Frivolous**, this court is obligated to appoint counsel to assist Conner in his quest for relief as held in State v. Robinson, 153 Wash.2d 689.

**D. CONCLUSION AND PRAYER
FOR RELIEF**

Based on the above this Court should vacate Conner's 2012 Kitsap County convictions with prejudice, or in the alternatives remand for new trial, re-sentencing within the standard sentence range, or evidentiary hearing on the points raised herein.

APPENDIX J

FILED
KITSAP COUNTY CLERK

ORIGINAL

2012 JUL 25 PM 3: 52

DAVID W. PETERSON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
	)	No. 11-1-00435-8
Plaintiff,)	
	)	STATE'S SENTENCING MEMORANDUM
v.)	
)	
LA'JUANTA LE'VEAR CONNER,)	
Age: 23; DOB: 04/22/1989,)	
)	
Defendant.)	

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney CAMI G. LEWIS, Deputy Prosecuting Attorney, with the following State's Sentencing Memorandum—

A. STATEMENT OF THE CASE

1. Procedural History

Release Conditions

The Defendant was released by the court on \$100,000 bail. During the pendency of the proceedings, the Defendant continued to violate the court's orders regarding conditions of release. The Defendant was ordered to have no contact with Heather Apache. The State alleged that the Defendant had contact with Heather Apache at her place of work, Burger King on November 1, 2011. The Defendant posted on his Facebook account a number of derogatory and inflammatory comments about Ms. Apache regarding that encounter. Although the court did not make a specific finding that the Defendant violated the release conditions, Judge Haberly advised the Defendant he was "riding a fine line".

MEMORANDUM OF AUTHORITIES;
Page 1 of 6



Russell D. Hauge, Prosecuting Attorney
Adult Criminal and Administrative Divisions
614 Division Street, MS-35
Port Orchard, WA 98366-4681
(360) 337-7174; Fax (360) 337-4949
www.kitsapgov.com/pros

149

1 On March 26, 2012, the Defendant again appeared at Ms. Apache's place of business,
2 this time at the Ross Store in Silverdale, Washington. The Court viewed the videotape of this
3 encounter, and it is clear the Defendant lingered near Ms. Apache although claims to be just
4 staying to get the keys from his girlfriend, Rachel Duckworth. On April 6, 2012 the Court found
5 the Defendant had violated the Order Regarding Release Conditions and amended the release
6 conditions prohibiting the Defendant from entering Silverdale, Washington.

7 On April 9, 2012 the Court amended the Defendant's release conditions to require an
8 additional \$50,000 bail be posted, and the Defendant would have to be on electronic home
9 monitoring. The Defendant elected to live at 2009 Magnuson Way, Bremerton, as his residence.

10 The Court found later that the Defendant violated his release conditions by constructively
11 possessing alcohol. The Court ordered the Defendant that he was not allowed outside his
12 apartment except to go directly to his car, directly to his attorney's office or court or church, or
13 the Emergency Room if needed.

14 On or about April 19, 2012 the Defendant moved out of his apartment and into a separate
15 residence, without notifying the court. The Court had issued a warrant for the Defendant, and he
16 was arrested at that new residence. Inside the residence were two of the Defendant's friends.
17 They admitted to smoking marijuana, a substance the Defendant was prohibited from possessing
18 (even constructively). The Defendant denied anyone in the residence had been smoking
19 marijuana, and denied possessing marijuana. After he learned others admitted to smoking
20 marijuana, he admitted that fact, and admitted he had marijuana in his pocket. A Bremerton
21 Police Officer and a drug detective both noticed a small amount of marijuana in the Defendant's
22 pocket. The Defendant testified in two hearings that he had "sarcastically" admitted to
23 possessing any marijuana.

24 The Court found the Defendant had again violated the release conditions and imposed
25 twenty-five very specific release conditions on the Defendant.

26 During the course of the pendency of the trial, the State and the Court learned that the
27 Defendant, accompanied by his attorney, violated the release conditions by travelling to places he
28 was not entitled to travel.

29 **Trial**

30 For trial, the State charged the Defendant with various crimes under this cause number
31 arising from six separate incidences. The case proceeded to a jury trial, and the jury came back



1 with convictions on twenty-four counts, including special verdicts that the Defendant or an
2 accomplice was armed with a firearm, and that there were victims present during the burglaries.

3 At trial, the Defendant admitted to lying on the stand at least three times. In his direct
4 testimony he denied intending to have a long term relationship with Rachel Duckworth. On
5 cross-examination after having been confronted with his jail calls, he admitted that he had
6 intended to have a long term relationship with Ms. Duckworth. He explicitly admitted to lying in
7 his direct testimony on this point.

8 Also, the Defendant claimed in his direct testimony that he always kept receipts from
9 items he purchased "on the streets" to protect himself in case there was a claim that the item was
10 stolen. In a second set of questioning he claimed to keep all of his "important documents" in the
11 safe that was confiscated from Ms. Duckworth's apartment. On cross-examination, he gave
12 convoluted testimony regarding the receipts of property. Initially he claimed that although he
13 "always" kept receipts of the property he bought on the streets, he never actually bought any
14 property on the streets. Then, he vacillated between whether he did or did not buy property on
15 the streets, to whether he even knew if he did. His final answer was that he had bought property
16 on the streets, collected receipts, and would have kept them in the safe, but they must be located
17 somewhere else.

18 Further, the Defendant and Megan Duckworth both testified that they had never been in a
19 romantic relationship. The State has filed Bremerton Police Report B08-5995. This report
20 clearly shows that the Defendant at one time considered Megan Duckworth his girlfriend, which
21 again shows he misrepresented facts under the penalty of perjury.

22 The State has also attached police reports for the incident for which he was charged and
23 convicted in King County. This is the crime to which he testified on the stand. He represented
24 that the charge began as a Robbery in the First Degree. The Court might recall Anthony Adams
25 is the Defendant's cousin. The Seattle Police Department reports indicate Anthony Adams
26 confessed to committing an armed robbery with the Defendant. The victims reported that the
27 suspects, including the Defendant, stole marijuana and cash. Anthony Adams later confessed to
28 committing this robbery, and implicated the Defendant as well. The facts of that case are
29 remarkably similar to those in the incidences in this case.

30
31
MEMORANDUM OF AUTHORITIES;
Page 3 of 6



Russell D. Hauge, Prosecuting Attorney
Adult Criminal and Administrative Divisions
614 Division Street, MS-35
Port Orchard, WA 98366-4681
(360) 337-7174; Fax (360) 337-4949
www.kitsapgov.com/pros

B. ARGUMENT

Offender Score

The Defendant comes into this case with an offender score of "1" for his King County Conviction of 2008. Calculating his current score depends on which charge is being discussed. Each of the Burglary in the First Degree charges and the Robbery in the First Degree charges count against each other per RCW 9.94A.525 as two points. The firearm charges (Unlawful Possession of a Firearm in the Second Degree, Possession of a Stolen Firearm and Theft of a Firearm) do not count against each other, but rather run consecutively to each other. The other felonies are scored "normally" in that other current and prior offenses count as "1". The following chart may be helpful:

CHARGE	OFFENDER SCORE	RANGE (IN MONTHS)	FIREARM ENHANCEMENT
1. Consp. To Burg. 1	36	65.25 – 87	Yes
2. UPF 2	19	343 – 414	
3. Poss. Stolen Fire.	19	343 – 414	
4. UPF 2	19	343 – 414	
5. Poss. Stolen Fire.	19	343 – 414	
6. Poss. MJ	Acquitted		
7. Robb. 1	36	129 – 171	Yes
8. Robb 1	36	129 – 171	Yes
9. Burg. 1	36	87 – 116	Yes
10. Theft 2	23	22 – 29	
11. Robb. 1	36	129 – 171	Yes
12. Robb. 1	36	129 – 171	Yes
13. Robb. 1	36	129 – 171	Yes
14. Burg. 1	36	129 – 171	Yes
15. Theft 2	23	22 – 29	

MEMORANDUM OF AUTHORITIES;
Page 4 of 6



Russell D. Hauge, Prosecuting Attorney
Adult Criminal and Administrative Divisions
614 Division Street, MS-35
Port Orchard, WA 98366-4681
(360) 337-7174; Fax (360) 337-4949
www.kitsapgov.com/pros

1	16. Robb 1	36	129 – 171	Yes
2	17. Burg. 1	36	129 – 171	Yes
3	18. Theft 3	N/A	0 – 12	
4	19. Burg. 1	36	87 – 116	
5	20. Theft 2	23	22 – 29	
6	21. Robb. 1	36	129 – 171	Yes
7	22. Robb. 1	36	129 – 171	Yes
8	23. Burg. 1	36	87 – 116	Yes
9	24. Theft of Fire.	19	343 – 414	
10	25. Theft 2	23	22 – 29	
11	26. PSP 3	Acquitted		

13 The jury found that the Defendant or an accomplice was armed with a firearm in thirteen
14 of those offenses. For each of those special verdicts, the mandatory enhancement is five years.
15 Each of those enhancements run consecutively to each other, and consecutively to the total base
16 sentence. The total time for the enhancements is 780 months. This means his total range is 1123
17 months to 1194 months.

18 Further, the jury found the special allegation of Victim Present During Burglary was
19 proved in Counts 9, 14, 17 and 23.

21 **Argument**

23 Throughout the pendency of this case, the Defendant has failed to take responsibility for
24 any of his actions. The Defendant repeatedly violated the Order of Release to the point that the
25 Court took the unusual step of creating twenty five very specific release conditions. As the Court
26 noted in one of the hearings, the Court offered the Defendant “every possible forbearance”, and
27 yet he continued to violate the conditions.

28 The Defendant has shown no remorse for his actions. Each time the court found him in
29 violation of the conditions, the Defendant showed no remorse. Further, and most importantly, the
30 Defendant has never shown any remorse for any of his criminal actions or his victims. The
31



1 Defendant feels comfortable creating his own rules by which to live, has no regard for the legality
2 of his actions and no regard for the effect on others. These victims consistently testified that as a
3 result of the Defendant's and his co-defendants' actions, they no longer felt safe in their homes.
4 Many moved as a result of their fear. The Defendant's actions traumatized the victims and left
5 them with life-long distressing memories. The Defendant showed no mercy to the victims, and
6 deserves the same.

7 For these reasons, the State recommends top of the Defendant's standard range, 1194
8 months. Although, in another case the State would recommend an exceptional sentence out of
9 respect of the jury's findings with respect to the special allegations, the State is not doing so here.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

RESPECTFULLY SUBMITTED this 20th day of July, 2012.

STATE OF WASHINGTON



CAMI G. LEWIS, WSBA NO. 30568
Deputy Prosecuting Attorney

Prosecutor's File Number-10-184374-3

MEMORANDUM OF AUTHORITIES;
Page 6 of 6



Russell D. Hauge, Prosecuting Attorney
Adult Criminal and Administrative Divisions
614 Division Street, MS-35
Port Orchard, WA 98366-4681
(360) 337-7174; Fax (360) 337-4949
www.kitsapgov.com/pros

I N C I D E N T D A T A	Agency Name Bremerton Police Dept		INCIDENT / INVESTIGATION REPORT ARREST / CITATION MADE				OCA: B08-005995	
	ORI WA0180100						Date / Time Reported TH May 29, 2008 00:20	
	#1	Crime Incident WANTED PERSON (OTHER AGENCY WARRANT)	CJA: 10034	Local Statute: NONE	<input type="checkbox"/> Alt	<input checked="" type="checkbox"/> Com	Occ From 05/29/2008 00:20	Occ To 05/29/2008 00:20
#2	Crime Incident	UCR:	Local Statute:	<input type="checkbox"/> Alt	<input type="checkbox"/> Com	Dispatched 05/29/2008 00:06	Arrived 00:06	
#3	Crime Incident	UCR:	Local Statute:	<input type="checkbox"/> Alt	<input type="checkbox"/> Com	Cleared 01:21		
Location of Incident First Street /national Avenue, Bremerton, WA 98312					Premise Type Vehicle		Offense Tract	
M O	How Attacked or Committed							
	Weapon / Tools							
V I C T I M	# Victims 0 Type		Injury			Residency Status		
	Victim/Business Name (Last, First, Middle)				Victim of Crime #		Age / DOB	Race
	Relationship to Offenders							Sex
	Home Address					Home Phone		Cell Phone
	Employer Name/Address					Business Phone		
	YR	Make	Model	Style	Color	Lic/Lis	VIN	
O F F E N D E R	Offender(s) Suspected of Using <input type="checkbox"/> Drugs <input checked="" type="checkbox"/> N/A <input type="checkbox"/> Alcohol <input type="checkbox"/> Computer		Offender 1 OFL Age: 19 Race: B Sex: M		Offender 2 Age: Race: Sex:		Offender 3 Age: Race: Sex:	
			Offender 4 Age: Race: Sex:		Offender 5 Age: Race: Sex:		Offender 6 Age: Race: Sex:	
Primary Offender Resident Status <input checked="" type="checkbox"/> Resident <input type="checkbox"/> Non-Resident <input type="checkbox"/> Unknown								
S U S P E C T	Name (Last, First, Middle) Conner, Lajuante L				Home Address 3439 Spruce Ave Apt. H, Bremerton, WA 98310			
	OF Also Known As La Juanta Le Vear Conner, Lajuante Levear...				Home Phone (360) 621-2049		Cell Phone (219) 256-2364	
	Occupation Fire Watch			Business Address U/E		Business Phone		
	DOB. / Age	Race	Sex	Hgt	Wgt	Build	Hair Color Black	Eye Color Brown
	4/22/1989	19	B	M	5'09	145	Hair Style	Hair Length
	Glasses							
Scars, Marks, Tattoos, or other distinguishing features (i.e. limp, foreign accent, voice characteristics) ; Cleared By Arrest- Warrant Only/Left Arm-Praying Hands; Arm/Right Right-Jean								
Hat		Shirt/Blouse			Coat/Suit		Socks	
Jacket		Tie/Scarf			Pants/Dress/Skirt		Shoes	
Was Suspect Armed?	Type of Weapon				Direction of Travel		Mode of Travel	
YR	Make	Model	Style/Doors	Color	Lic/Lis	VIN		
Suspect Hate / Bias Motivated: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				Type:				
W I T N E S S	Name (Last, First, Middle)				D.O.B.	Age	Race	
	Home Address				Home Phone		Cell Phone	
	Employer				Business Phone			
Officer:	SUPERVISOR:		INFO: ONLY:	F/UP: DET.	F/UP: LINE	PROSECUTOR:		
(442) MAYFIELD, KENT A								

Incident / Investigation Report

Bremerton Police Dept

OCA: B08-005995

O T H E R S I N V O L V E D	CODES: DE-Deceased, DR-Driver, MN-Mentioned, MP-Missing Person, OT-Other, OW-Owner, PA-Passenger, PT-Parent/Guardian, RA-Runaway, RO-Registered Owner, RP-Reporting Party, VI-Victim					
	Code	Name (Last, First, Middle)	Victim of Crime #	Age / DOB	Race	Sex
	MN1	Hope, Heather A		19 5/2/1989	W	F
	Home Address 3605 "J" Street, Bremerton, WA 98312		Home Phone	Cell Phone (360) 440-9253		
Employer Name/Address		Business Phone				
Code	Name (Last, First, Middle)	Victim of Crime #	Age / DOB	Race	Sex	
Home Address		Home Phone	Cell Phone			
Employer Name/Address		Business Phone				

**N
A
R
R
A
T
I
V
E**

INCIDENT/VENUE: 0020 hours, 05/29/2008, I arrested Conner on a felony warrant at First Street near National Avenue.

ACTIVITY/OBSERVATIONS: A dark, green, Honda, Accord, Washington license plate number 079UWT was backed into a dark area of the west parking lot of the Skill Center. Hope was in the passenger seat and Conner was in the driver's seat.

OFFICER ACTIONS: I met Hope and Conner at the car. They stated they were just talking. I asked for identification and Conner provided a Washington State Driver's license. Hope had no identification, but gave her data including her Washington State Driver's license number.

Conner was wanted on a Seattle Police Department robbery first degree warrant number 08C049376 bail \$100,000.00.

Prior to my getting the warrant hit back Conner pulled out of the lot and drove north bound on First Street to a drive way about a block north of National Avenue. Conner started to pull into the driveway and I activated my overheads.

I took Conner into custody. I confirmed the warrant and had Seattle Police Department teletype a copy to the Kitsap County Jail.

Conner stated that he knew it probably had something to do with his cousin using a car that is registered in Conner's name. Conner said that it was a Chevrolet, Malibu. Conner said he does not go to Seattle and has not been involved in any robbery.

Conner requested the car be released to the owner his girlfriend Megan Duckworth. The car is registered to Mathew Duckworth (Megan Duckworth's father) at the same address as Megan Duckworth. Megan Duckworth responded and took custody of the car. The car was missing it's in dash stereo on my contact with Conner.

DISPOSITION: I booked Conner into the Kitsap County Jail on the listed warrant in lieu of the \$100,000.00 bail.

**I CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON
THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.**

(Signature, Date)

**(442) MAYFIELD, KENT A
KITSAP COUNTY, WA**

Quantity	Description / License Plate	Vehicle Make	Model
1	1999 GRN/DGR / 079UWT, WA	HONDA	ACCORD
VIN		Notes	
JHMCG6656XC018735			
Insured	Estimated Value		
<input type="checkbox"/>	\$0.00	Entered	WACIC (entry date and time)
		<input type="checkbox"/>	
		Cleared	WACIC (entry date and time)
		<input type="checkbox"/>	
		Status	Status date



SEATTLE
POLICE
DEPARTMENT

SUPPLEMENTAL REPORT

GENERAL OFFENSE # 08-182330
RELATED EVENT# R-08-092

Submitted by Detective Michael P. Magan	Serial# 5094	Unit# B717R	Date 05-21-08	Time 1100
Type of Offense Robbery, Armed			Date of Incident 05-21-08	
Originally Reported As Robbery	Location of Incident 414 NE 42nd Street Seattle			
Victim KASPERS, Nicholas A.	Address 414 NE 42nd Street Seattle		Phone (206) 403-7058	
Clearance Block: Cleared (Arrest-Unfounded-Referral Juvenile Court-Exceptional Clearance); At Large Warrant ; ETC.				
Arrest				
Approved By			Serial	Date

D/C This Master Case also includes SPD # 08-184137

D/C Index as Verified Suspect # 1:

**ADAMS, Anthony P.
129 Bloomington Street # 503
Bremerton, WA.
(206) 548-6685
BM 02-14-88
6'-00, 190 lbs: Blk. Brn. Med. Med.
B of A # 208079651
CCN # 1827983
PCN # 214045613
FBI # 110488KB0
Cause # 08C049368
Referral # 2080523011
Bail \$ 500,000.00**

D/C. Charge(s): Charged in King County Superior Court with Two Counts of Robbery in the First Degree, RCW 9A.56.210. Bail \$ 500,000.00.

I certify (declare) under penalty of perjury under the laws of the State of Washington that this report is true and correct to the best of my knowledge and belief (RCW 9A.72.085)				
Officer Submitting Report	Serial #	Unit#	Date Signed	Seattle WA Place Signed



SEATTLE
POLICE
DEPARTMENT

**CONTINUATION SHEET
SUPPLEMENTAL**

SUBMITTED BY: DETECTIVE **MICHAEL P.
MAGAN B717R**

GENERAL OFFENSE # 08-182330
RELATED EVENT#

D/C Index as Verified Suspect # 2

**CONNER, LaJuanta LeVear
3439 Spruce Place # H
Bremerton, WA. 98310
(623) 628-6577
BM 04-22-89
5'-09" 145 lbs: Blk. Brn. Med. Med.
B of A # 208020730
CCN # 1855702
PCN #
FBI # 570200VC9
Cause # 08C049376
Referral # 2080523011
Bail \$ 100,000.00**

**D/C Charged in King County Superior Court with One Count of Robbery in the First Degree, RCW
9A.56.210. Bail \$ 100,000.00.**



SEATTLE
POLICE
DEPARTMENT

CONTINUATION SHEET
SUPPLEMENTAL

SUBMITTED BY: DETECTIVE **MICHAEL P. MAGAN** B717R

GENERAL OFFENSE # 08-182330
RELATED EVENT#

D/C Index as Verified Suspect # 3:

WILLIAMS, Jermario Montez
3413 # D Spruce Avenue
Bremerton, WA. 98310
BM 01-24-90
5'-03" 192 lbs: Blk. Brn. Med. Med.
B of A #
CCN #
PCN #
FBI # 556265KC9
Cause #
Referral #
Bail \$

D/C Not Charged.



**CONTINUATION SHEET
SUPPLEMENTAL**

GENERAL OFFENSE # 08-182330
RELATED EVENT#

SUBMITTED BY: DETECTIVE **MICHAEL P. MAGAN** B717R

1 05-21-08, 0530 hrs: Received a telephone call from Detective Sergeant **Kevin ARATANI**, Seattle Police Department (SPD) Robbery Unit and was informed that there had been a home invasion robbery at 414 NE 42nd Street in Seattle and that my presence was requested at the scene.

2 05-21-08, 0630 hrs: Arrived at 414 NE 42nd Street and was briefed by Officer **M. BODY #4746** from the SPD North Precinct. **BODY** informed me that the suspect(s) made entry through a kitchen door located on the northeast corner of the residence. The suspect(s) broke a pane of glass, reached in an unlocked the door and made entry.

The suspect(s), after entering, walked up stairs entered victim **KASPERS, Nicholas A. WM 10-19-87**, bedroom, placed pistols at his head and demanded cash and Marijuana. A struggle ensued between **KASPERS** and what **KASPERS** describes as two black males. The suspects forced **KASPERS** to give them his wallet that contained cash, approximately \$280.00 cash, credit cards and identification. The suspect(s) then ran out of the bedroom and are believed to have exited out the same door they entered.

The suspects were described as two black males with a very generic description. It was unknown of the suspects were wearing masks and or gloves.

BODY told me that there were to other people in the residence, sleeping and the were not aware of the robbery until **KASPERS** started to yell for assistance,

BODY identified the two witnesses as **THOMAS, Franklin G. WM 03-16-88**, (206) 250-1503 and **SIEGLER, Samantha L. WF 09-22-87**. 115 39th Avenue East Seattle, WA. 98112 (206) 669-6341.

Neither **THOMAS** nor **SEIGLER** were injured or could identify any of the suspect(s) in this incident.

Upon entering the residence, I met with **KASPERS**, introduced myself and explained the purpose of my presence.

KASPERS told me that he was not injured in this incident and said that he believes that he knows who one of the suspects is.

KASPERS was asked to walk me through the residence and tell me specifically what occurred.

KASPERS took me to the northeast corner of the two-story residence and showed me a kitchen door that was a solid core door that had one piece of small glass above the doorknob that was broken. The glass was on the floor of the kitchen, indicating that the glass was broken from the outside and shattered inward. The door is an outward swing and was approximately open eight-teen inches. **KASPERS** said that the door had been locked with both a lock on the doorknob and a door chain.

KASPERS took me upstairs to a landing where there were three bedrooms and one bathroom. **KASPERS** bedroom was the last door on the west wall, facing east.



CONTINUATION SHEET
SUPPLEMENTAL

SUBMITTED BY: DETECTIVE MICHAEL P.
MAGAN B717R

GENERAL OFFENSE # 08-182330
RELATED EVENT#

Upon entering **KASPERS** bedroom, I found the room to be literally torn apart. The bed pulled from the north wall to the middle of the room. Clothing thrown about the floor, with the bedding (sheets, pillows and down comforter) lying on the floor in the middle of the room as well.

I specifically noted the there was an unordinary amount of down feathers all over the room.

KASPERS sat down on the bed and proceeded to tell me that in late April of 2008, date and day of the week unknown, when **Matthew RALKOWSKI**, a roommate of **KASPERS** made arrangements to sell a quarter pound of Marijuana to a suspect identified only as "**Infamous**." ("**Infamous**" is described as a black male, approximately twenty years of age, 6'-00" 190 lbs: and lives in Bremerton Washington. **RALKOWSKI** has known "**Infamous**" for approximately five years and had purchased narcotics from him in the past.) **RALKOWSKI** allowed "**Infamous**" to come to his residence, 414 NE 42nd Street in Seattle to look at the Marijuana. **KASPERS** said that this was strictly forbidden. **KASPERS** who professed to be a small-time Marijuana salesman, discussed this was **RALKOWSKI** and neither were to make transactions in their residence because they feared being robbed. **KASPERS** said that he was at the residence when "**Infamous**" came to the residence to buy the quarter pound of Marijuana. After "**Infamous**" looked at the Marijuana, he decided to not buy the quarter pound of Marijuana because it was not "good quality" and left the residence. **KASPERS** said that "**Infamous**" was with three other black males.

Approximately one week later, date and day of the week unknown, **RALKOWSKI** obtained a quarter pound of Marijuana that was better quality and made arrangements via cellular telephone, to sell a quarter pound of Marijuana to "**Infamous**" for \$1300.00 cash. **KASPERS** said that he became suspicious of the transaction because the price of the Marijuana was four to five hundred dollars higher than the average price for a quarter pound of Marijuana. **KASPERS** said that "**Infamous**" requested that **RALKOWSKI** come to his residence in Bremerton, Washington to make the transaction. **RALKOWSKI** drove to Bremerton, Washington to make the transaction, but prior to making the transaction, was stopped by police officers on the grounds of a low-income residence, address unknown. **RALKOWSKI** managed to hide the Marijuana prior to the contact by officers and was eventually requested to leave the grounds of the low-income residence. **RALKOWSKI** later returned to the area of where he sloughed the Marijuana he found the shoebox that once contained the Marijuana, but found that the shoebox no longer contained the Marijuana.

On Thursday, 05-08-08, between 1300 hrs: and 1600 hrs: **KASPERS** said that **RALKOWSKI** was at his residence, 414 NE 42nd Street in Seattle when they had just finished counting approximately \$1000.00 cash. **KASPERS** said that after counting the cash, he left and went to a nearby store to buy a cigar. Upon returning home, **KASPERS** said that he found "**Infamous**" and three other black males suspects whose identity is unknown at this time, dressed in all black clothing at the front door of the residence talking with **RALKOWSKI**. While **RALKOWSKI** was standing on the porch, **KASPERS** opened the front door and entered the residence. Upon doing so, "**Infamous**" and the three other suspects pushed there way into the residence and pulled pistols, shotguns and assault rifles on **RALKOWSKI** and **KASPERS**, demanding their Marijuana and cash. **RALKOWSKI** and **KASPERS**, fearing for their lives, complied and gave "**Infamous**" and the three other suspects the \$1000.00 cash, US currency and a large quantity of Marijuana. While "**Infamous**" held **RALKOWSKI** and **KASPERS** at gunpoint, the three other suspects ransacked the residence, taking clothing, a laptop computer and tennis shoes. During the robbery, a friend of **RALKOWSKI'S**, identified only as "**Eddie**" walked into the residence and he



GENERAL OFFENSE # 08-182330
RELATED EVENT#

too was held at gunpoint during the robbery. **"Infamous"** and the three other suspects fled the residence after gathering the items they wanted.

RALKOWSKI and **KASPERS** decided not to report the robbery to police because narcotics were involved.

RALKOWSKI, fearing for his life, moved out of the residence, leaving all of his personal belongings in his room at the residence. **KASPERS** said that he has not had any contact with **RALKOWSKI**, but believes that he is staying at his girlfriend's residence in North Seattle.

KASPERS then proceeded to tell me that in the incident that occurred on this date, Wednesday, 05-21-08, at approximately 0445 hrs: **KASPERS** said that he was sleeping (on his back) in his bed when two armed black males awakened him. The black male's placed their pistols at **KASPERS** head and demanded **KASPERS** "Cash and Marijuana." A struggle ensued between the two suspects and **KASPERS**. **KASPERS** said that he attempted to take hold of the pistol with his hands and push it away, but his down comforter became tangled up in his hands making it difficult to fight off the suspects.

During the struggle **KASPERS** could see that one of the suspects was **"Infamous"** the same suspect who robbed he and **RALKOWSKI** on Thursday, 05-08-08. The suspects took **KASPERS** wallet that contained \$280.00 cash, US currency, and his identity and credit cards and fled out a main floor kitchen door. **KASPERS** said that after the suspects ran from his bedroom, he pushed the bed over to the door and attempted to barricade himself in the bedroom. After believing that the two suspects left, he ran out into the hallway and yelled to **THOMAS** to telephone the police because he had just been robbed.

KASPERS said that he thought that he was not injured during the struggle with the suspects, but he showed me what appeared to be stippling marks on both forearms. See attached photographs.

KASPERS said that the red mark(s), that's dried blood, were not on his arms when he went to bed the evening before.

KASPERS was asked about the condition of his bedroom prior to the incident and **KASPERS** said that he is not a good house-keeper and usually has clothes on the floor, but could not explain where all of the down feathers were coming from.

Upon further examination of his down comforter, I found a small hole with a black powder burn around the hole. This appeared to be an entrance hole. Upon turning the comforter over, I found directly opposite of the entry hole, and exit hole.

KASPER said that his bed was on the north wall of the room when the suspects came into the room and the struggle began.

Upon searching the north wall of the room, I located what appeared to be a small caliber bullet hole on the north wall, approximately ten inches above the floor. The hole appeared to be fresh with particles of plaster on the floor. This was an entry hole and it appeared to be from a downward angle. **KASPERS** was shown the hole and said that the hole was not in the wall a few weeks prior to this incident. **KASPERS** said that he painted the walls and would have seen the hole then.



CONTINUATION SHEET
SUPPLEMENTAL

SUBMITTED BY: DETECTIVE MICHAEL P.
MAGAN B717R

GENERAL OFFENSE # 08-182330
RELATED EVENT#

At that point, I had **KASPERS** exit the room and notified **ARATANI** of what I found and requested the Crime Scene Investigations (CSI) Unit respond to process the scene.

- 3 **05-21-08, 0728 hrs:** Took a tape-recorded statement from **KASPERS** regarding this incident. See statement for details.

- 4 **05-21-08, 0815 hrs:** Spoke with **THOMAS** and was informed that I could locate **RALKOWSKI'S** girlfriend at Seattle Sun Tan at University Village. **THOMAS** said that **RALKOWSKI'S** girlfriends name is **Armani BROOKS**.

- 5 **05-21-08, 0830 hrs:** CSI processed the scene and attempted to locate the round that was shot into the wall, but could not do so. The scene was photographed.

- 6 **05-21-08, 1030 hrs:** Drove to Seattle Sun at University Village and learned that **BRROKS** was not at work.

- 7 **05-21-08, 1100 hrs:** Drove to **BROOKS** residence 9703 Wallingford Avenue N. and located **RALKOWSKI**. After I identified myself and explained the circumstances **RALKOWSKI** said that he is fearful for his life and said that he would cooperate in the investigation.

- RALKOWSKI** was transported to the SPD Robbery Office and provided a tape-recorded statement as to the case on Thursday, 05-08-08. **RALKOWSKI** provided me with the cellular telephone number for "*Infamous*" (206) 548-6685. See statement for details.

- 8 **05-21-08, 1345 hrs:** Received an anonymous tip from a male caller identifying "*Infamous*" as "*Anthony Adams*" and that he lives in Bremerton, Washington.

- 9 **05-21-08, 1350 hrs:** Completed a records check via the SPD database and located a possible suspect, identified as **ADAMS, Anthony P. BM 02-14-88**. A booking photograph was also obtained and shown to **RALKOWSKI**. **RALKOWSKI** identified **ADAMS** as "*Infamous*."

- 10 **05-21-08, 1400 hrs:** Prepared photomontage # 61266 with **ADAMS** photograph in position # 5.

- 11 **05-21-08, 1430 hrs:** Telephoned Washington State Department of Corrections (DOC) Officer **Marcus MILLER** (360) 415-5648 and was informed that **ADAMS** is currently living at 129 Blooming Street # 503 in Bremerton, Washington. **ADAMS** is currently living with his mother, who recently reported him for possessing a firearms and using narcotics. **MILLER** said that he conducted a search of the residence on Wednesday, 05-21-08, at approximately 1145 hrs: but did not locate any narcotics and or firearms. **ADAMS** was not present during the search of the residence.

- 12 **05-21-08, 1455 hrs:** Telephoned **KASPERS** (206) 403-7058 and made arrangements to meet him at his residence at 1600 hrs: this date.

- 13 **05-21-08, 1545 hrs:** Received a telephone call from **KASPERS** and was informed that he had returned home and was cleaning his bedroom and located one spent shell casing under his bed, inside of some clothing. I instructed **KASPERS** to place the shell casing in an envelope and that I would be at his residence at 1600 hrs.



GENERAL OFFENSE # 08-182330
RELATED EVENT#

SUBMITTED BY: DETECTIVE **MICHAEL P. MAGAN B717R**

- 14 **05-21-08, 1555 hrs:** Arrived at **KASPERS** residence and was provided the spent shell casing and found it to be a .380 caliber.

Advised **KASPERS** of the montage admonition and showed him photomontage # 61266 and **KASPERS** identified **ADAMS** as the suspect in both armed robberies.
- 15 **05-21-08, 1800 hrs:** Prepared an affidavit for a search and arrest warrant for **ADAMS** residence and **ADAMS**. See attached affidavit and warrant.
- 16 **05-22-08, 0700 hrs:** Telephoned Deputy King County Prosecutor **Corin BOHN** and asked her to review my affidavit for search and arrest of **ADAMS**. I e-mailed a copy of the affidavit to search and arrest.
- 17 **05-22-08, 0820 hrs:** Arrived at Judge **Cheryl CAREY'S** chambers at the King County Court House and the affidavit for search and arrest reviewed and approved.
- 18 **05-22-08, 0900 hrs:** Telephoned Bremerton Police Department (BPD) (360) 478-5228 and made arrangements with the investigations unit to have both Detective and officers present during the search of **ADAMS** residence.
- 19 **05-22-08, 1030 hrs:** Executed the search warrant as **ADAMS** residence, 129 Blooming Street # 503 in Bremerton, Washington.

ADAMS was taken into custody without incident. Also present at the time of his arrest was his mother, identified as **CORLEONE, Cherry C. BF 07-18-47**, and **JOHNSON, Joyia L. BF 09-16-85**. **JOHNSON** is to be **ADAMS** girlfriend. She lives at 2987 Lowren Loop Bremerton, WA. 98377. Cellular telephone # (206) 851-4784.

JOHNSON had a vehicle, **WA: 754-XTK** parked at the residence. **JOHNSON** gave Detective's permission via Consent to Search to search her vehicle. No evidence was located. **JOHNSON** was provided a business card and asked to call if she had any information and or questions. **JOHNSON** was released from the scene.

ADAMS was advised of Miranda, via and explanation of rights form, which he stated that he understood all of the right's advised and did not request a lawyer. **ADAMS** was explained in full detail all of the facts of this case. **ADAMS** told me "You have the wrong guy, I did not do any robbery."

A subsequent search of 129 Bloomington Street # 503 occurred. The only item recovered was **ADAMS** cellular telephone.

CORLEONE, during the search of the residence, told me that there was a vehicle parked at the rear of the apartment complex **WA. 856-XTK**, a 1982 Chevrolet Impala, 4-door, gold colored that was being driven by **ADAMS**. **ADAMS** has been driving the vehicle for the past couple of weeks. **CORLEONE** said that she does not know how **ADAMS** came into possession of the vehicle or whom it registered to, but know specifically that he has been driving the vehicle everyday.



GENERAL OFFENSE # 08-182330
RELATED EVENT#

SUBMITTED BY: DETECTIVE MICHAEL P.
MAGAN B717R

ADAMS was questioned about the vehicle, but denied ever seeing the vehicle and or driving the vehicle. When it was determined that the vehicle had a report of sale to CONNER, it was determined that we would impound the vehicle. Once ADAMS was informed about this, ADAMS quickly changed his mind and stated, "Man, that's my cousin car. He parks it here because ha can't park it at his place."

The vehicle was impounded to the BPD holding facility.

ADAMS was transported to the SPD Robbery Office by AAKERVIK and myself.

20 05-22-08, 1420 hrs: Entered the interview room with AAKERVIK where ADAMS was seated. ADAMS was explained for the second time all of the facts of this case. ADAMS told both AAKERVICK and me that he would tell us in detail what really happened and wanted us to know that no firearms were used, or not used by him.

ADAMS was re-advised of Miranda, via an explanation of rights form. ADAMS signed the acknowledgement and the waiver and did not request the presence of a lawyer.

ADAMS then confessed to committing the robbery on Thursday, 05-08-08, with three others who were identified as:

- 1) CONNER, LuJuanta L. BM 04-22-89, cellular telephone # (623) 628-6577
- 2) CREEKMORE, Davone M. BM 04-18-90, cellular telephone (360) 550-6590
- 3) "Detroit or Mario" BM 20, cellular telephone # (313) 405-2350

ADAMS was adamant that he was not at the second robbery, but eluded to the fact that he gave RALKOWSKI'S telephone number to his cousin (CONNER) to buy weed and does not know if he robbed RALKOWSKI.

ADAMS also confessed to going by the name "Infamous" and his cellular telephone # (206) 548-6685.

See statement for details.

21 05-22-08, 1615 hrs: ADAMS was booked into the King County Jail for Investigation of Robbery.

22 05-23-08, 1030 hrs: Telephoned KASPERS (206) 403-7058 and asked if he could identify any of the other suspects from the first robbery on Thursday, 05-08-08, if he saw them again. KASPERS said he could.

23 05-23-08, 1035 hrs: Telephoned RALKOWSKI (206) 380-6458 and asked if he could identify any of the other suspects from the first robbery on Thursday, 05-08-08, if he saw them again. RALKOWSKI said that he could not.

24 05-23-08, 1100 hrs: Prepared two independent sequential photomontages of CONNER and CREEKMORE.



CONTINUATION SHEET
SUPPLEMENTAL

GENERAL OFFENSE # 08-182330
RELATED EVENT#

SUBMITTED BY: DETECTIVE **MICHAEL P. MAGAN B717R**

- 25 **05-23-08, 1230 hrs:** Telephoned **KASPERS** (206) 403-7058 and made arrangements to meet him at the SPD Robbery Office at 1400 hrs: this date.
- 26 **05-23-08, 1410 hrs:** **KASPERS** arrived at the SPD Robbery Office and was advised of the montage admonition shown the sequential photomontage that contained **CONNERS** photograph. **KASPERS** identified **CONNERS** as a suspect in the armed robbery on Thursday, 05-08-08.
- 27 **05-23-08, 1430 hrs:** **KASPERS** was re-advised of the montage admonition and shown the sequential photomontage that contained **CREEKMORES** photograph and could not make any identification because of the photographs used in the montage.
- 28 **05-25-08, 1350 hrs:** Obtained **CONNERS** criminal history via the SPD database and reviewed the same.
- 29 **05-25-08, 1400 hrs:** SPD case # 08-184137 is now assigned to the armed robbery on Thursday, 05-08-08.
- 30 **05-27-08, 0900 hrs:** Prepared case for filing with the King County Prosecutors Office.
- 31 **05-27-08, 1300 hrs:** Telephoned Detective **Rod HARKER**, Bremerton Police Department (253) 473-5483 and requested a records check on "**Mario**" a black male, 18 to 20 years of age, who was arrested in the past six months. "**Mario**" is to be short and heavyset. **HARKER** said that he would check the Bremerton Police Department database and contact me if he obtains a name.
- 32 **05-27-08, 1315 hrs:** Received a telephone call from **HARKER** and was informed that "**Mario**" is **WILLIAMS**, Jermario Montez BM 01-24-90. **HARKER** said that he would e-mail me photograph of **Williams**.
- 33 **05-27-08, 1350 hrs:** Received **HARKERS** e-mail and reviewed the same. The photograph of **WILLIAMS** is dated 02-18-08.
- 34 **05-27-08, 1530 hrs:** Telephoned **KASPERS** (206) 403-7058 and left a message for him to telephone me at the SPD Robbery Office.
- 35 **05-28-08, 1030 hrs:** Received a telephone call from **KASPERS** and made arrangements to have him come to the SPD Robbery Office to view a photomontage on Thursday, 05-29-08, at 0930 hrs.
- 36 **05-29-08, 0830 hrs:** Prepared a sequential photomontage using **WILLIAMS** photograph.
- 37 **05-29-08, 0930 hrs:** **KASPERS** arrived at the SPD Robbery Office and he was advised of the photomontage admonition. **KASPERS** was then shown the sequential photomontage. **KASPERS** immediately identified **WILLIAMS** as one of the suspects from the Thursday, 05-08-08.
- 38 **06-25-08, 1500 hrs:** Prepared case (# 08-184137) for filing on **WILLIAMS** with the King County Prosecutors Office.
- 39 **06-25-08, 1500 hrs:** **ADAMS** was charged in King County Superior Court with Two Counts of Robbery in the First Degree, RCW 9A.56.210. Bail \$ 500,000.00.



SEATTLE
POLICE
DEPARTMENT

**CONTINUATION SHEET
SUPPLEMENTAL**

SUBMITTED BY: DETECTIVE *MICHAEL P.
MAGAN B717R*

GENERAL OFFENSE # 08-182330
RELATED EVENT#

CONNERS was charged in King County Superior Court with One Count of Robbery in the First Degree, RCW 9A.56.210. Bail \$ 100,000.00.

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

January 07, 2019 - 9:43 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52172-5
Appellate Court Case Title: In re the Personal Restraint Petition of La'Juanta Le'Vear Conner
Superior Court Case Number: 11-1-00435-8

The following documents have been uploaded:

- 521725_Briefs_20190107094140D2459003_0822.pdf
This File Contains:
Briefs - Respondents
The Original File Name was LaJuanta Conner 20190107.pdf

A copy of the uploaded files will be sent to:

- corey@coreyevanparkerlaw.com
- kcpa@co.kitsap.wa.us

Comments:

Sender Name: Elizabeth Allen - Email: erallen@co.kitsap.wa.us

Filing on Behalf of: Randall Avery Sutton - Email: rsutton@co.kitsap.wa.us (Alternate Email:)

Address:
614 Division Street, MS-35
Port Orchard, WA, 98366
Phone: (360) 337-7171

Note: The Filing Id is 20190107094140D2459003