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King County Prosecutor
Appellate Unit

COA NO. 70653-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNNIE LEE WIGGINS,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining To Assignments Of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. Charge.....	1
2. Background.....	2
3. Brooks' Version Of Events	5
4. MH's Version Of Events.....	6
5. Aftermath.....	7
6. Wiggins' Testimony	11
7. Defense Theory of the Case.....	16
8. Verdict and Sentence	17
C. <u>ARGUMENT</u>	18
1. THE COURT ERRED WHEN IT ADMITTED EVIDENCE OF CONVICTIONS THAT WERE MORE THAN 10 YEARS OLD IN VIOLATION OF ER 609(b).	18
a. <u>The Court Admitted The Prior Convictions Over Defense Objection</u>	18
b. <u>The Court Misinterpreted The Standard For Admissibility Under ER 609(b)</u>	20
c. <u>There Is A Reasonable Probability That The Error Affected The Outcome</u>	25

TABLE OF CONTENTS (CONT'D)

	Page
2. THE COURT ERRED IN FAILING TO COUNT PRIOR OFFENSES AS THE SAME CRIMINAL CONDUCT IN COMPUTING THE OFFENDER SCORE.	30
D. <u>CONCLUSION</u>	37

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Personal Restraint of Rowland,
149 Wn. App. 496, 204 P.3d 953 (2009)..... 35

State v. Alexis,
95 Wn.2d 15, 621 P.2d 1269 (1980)..... 24, 25

State v. Bergstrom,
162 Wn.2d 87, 169 P.3d 816 (2007)..... 31

State v. Burns,
114 Wn.2d 314, 788 P.2d 531 (1990)..... 32, 33

State v. Calvert,
79 Wn. App. 569, 903 P.2d 1003 (1995),
review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996) 33

State v. Fernandez-Medina,
141 Wn.2d 448, 6 P.3d 1150 (2000)..... 27

State v. Foxhoven,
161 Wn.2d 168, 163 P.3d 786 (2007)..... 20, 25

State v. Graciano,
176 Wn.2d 531, 295 P.3d 219 (2013)..... 31

State v. Hardy,
133 Wn.2d 701, 946 P.2d 1175 (1997)..... 21, 26

State v. Hilton,
164 Wn. App. 81, 99, 261 P.3d 683 (2011),
review denied, 173 Wn.2d 1037,
cert. denied, 133 S. Ct. 349, 184 L. Ed. 2d 208 (2012) 26

State v. Jackson,
129 Wn. App. 95, 117 P.3d 1182 (2005)..... 35

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Jennings</u> , 106 Wn. App. 532, 24 P.3d 430 (2001).....	36
<u>State v. Jones</u> , 117 Wn. App. 221, 70 P.3d 171 (2003).....	24
<u>State v. McCraw</u> , 127 Wn.2d 281, 898 P.2d 838 (1995).....	31
<u>State v. McKinsey</u> , 116 Wn.2d 911, 810 P.2d 907 (1991).....	22
<u>State v. Mehaffey</u> , 125 Wn. App. 595, 105 P.3d 447 (2005).....	31
<u>State v. Nass</u> , 76 Wn.2d 368, 456 P.2d 347 (1969).....	25
<u>State v. Parker</u> , 132 Wn.2d 182, 937 P.2d 575 (1997).....	35, 36
<u>State v. Porter</u> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	33, 34
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008).....	20, 25
<u>State v. Reinhart</u> , 77 Wn. App. 454, 892 P.2d 110, <u>review denied</u> , 127 Wn.2d 1014 (1995)	31
<u>State v. Rivers</u> , 129 Wn.2d 697, 921 P.2d 495 (1996).....	28
<u>State v. Roche</u> , 75 Wn. App. 500, 878 P.2d 497 (1994).....	28

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Rowland,
160 Wn. App. 316, 249 P.3d 635 (2011),
aff'd, 174 Wn.2d 150, 272 P.3d 242 (2012)..... 37

State v. Russell,
104 Wn. App. 422, 16 P.3d 664 (2001)..... 22-26

State v. Wilson,
83 Wn. App. 546, 922 P.2d 188 (1996),
review denied, 130 Wn.2d 1024, 930 P.2d 1231 (1997) 28

FEDERAL CASES

North Carolina v. Alford,
400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)..... 32

United States v. Beahm,
664 F.2d 414 (4th Cir. 1981) 23

RULES, STATUTES AND OTHER AUTHORITIES

5A Karl B. Tegland, Washington Practice: Evidence Law and Practice §
609.1 (5th ed. 2007)..... 21

13A Seth Aaron Fine, Washington Practice § 2810 (Supp. 1996) 34

ER 609 21, 23, 25

ER 609(a) 21

ER 609(a)(1) 28, 29

ER 609(a)(2) 19, 22, 28, 29

TABLE OF AUTHORITIES

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 609(b).....	18-24
RCW 9.94A.510	35
RCW 9.94A.515	35
RCW 9.94A.525	30
RCW 9.94A.525(5)(a)(i).....	31
RCW 9.94A.525(9).....	35
RCW 9.94A.530(1).....	30
RCW 9.94A.589(1)(a).	30, 31, 35

A. ASSIGNMENTS OF ERROR

1. The court violated ER 609(b) in erroneously admitting evidence of appellant's prior convictions for possession of stolen property.

2. The court erred in failing to count the prior offenses of possession of stolen property as "same criminal conduct" in calculating the offender score.

Issues Pertaining to Assignments of Error

1. Whether the court improperly admitted appellant's prior convictions that were more than 10 years old under ER 609(b), requiring reversal of the conviction?

2. Whether prior offenses of possession of stolen property constitute the "same criminal conduct" in calculating the offender score because each involved the same time, place, victim and objective intent?

B. STATEMENT OF THE CASE

1. Charge

The State charged Johnnie Wiggins with the first degree murder and second degree felony murder of Prudence Hockley. CP 16-18.

2. Background

Prudence Hockley lived in the Greenwood neighborhood of Seattle with her daughter, MH. 4RP¹ 23, 45-46. Hockley had two men in her life: Wiggins and Greg Brooks. 4RP 26-27, 105; 5RP 80-81.

Hockley and Wiggins first met in February 2011 at a gym. 9RP 153. Wiggins was a personal trainer. 6RP 212; 9RP 148. The two had a few sexual encounters but stopped seeing each other for a period of time. 9RP 158-63. Around August 2011, they started up again. 9RP 163-64. They grew closer but the relationship remained rocky. 9RP 165, 172-73, 180-82, 188; 10RP 156.

Hockley also shared a relationship with Greg Brooks, whom she had been seeing for a number of years. 4RP 105; 5RP 7-8. They had sexual relations on a regular basis. 5RP 8. Brooks described Hockley as a good friend. 4RP 105. Yet Brooks told her that he loved her. 5RP 8. According to Brooks, they had an understanding: she could see anyone she wanted and he could see anybody he wanted. 4RP 105. Brooks did not want to be involved in a committed relationship with Hockley and resisted her desire for something more. 4RP 106; 5RP 42. Brooks knew Hockley

¹ The verbatim report of proceedings is referenced as follows: 1RP - 5/23/13; 2RP - 5/28/13; 3RP - 5/29/13; 4RP - 5/30/13; 5RP - 6/4/13; 6RP - 6/5/13; 7RP - 6/6/13; 8RP - 6/10/13; 9RP - 6/11/13; 10RP - 6/12/13; 11RP - 6/13/13; 12RP - 6/17/13; 13RP - 6/17/13 & 7/19/13.

was dating Wiggins, but claimed he had no problem with it. 4RP 109-10. Hockley told Brooks that he always came first. 5RP 48. She also told Brooks that Wiggins was a jealous guy. 5RP 47.

In July 2011, Brooks complained about Wiggins giving Hockley an ultimatum. 5RP 12-13, 37. Wiggins had told Hockley it was "either him or me." 10RP 104. In August 2011, there was an incident in which Wiggins and Hockley, riding his motorcycle, followed Brooks while he drove his vehicle. 5RP 15, 38-39. Brooks noticed they were following him. 5RP 15. He was angry about the incident, believing Hockley had pointed him out to Wiggins. 5RP 15-16. On other occasions, Brooks expressed his desire that Hockley no longer be involved with Wiggins. 5RP 16, 19.

On the evening of December 23, 2011, Hockley called a friend and told him that she had gotten into a fight with Wiggins, during which she hit him with a belt and he gave her a black eye. 5RP 79, 81-82. Earlier that evening, the two had been at a bar and Wiggins became angry that she was flirting with other men. 5RP 82. At trial, Wiggins acknowledged an altercation occurred in which Hockley struck him with a belt but maintained she sustained the black eye when he pulled on the belt and she accidentally connected with his elbow. 9RP 182-84. According to Wiggins, they had gotten into an argument about Wiggins taking a trip,

during which Hockley accused him of planning to see another woman. 9RP 179-82.

On December 24, MH noticed Hockley's black eye. 4RP 51-52. Hockley told her there was an accident at the gym. 4RP 52. A photo of Hockley's black eye she had apparently taken on her phone was admitted into evidence. 6RP 25, 78-82.

Wiggins came over in the morning of December 24.² 9RP 190. Hockley and Wiggins had sex and snorted cocaine.³ 9RP 192. Then they left the house and went shopping.⁴ 9RP 192. The day went well. 9RP 195. They had lunch and drinks. 9RP 195-97. They did cocaine in the car. 9RP 197. They parted later that afternoon so that Hockley could get ready for a party. 9RP 198. Wiggins went home. 9RP 198.

Hockley went to the party at her friend's house. 5RP 84-85. After she got home, Hockley invited Brooks to have a drink. 4RP 108, 114. Brooks arrived at Hockley's residence shortly before 10 p.m. 4RP 115.

² A neighbor testified he saw Wiggins drive up quickly to Hockley's house on the 24th at around 11 a.m. and get out of the car, looking agitated and trying to peer into the windows, before driving off again. 6RP 115-16, 119-21. Wiggins denied doing this. 9RP 193-94.

³ A sample of Hockley's urine collected on December 25 tested positive for cocaine. 11RP 4-5. Earlier in the relationship, Hockley told Wiggins that she liked having sex while on cocaine and the combination became part of their routine. 9RP 166, 169-70.

⁴ Hockley's co-worker testified that he saw Hockley and Wiggins at Fred Meyer and greeted them in the morning of December 24. 6RP 110-14. Wiggins was friendly and Hockley did not appear upset. 6RP 114.

They drank wine. 4RP 136. Brooks expected to spend the night with Hockley. 5RP 21.

3. Brooks' Version Of Events

Wiggins called Hockley while Brooks was at her house. 4RP 117-18; 5RP 21-22. Brooks described her as frantic and scared. 4RP 117, 119. Brooks claimed he was not upset that Wiggins was calling.⁵ 4RP 119. After the first call, Wiggins called again. 4RP 118. Hockley told Brooks that Wiggins was outside and directed Brooks to leave out the back door. 4RP 118-20. Brooks told her to open the door because he did not care. 4RP 120-21. Hockley insisted he leave. 4RP 120. Brooks left out the back. 4RP 127. As he neared the back gate, he heard Wiggins shout, "hey, man, I want to talk to you!" 4RP 127-29. Brooks told him "I don't have nothing to do with this" and started walking down the alley. 4RP 129; 5RP 23-24. Brooks heard Hockley arguing with Wiggins outside the house. 4RP 129. He heard Hockley, Wiggins and MH yelling. 5RP 25.

Brooks heard MH say something like "what did you do." 4RP 129-30. Brooks returned from the alley. 4RP 130. As he came across the yard, he heard a loud thump. 4RP 130. Brooks remembered MH yelling "leave my mom alone" and "stop hitting my mom." 5RP 25. Brooks ran

⁵ Phone records showed Wiggins called around this time. 6RP 46-47, 49. Text messages sent earlier that evening showed Wiggins wanted to come over but Hockley put him off. 6RP 41-43.

back through the gate to the driveway. 4RP 130-31. He saw Wiggins get in his car and drive off. 4RP 130-31. He almost tripped over Hockley, who was lying in the driveway. 4RP 130-31. Blood came from Hockley's head, and she was having trouble breathing. 4RP 131. MH came off the porch, screaming and crying. 4RP 131. Brooks told MH to get a blanket and call 911. 4RP 131. MH handed him the phone, and the two took turns talking to the 911 operator. 4RP 131-32.

4. MH's Version Of Events

MH, who was in the sixth grade at the time, returned home from a friend's house that evening. 4RP 45, 55. Hockley seemed stressed, anxious and "freaked out" when Wiggins called. 4RP 55-56, 64. Wiggins showed up at the front door. 4RP 63-64. No one answered the door. 4RP 64. MH saw Wiggins walk toward the rear of the house. 4RP 65-67, 91-92. Hockley told MH that she was going outside and that MH should stay inside. 4RP 68. MH stayed in her room. 4RP 68. She did not hear any yelling or screaming. 4RP 94. She heard a noise outside, which she described as a loud thump. 4RP 68-69. MH felt "freaked out" and ran outside, thinking her mom had been hurt "because there was a weird noise." 4RP 69. MH thought the thump might be up against the side of the house, but she was not sure. 4RP 93-94. She did not know what the thump was. 4RP 93. MH went outside and saw Hockley lying on the

ground at the side of the house. 4RP 69. Hockley was unconscious and her breathing was strange. 4RP 69. There was blood around her head. 4RP 71. MH did not see what happened. 4RP 92.

MH ran back inside the house to find Brooks but he was not there. 4RP 71-72. She ran back outside. 4RP 72. MH saw Wiggins walking in the driveway. 4RP 74-75. MH asked "What did you do to her?" 4RP 76. Wiggins responded, "he did it," referring to Brooks. 4RP 76-77. Wiggins then walked quickly to his car and drove off. 4RP 77-78. By this time, Brooks was standing next to Hockley. 4RP 75, 79, 82, 97. MH called her older sister and Brooks called 911.⁶ 4RP 74, 79. MH gave a blanket to Brooks, who put it on Hockley. 4RP 86.

5. Aftermath

Police arrived a few minutes after the 911 call went out. 4RP 133; 5RP 107-09, 112. Hockley had significant head and facial injuries. 5RP 112-13. There was blood spatter on a wood pile next to Hockley's head. 5RP 127-28. Hockley was transported to Harborview Hospital. 5RP 184; 7RP 36.

It was cold enough outside that there was dew or condensation on the side of the house. 5RP 110, 130-31. After listening to MH's

⁶ The 911 call went out at 10:56 p.m. 5RP 108. The last call between Wiggins and Hockley ended at 10:51:45. 8RP 35-36.

description of the thump, an officer checked the side of the house for any sign of disturbance. 5RP 130-31. The officer did not find any. 5RP 141.

Brooks told the responding officer that he had just arrived and found Hockley in her condition. 5RP 139. He appeared calm and in shock. 5RP 112. When her older sister came over shortly after the call, MH said, "why did Johnnie do this?" 4RP 32-33. MH was still upset, "freaking out." 4RP 33, 44. Brooks sat quietly. 4RP 34. After being questioned by police, Brooks went home. 4RP 135.

Hockley's condition deteriorated at Harborview. 6RP 188-89. Family and friends were present. 4RP 37-38. Brooks went to the hospital a few hours later, after MH's sister called and told him that Hockley was going to pass away. 4RP 43-44, 135.

Wiggins lived with roommate and ex-girlfriend Wendy Levine. 6RP 173; 9RP 152. Wiggins called Levine a few minutes after the incident and made a number of calls throughout the next day. 8RP 35-36, 48-49, 51, 55-57, 59, 61-63, 75-76. He sounded upset. 9RP 23. He told her that Hockley had been hurt and that "my life has changed forever." 9RP 23-24.

On December 25, Seattle Police Detective Cooper called Wiggins' phone number and left a message. 6RP 195-96. Wiggins called back and said he was driving to Oregon to visit friends for Christmas dinner. 6RP

196, 199. During a phone interview with Cooper, Wiggins said he was in front of Hockley's residence when he called her on the phone that night. 6RP 200-01. Pretending to be at home, he asked Hockley if he could come over, but Hockley told him she wanted to spend Christmas Eve with her daughter. 6RP 200-01. There was a red truck parked outside of Hockley's residence. 6RP 201. Wiggins asked her about what kind of vehicle Brooks drove. 6RP 202. Hockley told him. Ex. 44 at 3.⁷ He told her that he was actually out in front of her house. Id. Wiggins knocked on the door but received no answer. Id. He saw a man leaving from the back door. Id. The two exchanged words. Id. He did not see Hockley outside. Id. at 4. MH came outside when he was leaving and asked him what he had done to her mother. Id. at 5. Wiggins told her that he was looking for the guy. Id. He then got into his car and drove off. Id. He did not return to the residence. Id.

Hockley died on December 25. 6RP 211; 7RP 43-44. Death was caused by massive head and neck trauma from at least three blows administered with a force equivalent to a high speed vehicle collision or falling from a height of several stories. 7RP 10-11, 126, 151-54, 159-60, 163. There were fractures to her face and skull. 7RP 40, 134-35, 149-55. A bone in her neck was broken. 7RP 131-32, 151-52. Her brain sustained

⁷ Ex. 44 is the transcript for the recorded interview (Ex. 43). 6RP 203.

traumatic injuries. 9RP 116-18. A part of her scalp was detached from the back of her skull, caused by a shearing force. 7RP 133, 157-59. There were blunt force impacts to the torso and ribs were fractured. 7RP 143-44, 161. There were patterned abrasions on her face. 7RP 149-51, 157. A forensic scientist opined the pattern impressions on Hockley's face could be from the sole of a boot or shoe. 8RP 167-71.

On December 26, Wiggins called Detective Cooper and requested they meet the next business day. 6RP 212-13. Wiggins said there things that would make him look bad. 6RP 213. He had thought about running but his family told him to stay and deal with the situation. 6RP 213. He was too old to run. 6RP 213. He explained he was trying to deliver a gift to Hockley on Christmas Eve. 6RP 213. He did not mean "for anyone to get hurt," but things "went bad" when he saw the other man leaving out the back. 6RP 213-14.

The news of Hockley's death became public on December 27. 7RP 13. On December 28, Wiggins turned himself into police. 7RP 13-14. The boots he wore at the time were examined, but neither Hockley's DNA nor any blood was on them. 7RP 76; 8RP 113-14. The tread pattern of his boots did not match the pattern from Hockley's face. 7RP 31; 8RP 159, 172-73.

Police searched Wiggins' cell phone and learned he made Internet searches for terms such as "Washington's Most Wanted" and similar sites on December 25. 7RP 30; 8RP 11, 47-51, 79. Wiggins also searched for or connected to web sites involving Seattle local news, Harborview Hospital, warrant information, court sites, King County Jail inmate lookup, and homicides in the Seattle and Greenwood area. 8RP 51-59, 65. On December 27, he made Internet searches involving Hockley's death. 8RP 96-98. Wiggins later sent his cell phone to Levine with instructions to delete certain information from it, but she did not remove anything. 7RP 27; 9RP 38-39, 65-66.

During jail calls following his arrest, Wiggins expressed anger at Hockley for letting the incident come about and for putting him in this situation. Ex. 69 at 2-3, 8.⁸ He also expressed his love for Hockley and asked her forgiveness. Ex. 69 at 2, 5. He wondered if the other guy could have done something. Ex. 69 at 6.

6. Wiggins' Testimony

Wiggins took the stand in his own defense. 9RP 147-215. He testified that after dropping Hockley off at her house in the afternoon of December 24, he returned home and cooked a holiday dinner, planning to stay home with Levine. 9RP 198-99. Later that evening he decided to

⁸ Ex. 69 is the transcript for the jail call recording (Ex. 68). 9RP 89-90.

take a gift to Hockley. 9RP 200-02. He received texts from Hockley indicating she did not want him to come over, but he did not think she would be mad once he got there. 9RP 201.

Upon his arrival, Wiggins saw what he thought could be Brooks' red truck in front of Hockley's house. 9RP 203-04. He was jealous of Hockley's continued relationship with Brooks. 9RP 205; 10RP 100-01. In the past when Wiggins had expressed concern about Hockley's feelings for Brooks, Hockley told him it was all in his mind. 9RP 205. Wiggins called Hockley while outside the house, saying he wanted to come see her. 9RP 206. Hockley declined. 9RP 206. Wiggins figured Brooks must be inside. 9RP 206. Wiggins called again, asking what she was doing. 9RP 206. He told her that a red truck was in front of her house after confirming Brooks had one. 9RP 207. Hockley told him he was crazy and hung up the phone. 9RP 207. Wiggins got out of the car and knocked on the door. 9RP 207. MH saw him but no one opened the door. 9RP 207.

Wiggins went around to the back of the house because he was suspicious that someone might come out the back door. 9RP 207-08; 10RP 51-52. He saw a man. 9RP 208. Wiggins said, "hey, can I talk to you?" 9RP 208. The man said, "it's between you and her, not me." 9RP 208. Wiggins responded, "I just want to talk to you." 9RP 208. Wiggins described feeling as if "the bottom dropped out." 9RP 208. He felt hurt

and angry. 10RP 101-02. He had trusted Hockley and it hurt to see the man walk out of the house. 9RP 209. He maintained he did not know the man was Brooks at the time, having never seen him before. 9RP 209. Wiggins headed back towards his car. 9RP 210.

When he reached the end of the driveway, Hockley came around fast "out of nowhere" and walked into him. 9RP 210. It was dark out. 9RP 211. He was startled. 10RP 46. Wiggins was angry and did not want her to touch him. 9RP 211-12. He "came around with a stiff arm" like a "clothes hanger" or "clothes line." 9RP 211-12; 10RP 47. The momentum hit Hockley and she flipped to the ground. 9RP 212; 10RP 48. It was a forceful fall. 10RP 49. Her back hit first, then her head. 10RP 60. She lay there. 9RP 213. Nothing was planned. 10RP 41. It just happened. 10RP 41. He acknowledged assaulting her. 10RP 47. He knew she was knocked out. 10RP 49. He adamantly denied stomping or kicking Hockley. 10RP 44, 57. He believed he caused some injuries to Hockley, but not all of them. 10RP 49. He did not crush Hockley's head. 10RP 50.

Wiggins went and sat in his car, thinking he had "F'd up," that "it's over" and he was going to jail. 9RP 213; 10RP 9. Hockley's car blocked the driveway and Wiggins could not see past it as he sat in his own car. 9RP 214; 10RP 55-56. Wiggins was thinking about what happened and

was not paying attention to the driveway area. 10RP 160-61. When Hockley did not get up after 30 or 60 seconds, Wiggins walked back towards her trying to figure out what to do. 9RP 213-14; 10RP 11, 54-55. Wiggins saw blood pooling out. 9RP 213-14; 10RP 56. In his mind, "everything stopped." 10RP 66. He "freaked out." 10RP 89-90. The injury seemed far worse than what he had done. 10RP 71.

He heard MH come out of the house. 10RP 10. She asked, "what happened? What did you do? What did you do to my mom?" 10RP 10. Wiggins said, "it wasn't me," "it was Greg," and he was going to look for him now. 10RP 10. He did not know what to say, but tried to calm her and avoid scaring her more by saying this. 10RP 11, 69-70, 152-54. He had not seen Brooks do anything. 10RP 12. He had not seen anyone else in the driveway or heard anyone. 10RP 58. Wiggins walked to his car and left. 9RP 215; 10RP 10. He acknowledged it was not what he was supposed to do, but he did not want to there alone with MH. 9RP 215.

Wiggins was scared and in shock. 10RP 13, 15-16. He called Levine and told her something had happened to Hockley. 10RP 13-14. Levine asked what happened and Wiggins said he did not want to tell her. 10RP 14. He knew his life had changed. 10RP 16. He did not believe Hockley had died at this point, but did not know what to think. 10RP 16. He thought he had knocked her out, but that "it couldn't have been that

hard but then it could have." 10RP 16. He knew it was serious when he saw the blood. 10RP 19. He ended up driving to Portland. 10RP 17. He had no real destination in mind; he was just driving and "trying to think the whole thing through." 10RP 17. He searched sites like "Washington's Most Wanted" because he thought law enforcement would be in pursuit of him. 10RP 18-19.

He called Harborview several times on the 25th. 8RP 90, 93-94, 105-06; 10RP 19-20. He was told Hockley was in critical condition. 10RP 19-20. He later searched for information on Seattle area homicides because he thought Hockley might have died. 10RP 22. He looked up the King County Jail inmate register to see if Brooks had been arrested. 10RP 28-29. Wiggins spoke with Detective Cooper later in the day over the phone. 10RP 26-28. Wiggins thought police were looking at both him and Brooks as suspects.⁹ 10RP 32.

Wiggins learned on December 27 that Hockley had died. 10RP 30. When he read an online article about the death, Wiggins believed he must have killed her. 10RP 30-31. He turned himself in on December 27. 10RP 36-38. The boots he was wearing that day were the same ones he wore the night he encountered Hockley. 10RP 44.

⁹ Detective Brooks testified that he did not consider Brooks a suspect after interviewing him. 7RP 22, 58, 74.

With reference to the jail calls, Wiggins said he had mixed emotions; he had love for Hockley but also anger over something that never should have happened. 10RP 40. When those jail calls were made, he believed he was responsible for Hockley's death. 10RP 41-42. But after learning the extent of Hockley's injuries, he also believed the "other guy" must have done something. 10RP 167.

7. Defense Theory of the Case

The defense argued to the jury that the police investigation was flawed in terms of how the collection of evidence was bungled and how logical avenues of investigation were not pursued. 11RP 37-38, 54, 58-71. For example, police did not search Wiggins' apartment for items of forensic evidentiary value, such as bloody shoes or clothing. 11RP 61-63. Nor did police search Wiggins' car. 11RP 63-64. Wiggins admitted knocking her down, but he did not stomp on her. 11RP 76, 79. Police jumped to the conclusion that he was the killer without doing a thorough investigation. 11RP 60, 77.

Counsel argued Brooks had the motive and opportunity to kill Hockley. 11RP 38-39, 44-45, 76. Brooks' romantic relationship with Hockley provided the motive. 11R 39. Brooks was in control of the relationship, he did not like losing the power that he exercised over Hockley, and he must have been angry when she told him to sneak out the

back door when Wiggins came over on Christmas Eve. 11RP 39-45. Brooks' account of events was inconsistent with MH's account, especially in relation to putting MH, Hockley and Wiggins together at the same time outside. 11RP 49-51, 54-55. Brooks did not disclose the nature of his relationship with Hockley when initially questioned and lied when he told police he had just arrived when in fact he had been over there for some time. 11RP 47. His account changed over time and the details of how he came across Hockley on the ground and saw Wiggins leave were implausible given the physical layout of the scene. 11RP 50-57. More should have been done to scrutinize Brooks as the one responsible for her death. 11RP 38-39, 54, 58-59, 71-77. Police did not even ask for his shoes or clothing he wore that night. 11RP 72. Nor did they look at Brooks' car. 11RP 74.

Counsel further argued the State could not prove premeditation to support the first degree murder charge. 11RP 80-84. The jury received instruction on second degree assault as a lesser offense to second degree murder. CP 80-81.

8. Verdict and Sentence

The jury was unable to reach a verdict on the first degree murder charge, but found Wiggins guilty of second degree murder. CP 53, 57; 12RP 6-7. The jury returned affirmative special verdicts on two

aggravating circumstances: (1) the crime was committed within sight or sound of the victim's minor child and (2) the offense was part of an ongoing pattern of domestic violence against multiple victims over a prolonged period of time. CP 54-55; 12RP 55. The court imposed an exceptional sentence of 360 months based solely on the presence of a child aggravator. CP 159, 161, 165; 13RP 63-64. This appeal follows. CP 168-69.

C. ARGUMENT

1. THE COURT ERRED WHEN IT ADMITTED EVIDENCE OF CONVICTIONS THAT WERE MORE THAN 10 YEARS OLD IN VIOLATION OF ER 609(b).

The trial court improperly ruled evidence of Wiggins' prior convictions for possession of stolen property was admissible under ER 609(b). Those convictions were more than 10 years old and thus presumptively inadmissible. The reason given by the trial court to admit the convictions demonstrates a misunderstanding of the law. Reversal is required because there is a reasonable probability that the error affected the outcome.

- a. The Court Admitted The Prior Convictions Over Defense Objection.

The State sought to admit evidence of various convictions to impeach Wiggins if he testified in his own defense. 1RP 23-24; CP 181-

82. Defense counsel opposed, arguing the convictions were older than 10 years and there was no special reason to admit them under ER 609(b). CP 35-36; 1RP 24, 63-64. In particular, counsel noted Wiggins was released on the same day he was sentenced on the possession of stolen property convictions in 1999 or 2000. 1RP 24, 63-64.

The court ruled Wiggins' prior convictions for robbery in 2001 and possession of stolen property in 1999 were admissible under ER 609 if he testified. CP 42; 1RP 65-66. The 2001 robbery conviction was admissible because Wiggins had not been released from confinement for that offense for more than 10 years.¹⁰ 1RP 65-66.

According to the court, the 1999 possession of stolen property convictions were admissible because, although those convictions were beyond the 10 year requirement of ER 609(b), he met that requirement primarily while serving time in prison. 1RP 65-66. The court believed only those who managed to stay in the community for 10 years without committing another crime are able to take advantage of the 10 year bar. 1RP 65. The court opined the reason for not allowing evidence of prior convictions that were older than 10 years is because a person has

¹⁰ Wiggins does not challenge admission of the 2001 robbery conviction on appeal because it was admissible under ER 609(a)(2) as a crime of dishonesty and the 10 year clock had not expired as measured from the time of release.

rehabilitated himself in the community for that period of time. 1RP 65. Those who reoffend during that period cannot take advantage of the 10 year rule because they have not had the opportunity to prove their ability to be out in the community while remaining crime free. 1RP 65. The court believed the purpose of the rule is otherwise defeated. 1RP 65.

Armed with this pre-trial ruling, the very first thing the prosecutor did on cross-examination was impeach Wiggins with his prior convictions. 10RP 45.

b. The Court Misinterpreted The Standard For Admissibility Under ER 609(b).

Interpretation of an evidentiary rule is a question of law, subject to de novo review. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The trial court's decision to admit evidence under an evidentiary rule is reviewed for abuse of discretion only if the court correctly interpreted the rule. Foxhoven, 161 Wn.2d at 174. Failure to adhere to the requirements of a rule is an abuse of discretion. Id. Similarly, a trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Prior convictions are generally inadmissible because they are irrelevant to the question of guilt and are prejudicial, shifting the jury's

focus from the merits of the charge to the defendant's general propensity for criminality. State v. Hardy, 133 Wn.2d 701, 706, 710, 946 P.2d 1175 (1997). ER 609 carves out a narrow exception to the general rule. Hardy, 133 Wn.2d at 706. The aim of ER 609 is to achieve the proper "balance between the right of the accused to testify freely in his own behalf and the desirability of allowing the State to attack the credibility of the accused who chooses to testify." 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 609.1, at 471 n. 14 (5th ed. 2007).

ER 609(a) allows admission of prior convictions for the limited purpose of impeaching a witness if "the crime (1) was punishable by death or imprisonment in excess of 1 year . . . and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment."

ER 609(b) places a time limit on the use of such convictions: "Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

Prior convictions involving dishonesty less than 10 years old are automatically admissible under ER 609(a)(2). State v. Russell, 104 Wn. App. 422, 434, 16 P.3d 664 (2001). But if a conviction is more than 10 years old, it is admissible only if the court determines that the conviction's probative value, as supported by specific facts and circumstances, substantially outweighs its prejudicial effect. ER 609(b); Russell, 104 Wn. App. at 433. Trial courts must make this determination on the record. Id. at 433-34.

Possession of stolen property is a crime of dishonesty. State v. McKinsey, 116 Wn.2d 911, 913, 810 P.2d 907 (1991). Time is measured by admission of the prior conviction evidence at trial, not the date on which the alleged current crime occurred. Russell, 104 Wn. App. at 432 ("The 10-year period ends when the conviction is admitted at trial."). Here, more than 10 years passed between Wiggins' incarceration on the possession of stolen property offenses and his trial in the present case. Sentencing on those convictions took place in October 1999 and he was released the same day. 1RP 24, 63-64; CP 153-55. Wiggins' trial did not take place until 2013. The convictions were therefore presumptively inadmissible under ER 609(b) because more than 10 years had passed since his release on the possession of stolen property convictions.

Courts should "very rarely and only in exceptional circumstances" deviate from the general rule that crimes more than 10 years old are inadmissible. Russell, 104 Wn. App. at 436 (quoting United States v. Beahm, 664 F.2d 414, 417-18 (4th Cir. 1981)). Before admitting evidence of the possession of stolen property convictions, the trial court did not balance the probative value of those convictions against the prejudicial effect on the record. 1RP 65-66; CP 42. The failure to do so was error. Russell, 104 Wn. App. at 434.

The trial court did not conduct any balancing analysis because it misinterpreted the requirements of ER 609. The court wrongly believed the possession of stolen property convictions, although older than 10 years, were not subject to the ER 609(b) requirement because Wiggins was incarcerated for much of those 10 years and therefore had not demonstrated an ability to rehabilitate himself. 1RP 65-66.

ER 609 has never been interpreted in this manner. The language of ER 609(b) is clear: "Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially

outweighs its prejudicial effect." There is nothing in the language of ER 609(b) that allows trial courts to sidestep its requirements in the event that the witness has committed another crime in the interim.

Rather, "[t]he ten year period is judged separately for each conviction." Russell, 104 Wn. App. at 432. An intervening crime during the ten year period does not affect whether the earlier crime is subject to the 10 year bar. Id. at 432 & n.15. This makes sense in light of the underlying purpose of the rule. "[T]he only purpose of impeaching evidence is to aid the jury in evaluating a witness' credibility, including a defendant when he elects to take the witness stand." State v. Alexis, 95 Wn.2d 15, 18-19, 621 P.2d 1269 (1980). As times passes, the probative value of prior convictions generally diminishes. The 10 year bar in ER 609(b) reflects the judgment that after 10 years, any remaining probative value is so diminished that its prejudicial effect outweighs its probative value except in extraordinary circumstances. State v. Jones, 117 Wn. App. 221, 233, 70 P.3d 171 (2003); Russell, 104 Wn. App. at 433-34, 436. Whether a witness commits another crime during the 10 year period does not affect the probative value of an older crime for impeachment purposes, and the value of impeachment is the only purpose behind the rule.

The trial court abused its discretion in admitting evidence of Wiggins' prior conviction for possession of stolen property because it

misunderstood the applicable law and failed to adhere to the rule's requirements. Quismundo, 164 Wn.2d at 504; Foxhoven, 161 Wn.2d at 174.

c. There Is A Reasonable Probability That The Error Affected The Outcome.

"It is obvious that evidence of former convictions is so prejudicial in its nature that its tendency to unduly influence the jury in its deliberations regarding the substantive offense outweighs any legitimate probative value it might have in establishing the probability that the defendant committed the crime charged." Alexis, 95 Wn.2d at 18 (quoting State v. Nass, 76 Wn.2d 368, 371, 456 P.2d 347 (1969)). "The same prejudicial effect exists when the admission of evidence of a conviction is for the purported purpose of helping the jury assess defendant's credibility as a witness." Alexis, 95 Wn.2d at 18.¹¹

In light of these concerns, reversal of a conviction is required where there is a reasonable probability that the ER 609 error affected the verdict. Russell, 104 Wn. App. at 438. "Applying the harmless error standard the appellate court looks to the evidence at trial, the importance of defendant's credibility, and the effect the prior convictions may have had on the jury." Hardy, 133 Wn.2d at 712. "At the core of this inquiry is

¹¹ The jury in Wiggins' case was given a limiting instruction on the use of the prior convictions. CP 67 (Instruction 6).

the strength of the other evidence." Russell, 104 Wn. App. at 438. In most cases, improper admission of convictions for crimes of dishonesty is highly prejudicial. Id. at 439 n. 32 (appellate court found error harmless based on the "highly unusual strength of the evidence").

In the present case, there was strong evidence that Hockley suffered massive injuries that caused her death. But the question of whether the State could prove Wiggins was responsible for those injuries beyond a reasonable doubt was far from indisputable. The defense theory was that Brooks, not Wiggins, was the one who stomped Hockley to death. 11RP 38-59, 71-77. There was evidence to support this theory. As argued by counsel, Brooks had motive and opportunity to harm Hockley. 11RP 38-39, 44-45, 76. Brooks took a step to act on that motive and opportunity by returning to Hockley's location after initially retreating down the alleyway. 4RP 130. Neither the State nor the court ever disputed Wiggins' right to argue his other suspect theory. See State v. Hilton, 164 Wn. App. 81, 99, 261 P.3d 683 (2011) (to admit evidence suggesting another person committed the charged offense, the defendant must establish a train of facts or circumstances as tend clearly to point out someone besides the defendant as the guilty party), review denied, 173 Wn.2d 1037, cert. denied, 133 S. Ct. 349, 184 L. Ed. 2d 208 (2012). The other suspect theory did not need to convince jurors that Brooks more

probably than not stomped Hockley. To succeed, the theory only needed to create a reasonable doubt that Wiggins did not stomp Hockley to death.

Wiggins admitted he assaulted Hockley by striking her in a manner that caused her to fall to the ground. 9RP 211-12; 10RP 47-49, 60. That was an assault. Significant blunt force caused Hockley's death. 7RP 10-11, 126, 151-54, 159-60, 163. But Wiggins denied stomping on Hockley. 10RP 44, 50, 57. There were patterned abrasions on her face. 7RP 149-51, 157. A forensic scientist opined the pattern impressions on Hockley's face could be from the sole of a boot or shoe. 8RP 167-71. But the footwear recovered from Wiggins did not match the pattern on Hockley's face and neither Hockley's DNA nor any blood was on them. 7RP 31, 76; 8RP 113-14, 159, 172-73.

There was no allegation that Brooks and Wiggins worked as accomplices. If the jury believed Wiggins' account of what he did, he was only guilty of the lesser offense of second degree assault. The jury was instructed on that lesser offense. CP 80-81. Wiggins was entitled to the lesser offense instruction because substantial evidence supported the conclusion that a rational jury could find he committed only the lesser offense. See State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (jury instruction on lesser offense should be administered if

substantial evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater).

Whether the jury believed Wiggins' version of events, such that it would only find him guilty of the lesser offense of second degree assault rather than murder, turned largely on Wiggins' credibility. The erroneous admission of the possession of the stolen property conviction — a prior crime of dishonesty — undermined his credibility and therefore his defense theory.

The State will argue the error was harmless because the trial court properly admitted evidence of the 2001 robbery conviction to impeach Wiggins. Such an argument, however, is simplistic. The relative strength of the State's evidence is still taken into account even where evidence of one or more other convictions is properly admitted. See State v. Rivers, 129 Wn.2d 697, 706, 921 P.2d 495 (1996) (ER 609(a)(1) error harmless where two of three prior convictions properly admissible, evidence against defendant was strong, defendant made prior inconsistent statements, victim made consistent statements, and defendant offered testimony showing still other criminal history); State v. Roche, 75 Wn. App. 500, 509, 878 P.2d 497 (1994) (ER 609(a)(1) error harmless where defendant had six convictions automatically admissible under ER 609(a)(2) and there was uncontroverted evidence of guilt); State v. Wilson, 83 Wn. App. 546,

554, 922 P.2d 188 (1996) (ER 609(a)(1) error harmless where defendant's prior theft conviction admissible under ER 609(a)(2), evidence was overwhelming, and defendant's testimony was implausible), review denied, 130 Wn.2d 1024, 930 P.2d 1231 (1997).

While the State's evidence was strong that Wiggins was guilty of some crime, the crucial question is which crime. The jury was given the opportunity to convict Wiggins of only second degree assault as a lesser offense to murder. CP 80-81. The probability of that happening was lessened by the erroneous admission of the possession of stolen property conviction. No witness actually testified to seeing Wiggins hit Hockley. Whether the jury believed Wiggins' account of what he had done during his altercation with Hockley turned on the credibility of his testimony.

The outcome may have been different had the jury only heard evidence of the 2001 robbery conviction as opposed to the additional evidence of the possession of stolen property conviction. Evidence of more than one prior conviction for dishonesty, in the form of the possession of stolen property conviction, painted a different picture of Wiggins. While reasonable jurors could be expected to view one prior crime of dishonesty as an isolated instance unworthy of weight, jurors could be expected to take quite a different view of a defendant who has more than one such prior conviction. In that circumstance, the jury is

likely to view the defendant as an inveterate liar based on a history of multiple crimes of dishonesty rather than a person who had a momentary lapse into dishonesty.

There was, therefore, a reasonable probability that admission of evidence that Wiggins was previously convicted for possession of stolen property led the jury to doubt his account of events. Given the prejudicial nature of the error, this Court should decline to find the court's erroneous admission of the possession of stolen property conviction harmless. Reversal of Wiggins's conviction and remand for a new trial is the appropriate remedy.

2. THE COURT ERRED IN FAILING TO COUNT PRIOR OFFENSES AS THE SAME CRIMINAL CONDUCT IN COMPUTING THE OFFENDER SCORE.

The facts show the prior offenses of possession of stolen property meet the same criminal conduct test. The court misapplied the law or abused its discretion in ruling otherwise. Although Wiggins received an exceptional sentence, remand is required to resentence Wiggins based on the corrected offender score.

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.530(1); RCW 9.94A.525. The sentencing court calculates an offender score by adding current offenses and prior convictions. RCW 9.94A.589(1)(a). Current offenses

that encompass "the same criminal conduct" are counted as one crime for sentencing purposes. Id.

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of law. State v. Graciano, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). The sentencing court has an affirmative duty under RCW 9.94A.525(5)(a)(i) to independently determine whether prior offenses served concurrently shall be counted as one offense using the "same criminal conduct" analysis. State v. McCraw, 127 Wn.2d 281, 287, 898 P.2d 838 (1995); State v. Reinhart, 77 Wn. App. 454, 459, 892 P.2d 110, review denied, 127 Wn.2d 1014 (1995); State v. Mehaffey, 125 Wn. App. 595, 600, 105 P.3d 447 (2005). The State has the burden of proving prior criminal history, including the burden of proving prior convictions do not constitute "same criminal conduct" when disputed by the defendant. State v. Bergstrom, 162 Wn.2d 87, 89, 169 P.3d 816 (2007).

"Same criminal conduct" is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). The test is an objective one that "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there

was any substantial change in the nature of the criminal objective." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

In 1999, Wiggins entered an Alford¹² plea to two counts of possession of stolen property as alleged in the amended information. CP 144, 150-51. The basis for count I was possession of a stolen vehicle belonging to Richard Bentz. CP 141. The basis for count II was possession of a stolen credit card number belonging to Richard Bentz. CP 141. The certificate of probable cause formed the factual basis for the plea. CP 143, 151. According to the certificate, Wiggins attempted to use a stolen credit card at a hotel. CP 143. The hotel manager contacted the owner of the credit card, Richard Bentz, who told the manager "his car and wallet among other things had been stolen." CP 143. Police arrived and located the stolen vehicle in the parking lot of the hotel. CP 143. Numerous documents with the name Richard Bentz, including a passport, were found in a suitcase carried by Wiggins. CP 143.

At sentencing, defense counsel argued the two prior crimes of possession of stolen property should be counted as the same criminal conduct in calculating the offender score. CP 106-08; 13RP 28-31. The court disagreed. 13RP 29-31. The court based its ruling on the notion that

¹² North Carolina v. Alford, 400 U.S. 25, 38, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

the record did not show the car and the credit card were taken at the same time; i.e., that the credit card was in the car when the car was stolen. 13RP 29-30. According to the court, the idea that the wallet was in the car could not be reconciled with the fact that Wiggins was also in possession of the victim's passport and other documents in a suitcase. 13RP 29-30.

The court wrongly determined the two offenses did not constitute the same criminal conduct. There was no dispute the offenses involved the same victim: Richard Dennis Bentz, the owner of all the property. CP 143. There was no dispute about same criminal intent. Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318-19; State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996).

Here, the objective criminal intent was to possess the property belonging to Bentz. "Although the statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act, there is one clear category of cases where two crimes will encompass the same criminal conduct — 'the repeated commission of the same crime against the same victim over a short period of time.'" State v. Porter, 133

Wn.2d 177, 181, 942 P.2d 974 (1997) (quoting 13A Seth Aaron Fine, Washington Practice § 2810 at 112 (Supp. 1996)). Crimes involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. Porter, 133 Wn.2d at 186.

The sticking point for the trial court was the question of time. The court believed the record showed Wiggins did not take the vehicle at the same time he took the credit card. 13RP 29-30. That reading of the record is untenable. Bentz did not report he was the victim of two separate thefts occurring at separate times. The certificate of probable cause shows Bentz was the victim of one criminal episode. That is the only reasonable reading of the facts set forth in the certificate of probable cause. Bentz told the hotel manager "his car and wallet among other things had been stolen." CP 143. The crimes were committed simultaneously when Wiggins took the car with the credit card and other documents inside it. For the same reason, the offenses involved the same place: Bentz's vehicle.

The two offenses meet the same criminal conduct test. The trial court erred in ruling otherwise.

Wiggins was sentenced based on an offender score of 5 with a standard range of 175-275 months. CP 159. Treating the possession of stolen property offenses as "same criminal conduct" shaves one point off

the offender score. See RCW 9.94A.525(9) (count one point for prior non-violent felony offense); RCW 9.94A.589(1)(a) ("the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score"). With an offender score of 4, the standard range is 165-265 months. See RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (second degree murder has seriousness level of XIV).

"[E]ven where an exceptional sentence is imposed, as it was here, the erroneous addition of a point to the offender score is still a prejudicial error." In re Personal Restraint of Rowland, 149 Wn. App. 496, 508, 204 P.3d 953 (2009). "A correct offender score must be calculated before a presumptive or exceptional sentence is imposed." State v. Jackson, 129 Wn. App. 95, 109 n.14, 117 P.3d 1182 (2005). "Before departing from the standard range to impose an exceptional sentence, the sentencing court must have the standard range clearly in mind." Rowland, 149 Wn. App. at 508.

"When the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). This rule embodies the reviewing court's hesitancy

to affirm an exceptional sentence where the standard range has been incorrectly calculated "because of the great likelihood that the judge relied, at least in part, on the incorrect standard ranges in his calculus." Parker, 132 Wn.2d at 190.

The record in this case does not clearly show the trial court would have imposed the same sentence on Wiggins if it had correctly calculated the offender score. 11RP 60-64. It did not express any intent to impose the same length of sentence had Wiggins' offender score been lower. See 11RP 41 ("my review says that if there's an offender score of 5 on a seriousness level of 14, the standard range is 175 to 275 months. And that's what I'll be using for sentencing."); 11RP 63 ("I've already giving [sic] the standard range and the scoring for that, so I am imposing an exceptional sentence of 360 months[.]").

Remand for resentencing using a correct offender score is the appropriate remedy. Compare Parker, 132 Wn.2d at 192 n.15 ("Given the fact that a correct standard range is intended as the departure point, we cannot imagine many instances where it could be shown that the resulting exceptional sentence would have been the same regardless of the length of the standard range.") and State v. Jennings, 106 Wn. App. 532, 544, 24 P.3d 430 (2001) (remanding for resentencing where record strongly suggested but did not clearly show the trial court would have applied the

same exceptional sentence) with State v. Rowland, 160 Wn. App. 316, 332-34, 249 P.3d 635 (2011) (remanding only for correction of offender score rather than resentencing where trial court stated on record "If the scoring range is determined to be a one rather than a two, which I'm concluding that it is now, the sentence that I imposed today would be the same sentence that I would impose if it came back in front of me."), aff'd, 174 Wn.2d 150, 272 P.3d 242 (2012).

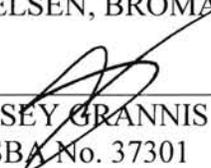
D. CONCLUSION

For the reasons set forth, Wiggins respectfully requests reversal of the conviction and remand for a new trial. In the event this Court declines to do so, Wiggins requests remand for resentencing based on a corrected offender score.

DATED this 4th day of February 2014

Respectfully Submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70653-5-1
)	
JOHNNIE WIGGINS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 4TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] JOHNNIE WIGGINS
 DOC NO. 801618
 WASHINGTON STATE PENITENTIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF FEBRUARY 2014.

X *Patrick Mayovsky*

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