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Division II
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NO. 52481-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ADRIAN BROUSSARD, APPELLANT

Appeal from the Superior Court of Pierce County

No. 16-1-03551-7

Brief of Respondent

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I. COUNTERSTATEMENT OF THE ISSUES.

1. Whether Mr. Broussard's claim that the trial court erred in not allowing his counsel to withdraw is without merit when the trial court properly found that any breakdown was caused by Mr. Broussard's own refusal to speak with his attorney and when under Washington law a defendant is not entitled to a reassignment of counsel on the basis of a breakdown in communications which is caused by the defendant's refusal to communicate with his attorney?

2. Whether Mr. Broussard's claim that the trial court abused its discretion in denying his motion to sever is without merit when the record shows that the trial court acted well within its broad discretion in denying the motion and when Mr. Broussard has failed to show any specific prejudice from the trial court's ruling as required under the law?

3. Whether the trial court abused its discretion in admitting evidence of Mr. James' crimes when there was substantial evidence that the actions of Mr. Broussard and Mr. James were intertwined and when the actions of Mr. James were highly probative of Mr. Broussard's knowledge, especially given that Mr. Broussard was charged with committing the financial crimes as either a principal or an accomplice?

4. Whether the Mr. Broussard's claim of ineffective assistance of counsel is without merit when he has failed to show either deficient performance or prejudice?

5. Whether Mr. Broussard's claim of insufficient evidence is without merit when, viewing the evidence in a light most favorable to the State, a rational finder of fact could have found that the elements of the charged offenses were proven beyond a reasonable doubt?

II. STATEMENT OF THE CASE.

A. PROCEDURAL HISTORY

The Appellant, Adrian Broussard, was charged with Theft in the First Degree, Forgery, Attempting to Elude a Pursuing Police Vehicle, two counts of Unlawful Possession of a Controlled Substance with Intent to Deliver, and one count of Possession of a Controlled Substance. CP 9-11. The trial judge dismissed the eluding charge for a lack of sufficient evidence. CP 180; RP 1195-96.¹ Following a jury trial, the Defendant was found guilty of the remaining offenses, and the trial court then imposed a standard range sentence. CP 103-09, 178-82. This appeal followed.

¹ The transcripts in this case consist of a number of volumes from pre-trial hearings as well as a sentencing hearing held on May 24, 2018 that are each individually paginated. Those volumes from 9/08/17 through 02/02/18 and from 5/24/18 will be cited with the respective date of the hearing noted in the following format: "RP (09/08/17) 3." The transcripts from the actual trial consist of nine volumes which are consecutively paginated. Citations to the record from those nine trial volumes will be in the following format: "RP 213" with no date listed.

B. FACTS

Mr. Broussard is the half-brother of Derek James and Anthony Smith, both of whom were co-defendants with Mr. Broussard in the court below. RP 461. The three cases were joined for trial, but prior to trial Mr. James entered a guilty plea. RP (01/23/18) 7. Mr. Broussard's and Mr. Smith's cases were tried together, beginning on April 23, 2018.

The evidence at trial generally showed that Mr. James², Mr. Broussard, and Mr. Smith were involved in number of fraudulent transactions involving auto loans obtained from a number of credit unions. The typical pattern was that one of the individuals would go to a credit union and obtain a loan for him to purchase a car from one of a number of fictitious auto dealer businesses that Mr. Broussard, Mr. Smith, and Mr. James had created. The credit union would then issue a check made payable to one of the fake auto businesses and the check would list whichever person applied for the loan applicant as the "remitter" (the person who requested the loan and on whose behalf the check was issued). RP 634. The check would then

² Prior to the beginning of testimony, the defendants objected to the admission of the evidence relating to Mr. James and his activities, arguing that there was no connection between the actions of Mr. James and the actions of the defendants, and this issue was briefly discussed as part of the motions in limine. RP 138-41. The trial court reserved a final ruling on this issue and indicated that it would conditionally admit evidence (conditioned on the State connecting this evidence with the defendant and the charged offenses), and then revisit the issue once the court had a better sense of the relationship of this evidence to Mr. Broussard and Mr. Smith. *See, e.g.*, RP 474-75, 488, 502.

be deposited by Mr. Smith, Mr. Broussard, or Mr. James into a business account for the one of the fictitious auto dealer businesses. In short, the defendants set up a number of fake auto dealer businesses, took out auto loans at a number of banks for fictitious auto purchases, and the deposited those loan proceeds into the bank accounts of their fake auto dealer businesses.

The Three Auto Dealer Businesses are Registered with the Secretary of State and Bank Accounts are Opened in Their Name.

Specifically, the evidence at trial showed that on April 12, 2016, Mr. James registered a business named “Fast Lane Autos” with the Secretary of State. RP 627-29. That very same day, Mr. Broussard registered a business named “Brown Bear Auto” with the Secretary of State’s office. RP 668, 674. On June 17, 2016 Mr. Smith registered a business named “A.J. Motors” with the Secretary of State. RP 658.

Mr. Broussard, Mr. James, and Mr. Smith also each opened up business banking accounts for their businesses. Specifically, on March 30, 2016, Mr. Broussard opened two accounts at Wells Fargo (accounts ending in numbers 9814 and 7116). RP 580-586. Surveillance footage from Wells Fargo confirmed that Mr. Broussard was indeed the person who opened the two accounts on March 30. RP 583-85.

On May 7, 2016 Mr. James opened an account at US Bank under the name of Derek James d/b/a Fast Lane Auto. RP 799-800, 812, 816. Surveillance footage from the bank on May 7th shows Mr. James at the counter and the footage also showed that with Mr. Broussard was standing with him. RP 810-813.

On June 3, 2016 Mr. James opened two account at Wells Fargo for Fast Lane Autos (accounts ending in numbers 7391 and 2281). RP 546.

On June 23, 2016 Mr. Smith opened two accounts for A.J. Motors Wells Fargo (account ending in numbers 3271 and 3685). RP 455, 574-79, 659-660. On July 1, 2016 Mr. Smith opened a second account for A.J. Motors at Wells Fargo (account ending in numbers 3685). RP 575-579.

Specific Transactions Involving Fraudulent Auto Loans

Harborstone Credit Union - May 6, 2016

On May 6, 2016 Mr. James went to the Fife branch of Harborstone Credit Union and applied for an auto loan to purchase a Chevy vehicle from Fast Lane Autos. RP 529-31, 630-31, 639. In filing out the application Mr. James used a social security number that belonged to a 13 year old who lived in Nebraska. RP 458, 531, 631-32. Surveillance footage of this transaction showed that it was Derek James who applied for and obtained this loan. RP 529, 634. Harborstone then issued a check in the amount of

\$11,500 on that same day (May 6th) made payable to Fast Lane Autos with the remitter named as Derek James. RP 633-35. The check was ultimately deposited into the US Bank account, discussed above, that Mr. James opened soon after the Harborstone check was issued. RP 635, 810-13.

TwinStar Credit Union - June 10, 2016

On June 10, 2016, Mr. James went to a branch of TwinStar Credit Union in the Parkland/Spanaway area and applied for an auto loan to purchase a Kia vehicle from Fast Lane Autos. RP 636, 638-40, 643. In filing out the application Mr. James used a social security number that belonged to a 10 year old who lived in Kentucky. RP 457, 638. Surveillance footage of this transaction showed that it was Mr. James who applied for and obtained this loan. RP 499-500.

TwinStar Credit Union then issued a check in the amount of \$15,340 made payable to Fast Lane Autos with the remitter named as Derek James. RP 640-41. On June 14, 2016, the TwinStar check was deposited via a Wells Fargo ATM machine in Tacoma into the Wells Fargo account of Fast Lane Autos. RP 562, 564-65, 641. Surveillance footage of this ATM deposit showed that it was Derek James who made the ATM deposit. RP 641-42. The following day Mr. James made three cash withdrawals from the Wells Fargo account in the amounts of \$3,500, \$5,000, and \$9,500. RP 642, 643.

Investigation showed that Mr. James never purchased the Kia vehicle. RP 643.

TAPCO Credit Union - June 10, 2016

On June 10, 2016 (the same day as the TwinStar transaction detailed above), the Appellant, Mr. Broussard, went to a Tacoma branch of TAPCO Credit Union and applied for an auto loan to purchase a 2012 Chrysler vehicle from Fast Lane Autos. RP 643-44. In filing out the application Mr. Broussard used an invalid social security number that an agent of the Social Security Administration testified had never actually been assigned to any person. RP 461, 644. Surveillance footage showed that it was Mr. Broussard who applied for and obtained this loan. RP 791-94. TAPCO Credit Union then issued a check in the amount of \$ 13,400 on that same day (June 10, 2016) made payable to Fast Lane Autos. RP 643-44. Later that same day the TAPCO check was deposited into the Fast Lane Autos account at Wells Fargo by Derek James (a fact that was demonstrated through surveillance footage). RP 652-53. Investigation showed that Mr. Broussard never purchased the Chrysler vehicle. RP 650.

Verity Credit Union - June 21, 2016

On June 21, 2016 Mr. James obtained an auto loan from a Seattle branch of Verity Credit Union purportedly for the purpose of purchasing a

2012 Chrysler from Fast Lane Autos. RP 653-56. In filing out the application Mr. James used a social security number that belonged to a 10 year old who was born in Indiana and who appeared to now live in Ohio. RP 457, 654-55. Surveillance footage of this transaction showed that it was Mr. James who applied for, and obtained, this loan. RP 473, 654 . Verity Credit Union then issued a check in the amount of \$16,340 made payable to Fast Lane Autos with the remitter named as Derek James. RP 565, 654. The check was ultimately deposited that same day, June 21, into the Fast Lane Autos account at Wells Fargo. RP 562, 565, 655-56. The deposit was made by Mr. James via an ATM in Renton (a fact that was demonstrated through surveillance footage). RP 656-57. Investigation showed that Mr. James never purchased the Chrysler vehicle. RP 655.

Inspirus Credit Union - June 24, 2016

On June 24, 2016 Mr. James went to Inspirus Credit Union and applied for an auto loan to purchase a 2013 Cadillac vehicle from A.J. Motors. RP 657-58. Surveillance footage of this transaction showed that it was Mr. James who applied for, and obtained, this loan. RP 488, 683. Inspirus Credit Union then issued a check in the amount of \$14,840 on June 28th, made payable to A.J. Motors (with the remitter listed as Derek James). RP 588, 659, 664. Investigation showed that Mr. James never purchased the Cadillac vehicle. RP 658.

The Inspirus check was ultimately deposited on June 29th into the Wells Fargo account of A.J. Motors that Mr. Smith had just opened a few days earlier. RP 568, 574, 588, 660, 685. The deposit was made via an ATM at the Tacoma Mall branch of Wells Fargo, and although surveillance footage of the deposit was admitted at trial, the footage was of such poor quality that the person making the actual deposit could not be definitively identified. RP 571, 660-62.

Two days later, on July 1, 2016, Mr. Smith opened a second account for A.J. Motors at Wells Fargo (account ending in numbers 3685). RP 575-579, 665. That same day Mr. Smith (identified via surveillance footage) transferred the proceeds from the Inspirus Credit Union loan from the old account (ending in numbers 3271) into the brand new A.J. Motors account at Wells Fargo (ending in number 3685). RP 579, 666-67. On July 11, 2016 Mr. Smith (identified through surveillance footage) made two cash withdrawals (in the amounts of \$5,000 and \$9,800) from the new account. RP 666-67. Bank account statements showed that the only funds in the new account (and the only deposit that had ever been made into the account) was the transfer of the \$14,840 in loan proceeds from the Inspirus loan. RP 667.

Tacoma Police Detective Elizabeth Schieferdecker complied much of the evidence outlined above, and after she had completed her

investigation of the above listed transactions, she prepared a “bulletin” or law enforcement “alert” to notify other law enforcement officers about the investigation. RP 674-75.

The Trial Court’s Ruling Regarding the Admissibility of
the Evidence Relating to Mr. James’s Actions.

Prior to the beginning of testimony the defendants objected to the admission of the evidence relating to Mr. James and his activities, and this issue was briefly discussed as part of the motions in limine. RP 138-41.

The issue then arose again when the State sought to admit the first of the banking records at trial. RP 474. Specifically, Mr. Broussard’s counsel objected to the relevance of the documents relating solely to Mr. James. RP 474. The trial court overruled the objection “on the condition that further testimony in this case establishes a connections with these particular defendants, so these exhibits are admitted on the condition that that connection be made later in the case.” RP 474-75. The trial court then continued to “conditionally” admit the evidence relating to Mr. James throughout the trial. See, e.g., RP 488, 502, 534-35, etc.

Ultimately, the trial court gave its ruling regarding the conditionally admitted evidence on May 8, 2018. RP 939-51. The trial court began by acknowledging that the defendants had made ongoing objections to the

evidence relating to Mr. James and that the defense argument was that this evidence pertained only to Mr. James and should not be admitted at trial. RP 939-40. The trial court further explained that it had held off in making a final decision on the evidence due to the complexity of the case, and that the court wanted to see how the evidence unfolded in order to get a “clearer overall picture.” RP 940.

The trial court then gave a detailed and thorough oral ruling on the issue. RP 941-51. The trial court began by noting that in the charging documents the State alleged that Mr. Broussard and Mr. Smith committed the various financial crimes as either a principal or an accomplice. RP 941. This was important in the trial court’s view, because under an accomplice liability theory the State had to prove that the defendant had knowledge that their act promoted or facilitated a crime. RP 941. The court further explained that such knowledge could be proven in several ways, including through evidence of direct participation by the defendants. RP 942. The court noted, however, that a second way to prove knowledge was for the State to show that the defendants were active participants in a larger, overarching, ongoing criminal scheme. RP 943. The court then explained that,

[I]f the circumstantial evidence and the reasonable inferences that may be taken from the evidence shows that the defendants knew about and willingly participated in Mr.

James' overall criminal scheme, then, in my view, this would have a strong tendency to prove that they had knowledge of particular crimes that are part of the overall scheme, specifically the crimes that they're accused of participating in. So if a person knows about and is engaged in the whole, then logically that helps prove that they're knowingly involved in constituent parts of the whole.

RP 943. The trial court then went through the evidence that tended to show that Mr. Broussard and Mr. Smith had knowledge of, and participated in a larger scheme. First, the court noted that each of the brothers formed auto sales companies and registered them with the Secretary of State, and that Mr. Broussard and Mr. James had registered their companies on the exact same date. RP 945. It was thus, reasonable, according to the court to infer that this was not merely coincidental, but rather showed that the three men had communicated about the scheme and planned their actions together. RP 945.

In addition, the court noted that each of the brothers had utilized social security number that were not their own during the transactions, and that this commonality was again circumstantial evidence showing knowledge and planning on the part of the three brothers. RP 945. Next, each of the brothers was involved to some degree with the loan applications (although Mr. James participated more than the other two) and this further demonstrated that each man knew of and understood the overall scheme and participated in it to some degree. RP 946. In addition, the court noted that

the surveillance footage also showed that Mr. Broussard was present with Mr. James inside the US Bank branch during one of the transactions. RP 948.

Furthermore, with respect to those transactions undertaken solely by Mr. James, the court explained that evidence regarding those transactions was highly probative to demonstrate that there was an overall plan. RP 947. In addition, Mr. James' action in those instances was essentially identical to the action in the transactions where Mr. Broussard and Mr. Smith were directly involved (and which were the basis for the charges against them), and the court noted that,

It is relevant and important for the jury to know the full extent of the alleged criminal scheme and to not be forced to view the conduct of the defendants in a vacuum, in isolation from the overall scheme. Proof of the alleged overall plan is necessary in order to prove what it was that the defendants were actively allegedly participating in.

So the evidence of Mr. James' conduct, which at first glance looks like it has no connection to the defendants, ultimately serves to underscore and make clear that there was an overarching plan and what that plan was. Therefore, Mr. James' nearly identical conduct to that of the defendants is, again, circumstantially probative of each defendants' overall knowledge and motive and their respective intentions, and as to Mr. Smith the absence of a mistake.

RP 947.

The court also addressed the evidence under an ER 404(b) analysis, even though that rule had not been raised by the defense, and the court

concluded that the purpose for this evidence under ER 404(b) was to provide proof of the defendants' knowledge, intent, and motive. RP 944, 946-47. In addition the court found little risk of unfair prejudice or confusion (that would outweigh the probative value of the evidence) since the evidence regarding Mr. James's activities was separate and distinct from the other two and the evidence had "no emotional or inflammatory content such that ER 403 should bar its admission." RP 949. Furthermore, the transactions for which Mr. Broussard and Mr. Smith were charged were going to be clearly separated out in the jury instruction by individual counts, and the trial court noted that the jury was presumed to follow the court's instructions. RP 949-50.

With respect to the actual documentary evidence itself, the trial court further noted that the documents speak for themselves and bear the names of the person involved and that the surveillance footage further clarified exactly who was involved in each transaction. RP 950. Thus the documents (and photos) themselves prevent confusion. RP 950. The trial court thus concluded that,

So on balance then, as I apply Evidence Rule 404(b) and Evidence Rule 403, I believe and find that the circumstantial evidence of an overall criminal scheme and the defendants' knowledge of it and their motive and intent to participate is highly probative and its probative value, in the Court's view, clearly outweighs the minimal risks that are cautioned

against in Evidence Rule 403. Therefore, the conditionally admitted documents are now fully admitted. They will go to the jury along with the rest of the evidence in this case.

RP 951.

The September 2, 2016 Arrest of Mr. Broussard

On September 2, 2016 Officer Randall Frisbie of the Tacoma Police Department observed a vehicle being driven in the area of 27th and Yakima in Tacoma, Washington. RP 721. Officer Frisbie ran a records check on the vehicle and found that the title for that vehicle had not been transferred within the 45 days that is required. RP 721-22. Officer Frisbie testified that based on this information he then initiated a traffic stop of that vehicle by activating his lights. RP 722. The vehicle pulled over and Officer Frisbie contacted the driver, Mr. Broussard, and asked for his license, insurance, and registration. RP 722-23. Mr. Broussard provided his driver's license and Officer Frisbie recognized the name from a "bulletin that was issued previously for probable cause to arrest for theft first" that had been created by Detective Schieferdecker. RP 727. Officer Frisbie then told Mr. Broussard that he was under arrest and told him to open the car door. RP 727. Mr. Broussard refused, and Officer Frisbie then opened the door and there was a struggle over the door and Officer Frisbie then saw Mr. Broussard reached for the "shifter." RP 727. Officer Frisbie told Mr.

Broussard not to “go for the shifter,” but Mr. Broussard reached over and put the car in drive and was able to drive away. RP 727.

Officer Frisbie did not chase after Mr. Broussard’s vehicle, as it was against department policy to chase a vehicle solely for a property crime. RP 738. Officer Frisbie did, however, follow in the general direction of Mr. Broussard’s travel and soon found the car nearby and saw the defendant running on foot. RP 738-39. Another officer ultimately contacted Mr. Broussard and detained him, and Officer Frisbie went to the scene and placed Mr. Broussard under formal arrest. RP 743-44. Mr. Broussard was advised of his Miranda warnings and was taken to the Pierce County jail. RP 744-45, 747.

At the jail Mr. Broussard was searched by Christopher Cooley, a corrections deputy with the Pierce County Sheriff’s office who was working as a booking officer. RP 1019-22. During the search Officer Cooley recovered a small plastic bag with a black tarry substance from Mr. Broussard’s right front pocket. RP 1024. Mr. Broussard was then instructed to remove his sweatpants, and when he began to do so Officer Cooley saw Mr. Broussard fumbling with something in his right hand and Officer Cooley then instructed Mr. Broussard to “hand it over.” RP 1026-27. Mr.

Broussard then handed the officer a plastic baggie that had a number of small bindles of a white powder and a number of pills. RP 1027.

Mr. Broussard was then reminded of his Miranda warnings and was then asked about the items in the baggie. RP 1028. Mr. Broussard stated that he was going to a “Wiz Khalifa/Snopp Dogg” concert in Seattle and planned on “partying.” RP 1029. Upon further inspection it was found that the plastic baggie contained 21 individual baggies of suspected cocaine and 68 pills of suspected ecstasy, and the black substance was suspected to be heroin. RP 773.

The suspected drugs were tested at the Washington State Patrol crime lab. RP 818-839. The packets of white powder were found to contain cocaine, and the pills were found to contained methamphetamine and caffeine. RP 836, 838. It was later explained that ecstasy or MDMA will test positive for methamphetamine. RP 1068. The black tarry substance was found to contain heroin. RP 839.

At trial the State also called Officer Jeff Martin as a witness regarding drug trafficking and sales. RP 1039. Officer Martin testified that he had approximately 20 years of law enforcement experience and that he had extensive training and experience related to narcotics. RP 1040, 1042-48. Officer Martin’s experience included nine and a half years with the

Special Operations Unit in Lakewood and had been involved in over 1,000 narcotics investigations. RP 1043-44. Officer Martin has also been involved in several hundred controlled buys and has extensive training in drug investigations. RP 1041-49. Officer Martin was also familiar with the typical pricing of various quantities of street drugs. RP 1057.

With respect to the drugs found on Mr. Broussard, Officer Martin explained that the 21 bindles of white powder weighed 19.2 grams (slightly less than one gram per bindle and that the value of each bindle was approximately \$80 to \$100. RP 1065-66. Officer Martin further explained that the pills would cost somewhere between \$5 and \$15 on the street. RP 1068. The heroin was described as a small amount of heroin worth approximately \$20-\$30. RP 1069. Officer Martin then testified that based on his training and experience the total number of baggies of cocaine that were found were inconsistent with personal use and were consistent with a quantity one would expect with the sale of narcotics. RP 1070-72. He also testified that if one individual were to consume all 19 grams of the cocaine the result would be “undoubtedly fatal.” RP 1071. Similarly, the 68 ecstasy pills found were more consistent with the sales of narcotics than with personal use, and if one person to consume all 68 pills the result would, again, be fatal. RP 1071-72. Officer Martin’s opinion was also based in part on Mr. Broussard’s statement that he was going to a concert, which

would present a potential market for the sale of drugs and the thus the packaging of the cocaine in 21 separate bindles was consistent with the preparation for the sale of those individual bindles at the concert. RP 1065.

Issues Involving Mr. Broussard and his Defense Counsel.

In addition to the trial evidence discussed above, Mr. Broussard has raised issues in the present appeal regarding his motion for new counsel, which requires some additional factual background. Mr. Broussard was initially charged in the trial court on September 6, 2016. CP 3-4. Mr. Broussard's trial counsel, Desmond Kolke, was appointed to the case on October 4, 2016 and made his first appearance at a hearing on November 29, 2016. CP TBD (See State's Supplemental Designation of Clerk's Papers regarding 10/04/16 Disqualification Order and 11/29/16 order Continuing Trial).

When the matter was finally called to trial (over a year and a half later) on April 23, 2018 Mr. Broussard informed the court that he wanted a new attorney because he was dissatisfied with Mr. Kolke and because he wanted to hire a new attorney, Dana Ryan, to represent him, and that his fiancé had been working to hire Mr. Ryan. RP 4-5.

The trial court then asked Mr. Kolke if he could "shed some light on what's going on here?" RP 6. Mr. Kolke then explained that he had gone

to visit Mr. Broussard on Friday afternoon to speak with him regarding the trial and about getting some clothes for trial. RP 6. Mr. Kolke, however, was unable to communicate with the Defendant and he wasn't able to get any information from him in order to secure trial clothes. RP 6. Mr. Kolke then explained that as far as he was concerned there was a communication breakdown since Mr. Broussard would not speak with him. RP 6.

The trial court also inquired about Mr. Ryan, and Mr. Kolke explained that he had heard that Mr. Ryan had been in automobile accident. RP 4-7. The trial court then spoke with Mr. Broussard's fiancé about whether Mr. Ryan had been retained. RP 9-10. She stated that she had made a payment to Mr. Ryan, but there had been no recent communication with him since February 1. RP 10, 13.

The trial court then asked Mr. Kolke if he could shed some light on how long this breakdown in communication had been "festering." RP 19. Mr. Kolke stated that he represented Mr. Broussard on another matter (a felony elude charge) in January and that in that case he was able to do motions and ended up being able to resolve that case with a guilty plea. RP 19-20. Mr. Kolke then stated,

You know, I would just say that I think – I don't know what to tell the Court other than I don't know what has happened other than – I mean, as of Friday I wasn't even able to get

any kind of relevant response having to do with making sure that he was clothed in non-jail clothes.

RP 20. The trial court then asked if this was a recent issue or if it was a problem for months, and Mr. Kolke stated that the relationship had been “strained” for a while, but Mr. Kolke acknowledged that he understood that this was, by itself, not enough to constitute a complete breakdown in communications. RP 20. Mr. Kolke then explained that it was now clear that Mr. Broussard did not want to communicate with him at all, and that based on what happened Friday and what was happening in court today he did not see how he could continue to represent Mr. Broussard. RP 20-21.

The trial court then suggested contacting Mr. Ryan to determine his status, and the trial court further stated that it had received mixed information from Mr. Kolke and Mr. Broussard, as Mr. Kolke had stated he represented Mr. Broussard in another case and was able to have effective communication with Mr. Broussard. RP 25. The trial court then asked Mr. Kolke if he was prepared to try this case and Mr. Kolke stated he was. RP 25. The trial court then explained that it seemed that Mr. Broussard was wanting to cut off the relationship with Mr. Kolke because he was anticipating hiring Mr. Ryan. RP 25.

After a recess, the court resumed with Mr. Ryan appearing by phone. RP 27. Mr. Ryan indicated he was not intending to substitute in as counsel at this time. RP 28. The trial court noted that this information changed the “complexion of things” and that the trial court saw this as a “day of trial complaint about Mr. Kolke,” yet Mr. Kolke and Mr. Broussard had been able to have an appropriate relationship in the other case and Mr. Kolke was prepared for trial. RP 29-30.

The trial court then had further discussion with the parties, discussed the relevant factors, and ultimately ruled as follows:

Mr. Broussard, when I consider all of these factors and consider what I’ve heard today, I’m not going to delay this case any further. I believe that you are capable, if you’re willing, to communicate appropriately with Mr. Kolke. I know he’s capable of it and I know he’s professional and a very experienced attorney and he’s willing and able to carry out his obligations to you as an attorney. He needs to communicate with you in order to represent you at trial. We’re in trial. Today is the day of trial. We’re going to be seeing a jury panel tomorrow morning. You need to be dressed for court appropriately.

I can only urge you to reconsider the apparent position that you've taken that you don't want to talk with Mr. Kolke. I infer, I assume, that you've taken that position because you've been expecting that Mr. Ryan is going to come on board and represent you, but that's not happening, so Mr. Kolke is your lawyer and he continues to be your lawyer.

I'm going to deny the request for a continuance so that a different lawyer can be located. You've had a great deal of time to hire a lawyer if that's what you wanted to do, and that hasn't come to pass, and this case has had nine or more continuances, so we've got to go forward. I’ve considered all

these factors. And, again, you're not telling me today, on the day of trial, that you have a lawyer that's ready to step in.

I'm confident that if you're willing to communicate with Mr. Kolke, he will do a good job of representing you. He knows his job. He's got a sworn obligation to represent you to the best of his ability within the boundaries of the law and I am certain that he will do that. He's prepared.

RP 42-43.

The following morning Mr. Broussard again appeared in jail clothes and the trial court inquired as to why that was and whether there was a bank of clothing available for Mr. Broussard at the Office of Assigned Counsel. RP 57-58. Mr. Kolke stated there was clothing available. RP 58. Mr. Broussard said he did not want to wear that clothing. RP 58. Mr. Kolke indicated he had gone to the jail the previous evening and tried to talk to Mr. Broussard about clothing. RP 60.

The trial court then readdressed the issue of the communication breakdown and stated that the court was convinced that if there was a breakdown in communication it was because Mr. Broussard had made a deliberate decision to not talk with his lawyer. RP 61. The trial court further explained that it was clear that Mr. Broussard wanted to continue the matter and try to hire a private attorney, but the court explained that such a request was untimely and would cause further delay in a case that was already 600 days old. RP 62. The trial court also concluded that,

Mr. Broussard's continuing refusal to cooperate with his attorney causes me to infer and to conclude that this is manipulative; that is done to create delay; it's done to manipulate this court. Similarly his refusal to even talk to his lawyer about civilian clothing, that is done to manipulate and delay. That is my conclusion.

There is clothing available to Mr. Broussard, provided and stored, I believe, at the county jail or at least available from the Department of Assigned Counsel for criminal defendants to wear, a bank of clothing. Mr. Broussard tells me he doesn't want to wear the Pierce County Jail clothing; he wants to get clothing from some other source. I see that as further efforts to manipulate and delay. I will give Mr. Broussard one further opportunity to wear civilian clothing.

RP 64-65.

The trial court further stated that it did not want to conduct any in-chambers discussion due the numerous recent appellate decisions regarding the public's right to observe all trial proceedings, and that the court felt that the inquiry had been thorough and complete. RP 67. The trial court then asked Mr. Broussard if he desired a recess so that he could change into civilian clothing. RP 67. Mr. Broussard responded, "I'm fine with the clothes I got on." RP 67. The trial court explained that was unwise, but Mr. Broussard reiterated that he was fine with the clothes he had on. RP 68. Despite repeated attempts by the court to change his mind, Mr. Broussard stated numerous additional times that he was "fine" with the clothes he had on. RP 69-71. The court then concluded that that Mr. Broussard had made his decision, but the court informed Mr. Broussard that if he changed his

mind the court and Mr. Kolke would make arrangements to find him clothes immediately, and that the court would likely continue to revisit this issue. RP 70-71. Mr. Broussard then again affirmed that this was his decision. RP 71.

When court resumed after the lunch break (but before the jury was brought in for the first time) the trial court again addressed the issue of Mr. Broussard's refusal to wear civilian clothing. RP 144. The trial court asked Mr. Broussard if he realized that that the jail clothing could have a negative effect on the jury, and Mr. Broussard responded, "You already asked me that, Your Honor." RP 144. The court asked the same question again, and Mr. Broussard responded that he didn't understand "why you keep asking me that," and Mr. Broussard affirmed multiple additional times that he did not want to change clothes. RP 144-45. Mr. Broussard also refused to sign the court ruling on the motions in limine, and instead wrote "UCC 1-308, all rights reserved. This is not a refusal." RP 151. At the close of proceedings for the day the trial court again told Mr. Broussard that it would be wise to wear civilian clothing and that if he decided to do so the he needed to do so first thing in the morning. RP 238.

The following morning Mr. Broussard again came to court in "jail garb." RP 244. The trial court asked Mr. Broussard if that was his choice

or whether he had given any further thought to wearing civilian clothing. RP 244. Mr. Broussard responded, “With all due respect, I don’t see why you keep asking me that.” RP 244. The trial court, however, continued to inquire, and asked Mr. Broussard several times if this was his choice, but Mr. Broussard refused to answer the trial court’s questions. RP 245. The trial court then stated,

All right. Mr. Broussard won't answer my questions. It appears to me, I'm satisfied, that it is his personal decision. He is deliberately being evasive, unwilling to answer my questions, and I am not going to waste any more of my time asking this question again this morning. I will probably revisit this at a later point as I've told him I will.

RP 245-46. The proceeding then continued through the day on April 26. When the proceedings next resumed on Monday, April 30, 2016, Mr. Broussard had bailed out of jail, and thus the issue of jail clothing did not arise again. RP 437. Mr. Broussard, however, again asked to fire Mr. Kolke and to continue the case for a week so that he could hire another attorney. RP 436. The trial court explained that a jury had been sworn and it was too late for that. RP 436-37.

III. ARGUMENT.

- A. MR. BROUSSARD'S CLAIM THAT THE TRIAL COURT ERRED IN NOT ALLOWING HIS COUNSEL TO WITHDRAW IS WITHOUT MERIT BECAUSE THE TRIAL COURT PROPERLY FOUND THAT ANY BREAKDOWN WAS CAUSED BY MR. BROUSSARD'S OWN REFUSAL TO SPEAK OR COOPERATE WITH HIS ATTORNEY AND BECAUSE UNDER WASHINGTON LAW A DEFENDANT IS NOT ENTITLED TO A REASSIGNMENT OF COUNSEL ON THE BASIS OF A BREAKDOWN IN COMMUNICATIONS WHICH IS CAUSED BY THE DEFENDANT'S REFUSAL TO COMMUNICATE WITH HIS ATTORNEY.

Mr. Broussard first argues that the trial court erred in not allowing his trial counsel to withdraw due to a breakdown in communications. App.'s Br. at 13. This claim is without merit because the trial court acted well within its discretion denying the motion when the record supports the trial court's finding that any breakdown in communication was caused solely by Mr. Broussard's refusal to communicate with his attorney, and when it is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications caused by the defendant's refusal to cooperate with his attorney.

A trial court's decision not to appoint new counsel is reviewed for an abuse of discretion. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Garcia*,

179 Wn.2d 828, 844, 318 P.3d 266 (2014). While criminal defendants are generally guaranteed the right to counsel, a defendant does not have an absolute right “to choose any particular advocate.” *Varga*, 151 Wn.2d at 200, quoting *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

In order to justify substitution of counsel, a defendant must show good cause for the substitution, such as “a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication.” *Varga*, 151 Wn.2d at 200 (quoting *Stenson*, 132 Wn.2d at 734). Similarly, the Washington Supreme Court has explained that to determine whether a breakdown in communication entitled a defendant to new counsel, a reviewing court is to examine three factors: (1) the extent of the conflict, (2) the adequacy of the trial court’s inquiry into the conflict, and (3) the timeliness of the motion for substitution of counsel. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006).

With respect to claims of a breakdown in communications, the court is to consider the cause of the breakdown in communication, and a defendant must show that the breakdown is not because of his own refusal to cooperate. *State v. Schaller*, 143 Wn.App. 258, 271, 177 P.3d 1139 (2007), review denied, 164 Wn.2d 1015 (2008), citing *Harding v. Davis*, 878 F.2d 1341, 1344 n. 2 (11th Cir.1989) (“[A]n accused cannot force the

appointment of new counsel by simply refusing to cooperate with his attorney, notwithstanding the attorney's competence and willingness to assist." See also, *State v. Thompson*, 169 Wn.App. 436, 457–58, 290 P.3d 996 (2012) ("It is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys.").

This is true even when a defendant goes so far as to assault his attorney in open court. In *State v. Fualaau*, 155 Wn.App. 347, 228 P.3d 771 (2010), for instance, the trial court found that the defendant's outburst was intentional and calculated to create a conflict of interest. *Fualaau*, 155 Wn.App. at 359. On appeal the court explained that "substitution of counsel is an instrument designed to remedy meaningful impairments to effective representation, not to reward truculence with delay." *Id* at 359, quoting *People v. Linares*, 2 N.Y.3d 507, 512, 780 N.Y.S.2d 529, 813 N.E.2d 609 (2004). The *Fualaau* court further noted that,

We rely in the first instance on our trial courts to determine whether a criminal defendant is represented by an attorney truly laboring under conflicting interests or whether the defendant has simply engineered an apparent conflict in an attempt to delay the ultimate moment of truth, the jury's verdict.

Fualaau, 155 Wn.App. at 359-60, quoting *People v. Roldan*, 35 Cal.4th 646, 675, 27 Cal.Rptr.3d 360, 110 P.3d 289 (2005).

Furthermore, the *Fualaau* court noted that a defendant may forfeit his Sixth Amendment right to counsel by engaging in “egregious misconduct.” *Fualaau*, 155 Wn.App. at 360, citing *City of Tacoma v. Bishop*, 82 Wn.App. 850, 860, 920 P.2d 214 (1996). The court explained that forfeiture by misconduct “is grounded in equity—the notion that people cannot complain of the natural and generally intended consequences of their actions,” and thus where a defendant intentionally creates a conflict of interest with his or her attorney, that defendant may be deemed to have forfeited either the right to the assistance of counsel or the right to the assistance of counsel free of the conflict created. *Fualaau*, 155 Wn.App. at 360, quoting *State v. Mason*, 160 Wn.2d 910, 926, 162 P.3d 396 (2007).

Finally, on review this Court is to consider the extent and nature of any breakdown in the relationship between the defendant and his attorney and its effect on the representation actually presented. *Schaller*, 143 Wn.App. at 270. If the representation is adequate, prejudice must be shown. *Id.* Furthermore, in *Schaller* the court explained that appropriate inquiry must focus on the adversarial process itself, not only on the defendant’s relationship with his lawyer as such, because “The essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.” *Schaller*, 143 Wn.App. at 270,

quoting *Wheat v. United States*, 486 U.S. 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)).

In the present case Mr. Broussard has failed to show that the trial court abused its discretion. First, with respect to the extent of the conflict, it is clear that any breakdown in communications was unilateral and was caused solely by Mr. Broussard's refusal to speak with his counsel. Second, the trial court engaged in multiple lengthy conversations concerning the alleged breakdown, and the record aptly demonstrates that the trial court took this issue seriously and attempted to discern what was going on. Unfortunately for Mr. Broussard, the trial court reasonably concluded that Mr. Broussard was refusing to speak with his attorney in an attempt to force a delay in the proceedings so that he could potentially hire a private attorney. Mr. Broussard's obstinance was further demonstrated by his later refusal to wear civilian clothes despite the fact that such clothes were available. In short, the trial court's conclusion that Mr. Broussard was simply refusing to cooperate with his attorney was well supported by the record, and the trial court's ruling was consistent with well-settled law that that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys. *Schaller*, 143 Wn.App. at 271.

Finally, the timeliness of Mr. Broussard's alleged breakdown in communication clearly weighs against him, as his complaint was not brought until the morning of trial.

In short, Mr. Broussard has failed to show that the trial court abused its discretion in denying his request for new counsel based on the alleged breakdown in communications because the trial court properly found that any breakdown was caused by Mr. Broussard's own refusal to speak or cooperate with his attorney.

B. MR. BROUSSARD'S CLAIM THAT THE COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION TO SEVER IS WITHOUT MERIT BECAUSE THE RECORD SHOWS THAT THE TRIAL COURT ACTED WELL WITHIN ITS BROAD DISCRETION AND BECAUSE MR. BROUSSARD HAS FAILED TO SHOW ANY SPECIFIC PREJUDICE FROM THE TRIAL COURT'S RULING AS REQUIRED UNDER THE LAW.

Mr. Broussard next argues that the trial court abused its discretion in denying his motion to sever his trial from the trial of Mr. Smith, or, in the alternative, that his trial counsel was ineffective for failing to renew the motion to sever. App.'s Br. at 21, 27. Mr. Broussard's claims, however, are without merit as the trial court acted well within its broad discretion in denying the motion to sever.

Separate trials are not favored in Washington. *State v. Asaeli*, 150 Wn.App. 543, 583, 208 P.3d 1136 (2009). A trial court's denial of a motion

to sever jointly charged defendants is reviewed for a manifest abuse of discretion. *State v. Wood*, 94 Wn.App. 636, 641, 972 P.2d 552 (1999), citing *State v. Dent*, 123 Wn.2d 467, 483, 869 P.2d 392 (1994); *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982).

A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Garcia*, 179 Wn.2d at 844. To demonstrate that the trial court abused its discretion when it denied the motions to sever, the appellants “must be able to point to specific prejudice” to support a claim that the trial court abused its discretion. *State v. Moses*, 193 Wn.App. 341, 359, 372 P.3d 147 (2016), quoting *Wood*, 94 Wn.App. at 641. A defendant may demonstrate specific prejudice by showing:

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

Moses, 193 Wn.App. at 360, citing *State v. Canedo–Astorga*, 79 Wn.App. 518, 528, 903 P.2d 500 (1995), quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir.1985)) (citations omitted).

In the present case there were no issues regarding antagonistic defenses, nor was there any statement from Mr. Smith inculcating Mr. Broussard. RP (1/23/18) 19. In addition, the record does not show that the quantity of evidence was so vast that it was almost impossible for the jury to separate evidence as it related to each defendant. Rather, Mr. Broussard and Mr. Smith were charged with separate and distinct crimes which were easily compartmentalized. Finally, the record shows no gross disparity in the weight of the evidence against Mr. Broussard and Mr. Smith; to the contrary the weight of the evidence was very similar.

Mr. Broussard's main argument on appeal appears to be that the focus at the trial was on Mr. James and the amount of evidence relating to his acts. App.'s Br. at 22. This argument, of course, overlaps with next section relating to the admission of the evidence relating to Mr. James and will be discussed in further detail there. With respect to issue of whether Mr. Broussard's trial should have been severed from Mr. Smith's trial, however, there is no evidence of specific prejudice stemming from the joint trial. Rather, the evidence relating to the specific charges against Mr. Broussard was clear and distinct.

Specifically, the jury was asked to determine if Mr. Smith committed the crimes of theft and money laundering during the period between June 23, 2016 and July 11, 2016, and to determine if Mr. Smith

committed the crimes of forgery on or about June 23, 2016 and on or about July 1, 2016. CP 63, 66, 70, 72. These dates correspond to the dates where Mr. Smith personally opened several accounts at Wells Fargo for the business registered in his name and when the Inspirus loan was obtained and the proceeds deposited into Mr. Smith's account (and transferred to a second of his accounts). RP 455, 568, 574-79, 588, 659-60, 685.

With respect to Mr. Broussard, on the other hand, the jury was asked to determine if Mr. Broussard committed the crime of theft during the period of June 10 to June 13th, 2016, and forgery on or about June 10, 2016. CP 84, 85. These dates did not overlap with the dates for Mr. Smith's crimes, and thus there was no danger in the jury conflating the charges against the two men. Furthermore, the dates for Mr. Broussard's crimes corresponded to the dates when Mr. Broussard personally obtained the TAPCO loan. RP 643-53.

In short, there was simply nothing about the evidence in this case that in any way made "it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt." Rather, although there was evidence of multiple transactions, the evidence regarding each of the charged offenses was compartmentalized and distinct.

Mr. Broussard, therefore, has failed to demonstrate that any of the relevant factors applies, and thus he has failed to show that the trial court abused its discretion in denying his motion to sever.³

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF MR. JAMES' CRIMES BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT THE ACTIONS OF MR. BROUSSARD AND MR. JAMES WERE INTERTWINED AND BECAUSE MR. JAMES' ACTS WERE HIGHLY PROBATIVE OF MR. BROUSSARD'S KNOWLEDGE, ESPECIALLY GIVEN THAT MR. BROUSSARD WAS CHARGED WITH COMMITTING THE FINANCIAL CRIMES AS EITHER A PRINCIPAL OR AN ACCOMPLICE.

Mr. Broussard next claims that the trial court abused its discretion in admitting evidence regarding Mr. James's crimes because there was no connection between Mr. James and Mr. Broussard other than the fact they were half-brothers. App.'s Br. at 29, 35. This claim is without merit because the record aptly demonstrates that the actions of Mr. Broussard and Mr. James were intertwined and that Mr. James' actions were highly probative of Mr. Broussard's knowledge, especially since Mr. Broussard was charges

³ As there were no grounds justifying severance, Mr. Broussard cannot show the prejudice necessary to support his claim of ineffective assistance. *See, Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1982)(To establish ineffective assistance a defendant must show deficient performance and prejudice), cited in App.'s Br. at page 27. In addition, as Mr. Broussard acknowledges, the motion for severance in this case was not renewed and thus was waived pursuant to CrR 4.4(a)(1). See, App.'s Br. at 28.

as being either a principal or an accomplice with respect to the financial crimes at issue.

A trial court's decision on the admissibility of evidence is reviewed for abuse of discretion. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). A trial court abuses its discretion when its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *Dobbs*, 180 Wn.2d at 10, 320 P.3d 705, quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Mr. Broussard’s argument in the present appeal essentially centers around his claims that the only real connection he had to Mr. James was the fact that “they had the same mother,” and that admission of evidence regarding Mr. James’ actions constituted propensity evidence which “ensured” that Mr. Broussard would be judged on Mr. James’ acts rather than on the charged crimes. App.’s Br. at 35-36.

Each of these arguments, however, were specifically and persuasively dismissed by the trial court in its detailed ruling on this issue. First, as the trial court properly noted, Mr. Broussard was charged with acting either as a principal or an accomplice. RP 941. Thus the acts of Mr. James were relevant and admissible under a theory of accomplice liability. Furthermore, the issue of Mr. Broussard’s knowledge was critical, both in

terms of accomplice liability and under the specific elements of Theft and Forgery. RP 941.

Furthermore, Mr. Broussard's claim that his only connection with Mr. James was the fact that they had the same mother was clearly, and appropriately, rejected by the trial court. As the court noted, Mr. James and Mr. Broussard formed their companies on the exact same day. RP 945. In addition each utilized fake social security numbers during their bank transactions. RP 945. In addition, surveillance footage showed Mr. Broussard with Mr. James inside the US Bank when Mr. James opened his account there. RP 948.

Furthermore, the evidence showed that on June 10, 2016, Mr. Broussard applied for (and obtained) an auto loan at the TAPCO Credit Union purportedly for the purpose of purchasing an auto from Fast Lane Motors, a company belonging to Mr. James. RP 627-29, 643-44. In addition, on the very same day that Mr. Broussard obtained the check from TAPCO, Mr. James was seen on surveillance footage depositing that very check into his Wells Fargo account for Fast Lane Motors. RP 643-44, 652-53, 791-94.

Given these facts, the claim that there was no connection between Mr. Broussard and Mr. James other than their mother is clearly incorrect, as there was substantial evidence linking Mr. Broussard and Mr. James.

The trial court, of course found the connections to be highly probative and then turned to the issue of prejudice. The trial court first noted that the evidence regarding Mr. James' acts had no emotional or inflammatory content, and that there had been no attempt by the State to mislead the jury regarding which acts Mr. Broussard was legally accountable for. RP 949. In addition, the trial court noted that the actual charges, as well as the jury instructions on those charges, made it perfectly clear what actions the charges were based upon. RP 949-50; see also, CP 63, 66, 70, 72.

Thus, as the trial court explained in great detail, there was substantial evidence linking the actions of Mr. Broussard and Mr. James, and a reasonable inference from that evidence was that Mr. James and Mr. Broussard were working together to a substantial degree. Furthermore, the actual charges against Mr. Broussard carried short and specific time frames that ensured that the jury was only ask to consider whether Mr. Broussard was guilty based on his actions in those transaction in which he was involved.

In short, Mr. Broussard's claim that the trial court abused its discretion in admitting the evidence at issue (because there was no relevant connection between Mr. Broussard and Mr. James and because the evidence

“ensured” a verdict based on propensity or confusion) is simply without merit.

D. MR. BROUSSARD’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT BECAUSE HE HAS FAILED TO SHOW EITHER DEFICIENT PERFORMANCE OR PREJUDICE.

Mr. Broussard next claims argues that his counsel was ineffective for failing to bring a suppression motion and that this case should be remanded to determine whether there was a basis for the September 2 traffic stop. App.’s Br. at 37-38. This claim is without merit because the record does not show that such a motion likely would have been granted, and because Mr. Broussard cannot show either deficient representation or prejudice.

To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 33. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. *Id.* at 34.

When arguing ineffective assistance for failure to seek suppression of evidence, a defendant must show from the record that a motion to suppress likely would have been granted. *State v. Walters*, 162 Wn. App. 74, 81, 255 P.3d 835 (2011), citing *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). When the issue is raised for the first time on appeal, as here, the issue is not “manifest” if the record is insufficient to properly adjudge the matter. *McFarland*, 127 Wn.2d at 334.⁴

In the present case Mr. Broussard surmises that the September 2 traffic stop could have been pretextual and that there was a chance that there was no probable cause for his arrest depending on what was in the “bulletin” prepared by Detective Schieferdecker. App.’s Br. at 37, 40.

The actual evidence in the record is that Officer Frisbie ran a records check and learned that the title for the vehicle that Mr. Broussard was driving had not been transferred within the 45 days required by law. This Court has previously held that evidence that there was a failure to transfer a title is a perfectly valid basis for a traffic stop under Washington law. See, *State v. Bonds*, 174 Wn.App. 553, 566, 299 P.3d 663 (2013). In addition, Mr. Broussard can point to nothing in the record that even remotely suggests that this was a pretextual traffic stop.

⁴ If a defendant needs to rely on evidence outside the record to support an ineffective assistance of counsel claim, the appropriate means to obtain review is to file a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

Furthermore, as no motion to suppress was filed below, the trial court was never asked to determine whether the traffic stop and arrest were lawful and the record is not fully developed as to the circumstances regarding the arrest. In short, the facts regarding the arrest have not been fully established, the parties did not have an opportunity to develop their arguments, and the trial court did not make factual findings for this Court to review. Accordingly, Mr. Broussard has failed to meet his burden to show counsel's performance was deficient for the simple reason that the record before this Court is insufficient and Mr. Broussard, therefore, cannot show that a motion to suppress would likely have been granted.

Mr. Broussard, however, argues that a remand is necessary, citing to *State v. Robinson*, 171 Wn.2d 292, 306, 253 P.3d 84 (2011). App.'s Br. at 38. *Robinson*, however, is clearly distinguishable and does not support Mr. Broussard's claim.

In *Robinson* the two defendants had not filed suppression motions challenging the search of their cars incident to their arrest. *Robinson*, 171 Wn.2d at 297-300. While their cases were still pending on direct review, however, the United States Supreme Court announced a new rule governing the search of automobiles incident to arrest in the groundbreaking case of *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). *Robinson*, 171 Wn.2d at 303. The *Robinson* court noted that the existence

of a new controlling constitutional interpretation was one of the narrow exceptions to the traditional rules regarding issue preservation, and the court thus remanded the case so that the record could be further developed in light of the brand new *Gant* decision. *Id* at 305-06.

In the present case there is no new controlling constitutional interpretation at play, and thus *Robinson* is clearly distinguishable. Rather, under well-established Washington law, Mr. Broussard's claim of ineffective assistance must fail unless he can show from the record that a motion to suppress likely would have been granted. As there was no motion to suppress filed below (and thus the record on the relevant issues were not fully developed), the record simply does not show that a suppression motion would likely have been granted. Mr. Broussard's claim of ineffective assistance of counsel, therefore, must fail.

E. MR. BROUSSARD'S CLAIM OF INSUFFICIENT EVIDENCE IS WITHOUT MERIT BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL FINDER OF FACT COULD HAVE FOUND THAT THE ELEMENTS OF THE CHARGED OFFENSES WERE PROVEN BEYOND A REASONABLE DOUBT.

Finally, Mr. Broussard claims that there was insufficient evidence to support the jury's finding of guilt on his two Possession with Intent to Deliver charges because there were no facts that would support a reasonable inference that he intended to deliver the drugs. App.'s Br. at 42, 45. This

claim is without merit because, viewing the evidence in a light most favorable to the State, a rational finder of fact could have found the elements of the charged offense beyond a reasonable doubt.

A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that may be drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Whether sufficient evidence supports a conviction depends on whether, when viewed in the light most favorable to the prosecution, any rational finder of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014).

For the crime of Possession of Controlled Substance with Intent to Deliver, the actual intent to deliver may be inferred where the evidence shows both possession and facts suggestive of a sale. *State v. Hagler*, 74 Wn.App. 232, 236, 872 P.2d 85 (1994).

In the present case Mr. Broussard stated he was on his way to a concert, and Officer Martin explained that based on his training and experience, such an event presented a market for drug sales. RP 1065. In addition, Mr. Broussard did not have just one or two, or even five, baggies of cocaine. Rather he had 21 *individually* packaged baggies of cocaine. In addition he had 68 ecstasy pills.

The quantity of each of these drugs, the fact that cocaine was *individually* packaged and was thus ready for sale, as well as Officer Martin's testimony about the drugs, and Mr. Broussard's own comments about his intended destination, all combined to constituted evidence suggestive of a sale and was evidence from which a jury could draw the reasonable inference that Mr. Broussard possessed both drugs with the intention to deliver them. Nothing more is required.

IV. CONCLUSION.

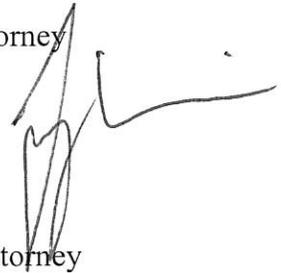
For the foregoing reasons, Mr. Broussard's convictions and sentence should be affirmed.

DATED: May 23, 2019

Respectfully submitted,

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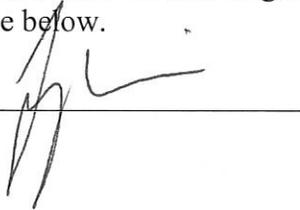


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The undersigned certifies that on this day she delivered by U.S. mail delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Port Orchard, Washington, on the date below.

5/23/19

Date Signature

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, written over a horizontal line.

GLISSON & MORRIS

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