71095-8

71095-8

NO. 71095-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WADE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

NAMI KIM
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. ER 801(d)(1)(iii) allows a witness to testify to a declarant's out-of-court identification of a person made after perceiving that person, as long as the declarant himself testifies at trial and is subject to cross-examination. After a former co-defendant recanted his original statement to police at trial, a detective testified to the co-defendant's previous identification of the defendant as the person who had burglarized the victims' homes with him and handled stolen guns. Did the trial court properly admit the identification, and if not, was any error harmless where the trial court found that it played little part in his decision?

2. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. A person commits the crimes of residential burglary, theft of a firearm, theft in the second degree, and unlawful possession of a firearm in the first degree when he enters and remains unlawfully in a dwelling with intent to commit a crime therein, wrongfully obtains a firearm belonging to another, commits theft of personal property, and possesses or has in his control a firearm having previously been convicted of a serious offense. The State presented evidence of the

defendant's highly incriminating jail calls; cell phone evidence linking him to each burglarized house; surveillance detectives who observed his highly suspicious behavior soon after the last burglary; evidence of broken glass and most of the stolen property in the car driven by the defendant to the pawnshop; and the testimony of an eyewitness who saw one of the co-suspects during one of the burglaries. Was this evidence sufficient to permit a rational trier of fact to convict?

3. When a defendant is convicted of unlawful possession of a firearm (UPFA) and theft of a firearm, RCW 9.94A.589(1)(a) specifically directs a sentencing court to elide the "same criminal conduct" analysis and apply RCW 9.94A.589(1)(c), which mandates that current convictions for UPFA or theft of a firearm shall not count against one another for scoring purposes. The sentencing court did not perform a "same criminal conduct" analysis for the six counts of theft of a firearm. Did the court properly calculate his offender score?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Michael Wade was charged by amended information with three counts of residential burglary, six counts of theft of a firearm, one count of trafficking in stolen property in the first degree, one count of theft in the second degree and one count of

unlawful possession of a firearm in the first degree (UPFA). CP 141-47. He was charged as an accomplice along with Cody Wade,[1] Christopher Patterson, and Filmon Berhe in all counts except the UPFA charge. Id. The State alleged that Wade burglarized three homes in three hours on the Eastside, stole six firearms from one house and personal property from another, actually or constructively possessed one of the firearms, and sold stolen items at a pawn shop. CP 7-19. Cody, Patterson, and Berhe all pleaded guilty prior to Wade's trial. 2RP 4-5. Wade waived his right to a jury trial and the court found him guilty as charged of all counts. CP 116, 167-73. The court sentenced him to 549 months. CP 155-59. Further scoring details are included in the relevant section below.

2. SUBSTANTIVE FACTS

On October 9, 2012, during a three-hour span of time, three different houses were burglarized. CP 167. The first home, located at 8817 NE 116th Place in Kirkland, belonged to Paul Wu and was burglarized just before noon. CP 167; 3RP 114-17, 152.[2] The

[1] Because Michael and Cody Wade share the same last name, Cody Wade will be referred to by his first name. No disrespect is intended.

[2] The verbatim report of proceedings consists of twelve non-consecutively numbered volumes which will be referred to as follows: 1RP (3/7/13); 2RP (7/8/13); 3RP (7/10/13); 4RP (7/11/13); 5RP (7/15/13); 6RP (7/16/13); 7RP (7/17/13, Part I); 8RP (7/17/13, Part II); 9RP (7/22/13); 10RP (7/23/13); 11RP (7/26/13); 12RP (10/17/13).

second home, located at 16108 82nd Place NE in Kenmore, belonged to Binh Vu and was burglarized close to 1:00 p.m. CP 167; 6RP 8, 50. The third home, located at 7603 NE 125th Street in Kirkland, belonged to Carl Reek and was burglarized at around 2:00 p.m. CP 167; 3RP 23, 34-35, 158. None of the three homeowners knew Wade, Patterson, Cody, or Berhe or had granted them permission to be in their homes. 3RP 97-98, 139; 6RP 72.

The point of entry at the Wu home was the sliding glass door on the back deck, which had been shattered with a rock. 3RP 118, 154; Ex. 20. Although the master bedroom had been ransacked and various drawers and cabinets opened, Kirkland Police Detective Benjamin Reali was unable to find any latent fingerprints, even after spending at least an hour with a high-powered flashlight designed to detect disturbance and dust. 3RP 121-25; 4RP 155-57. Two laptops, a tablet, some jewelry, a Pentax camera, handbags, and coins were stolen. 3RP 123, 128-38.

The Wus' neighbor, Hana Trnka, came home at around noon that day and saw a grayish sedan in front of her house with the engine running. 4RP 104-07, 111. She found this an odd place to park since it was in front of an empty lot. 4RP 107. The sole occupant was a thin male who looked almost Middle Eastern; when

she approached him, he said he was arguing on his cell phone with his girlfriend. 4RP 110-12. Four days later, Trnka picked Filmon Berhe "almost immediately" out of a photo montage as the driver. 4RP 33-38, 114-16.

The point of entry at the Vu residence was a sliding glass door in the back, which had been completely shattered. 6RP 11, 58-60; Ex. 70. The entire house had been ransacked with drawers dumped, objects overturned, and pictures taken off the walls and thrown on the floor. 6RP 10, 12-14, 57-59, 68-69. Despite this, responding King County Sheriff's Deputy Travis Thomas was unable to find any fingerprints. 6RP 8-11. Taken were 5-6 bottles of Hennessy and Courvoisier liquor, some gold jewelry, and a tablet. 6RP 68-70.

The point of entry at the Reek house was the front door, which had been kicked in. 3RP 36-37. Reek's wife, who habitually went out for lunch every Tuesday, had returned to the home 15-20 minutes earlier than Reek that day. 3RP 34-35. He found her frantic, yelling that she had heard people in the house after walking in from the garage. 3RP 36-37. The master bedroom, offices, and guestrooms had all been visibly disturbed, with doors and drawers opened and items strewn about. 3RP 42-43, 53-62, 68-71, 74-77. The plastic bags that they kept in the master bathroom had been taken out and

thrown around. 3RP 75-76; Ex. 7. Reek was missing about $1,400 cash, some of his wife's jewelry, two laptops, a tablet, and a Kodak camera. 3RP 43-45, 59, 63, 72-73. Also taken were six guns, including a Russian Makarov handgun with serial number A034916, a shrink-wrapped package of .38-special caliber ammunition, and a box of bullets. 3RP 43, 56-62, 69-70, 77-81, 162; Ex. 10, 17. The Makarov was later recovered several months later in a stolen vehicle. 8RP 85-90.

Detective Reali was still at the Wu residence when he received the call for the Reek home. 4RP 157-58. Despite the disturbed state of the Reek house, Reali was again unable to find any fingerprints anywhere, including the smooth surface of a rifle left behind; this indicated that the burglars had worn gloves. 4RP 162-65. Both Reali and Reek noted that many expensive items similar to those stolen had been left behind, including pearl necklaces, gold rings, checkbooks, and additional guns and rifles that had been pulled out yet not taken. 3RP 48-50, 58, 67-69; 6RP 164; Ex. 5, 8, 9.

Reek's neighbor, Vanessa Simpson, had been walking past his house at around 1:00 p.m. when she saw a golden-brown sedan the size of a "Focus or Camry" parked the wrong way in front of their

residence. 3RP 101-05, 107-08, 112. Cars rarely parked there. 3RP 108. The sole occupant, who was brown-skinned and thin, leaned back in the driver's seat as she walked by, which she found strange. 3RP 109. When she came back 10 minutes later, the car was gone and Mrs. Reek had just discovered the burglary. 3RP 105, 111.

One month prior to the burglary, a thin African-American man had banged on Reek's door; when Reek answered, the man became agitated and backed away, saying something about "his opportunity." 3RP 82-83. The trial court later found it "clear" that this was Filmon Berhe. CP 169; 11RP 9. Two weeks later, a larger African-American man knocked on his door, retreating when he saw that Reek was on the phone. 3RP 83-85. In the weeks preceding the burglary, Reek kept seeing a brownish-gold Toyota Camry driving and parking in the neighborhood; this struck him as unusual because visitors usually parked farther down near a trailhead to use the park. 3RP 85-86.

Five days before the burglaries, Bellevue Police Officer Michael Bryson had been called to Newport Shores in Bellevue to respond to a landscaper's report that some males were acting suspiciously, parking in different locations in a gold Camry and walking around at least one house. 3RP 15-16. When Bryson

arrived, he spotted the car with matching plate and saw at least three black males inside; he was unable to make contact. 3RP 16-17.

This information about the gold Camry with license plate 953-VTZ was passed along on October 9 to Bellevue Police Detective Jeffrey Christiansen, a member of a special proactive investigative unit. 4RP 66, 68. Christiansen discovered that the Camry was registered to Carol Anderson and associated with her grandson, Michael Wade. 4RP 66-68, 180. Wade had a 2005 conviction for Robbery in the First Degree. 6RP 78-79. At 3:30 p.m., Christiansen, who did not yet know about the burglaries that had just occurred, drove with a surveillance team to Anderson's house at 7900 48th Avenue South in Seattle. 4RP 72. The gold Camry arrived and parked in front of the house at around 4:00 p.m. 4RP 72.

Wade was driving, with Filmon Berhe in the front passenger seat and Patterson and Cody in the back. 4RP 74-76. Christiansen saw Wade get out of the car and open the trunk, where Cody joined him. 4RP 77. Wade bent over at the waist and appeared to manipulate items in the trunk as Cody looked side to side as a lookout. 4RP 77-78. When a Seattle Police parking enforcement vehicle went by, Cody grabbed Wade's shirt and tugged on it and Wade immediately pulled down the lid of the trunk. 4RP 78-79.

After ensuring that the police vehicle was out of view, Wade reopened the trunk and Cody took out a white vinyl drawstring shopping bag, which appeared to be weighed down by something heavy. 4RP 79-80, 180-81. Cody took the bag across the street toward a purple GMC Yukon that was parked by itself in the yard, and back again. 4RP 171-72, 180-81; 9RP 39-40. Wade, Berhe, and Patterson went inside Anderson's house very briefly and then met Cody back at the Camry, which Wade drove to Monorom Jewelry in Seattle. 4RP 81-85; 9RP 40-41. Wade dropped off Cody and Patterson and parked at the car wash across the street. 4RP 85-88. Christiansen and his surveillance team, which had followed the Camry, decided to arrest Wade on an outstanding DOC warrant. 4RP 88-89. When Wade saw marked police cars arrive, he looked visibly alarmed and unsuccessfully attempted to escape. 4RP 88-90.

Wade and Berhe were both arrested on unrelated warrants and taken to the Bellevue booking facility. 4RP 90-91; 5RP 8-10. Wade provided police with the phone number of 206-235-4949; Berhe provided the phone number of 206-707-5196. 5RP 11, 99-101. Meanwhile, other officers stopped and released Patterson and Cody after determining that they had sold some gold jewelry for $600 at Monorom Jewelry; $610 was found in Patterson's hand.

4RP 21; 9RP 45-46. Wu later confirmed that the jewelry that Cody and Patterson had sold at Monorom Jewelry had been stolen from him during the burglary. 4RP 22, 31.

In the Camry in open view, Christiansen saw one pair of cloth gloves in the front passenger door map holder, one pair of gloves in the hump between the backseat foot wells, and a black jacket and tablets in the back seat. 4RP 93, 100; Ex. 37. On the ground next to the passenger door, Christiansen found a cell phone that Berhe said belonged to him. 4RP 99; 5RP 101. The Camry was impounded. 4RP 101-02.

Police found most of the stolen property in the Camry the next day, pursuant to a search warrant. 4RP 102-03; Ex. 38. They found safety glass fragments in the pockets of the black jacket similar to the shattered glass from a sliding glass door; an additional black glove under the front passenger seat (for a total of 5 gloves); and two tablets belonging to Bing Vu and Paul Wu in the backseat. 4RP 28-31, 127-38. Inside the trunk, they found Wu's computer bag containing his laptops, Wu's Pentax camera, Carl Reek's two laptops, and Vu's bottles of liquor. 4RP 31, 139-42, 153.

The Camry contained a total of five cell phones in the driver's door, passenger seat, glove box, and rear seat. 4RP 144-52. Wade

admitted in a later jail call that the phones belonged to himself, Cody, Berhe and Patterson. Ex. 68, p. 9; Ex. 69. Also in the glove box was Wade's cell phone activation paperwork dated September 4, 2012 for his Samsung phone (206-235-4949), along with his recent Western Union receipt. 4RP 147-49; Ex. 46, 49.

On October 11, Bellevue police officers arrested Cody and Patterson after a brief chase before which Cody flipped off the undercover officers, indicating that he knew they had been watching him. 4RP 45-46, 160-66; 5RP 12-16. Patterson appeared nervous about speaking to police in public so Christiansen and Officer Smith drove him half a block away to talk. 9RP 22-24, 31, 51-52. After Christiansen read him his rights and explained the gravity of the charges, Patterson admitted his involvement in the burglaries, thefts, and trafficking. 9RP 27-28, 57. He identified Wade, Cody and Berhe as the people with whom he'd committed the crimes. 9RP 27-28, 57. He also identified Wade as the person handling the guns. 9RP 28.

Later that same evening, Christiansen executed search warrants on the house at 7900 48th Avenue South and Cody's purple GMC Yukon across the street at 7907 48th Avenue South. 4RP 159, 162; Ex. 33. No evidence from the burglaries was found, although the Yukon contained documents showing Cody's dominion and

control. 4RP 159, 178; Ex. 34. After the Yukon was towed, however, police discovered the white drawstring bag underneath it, full of the same .38-special caliber ammunition stolen from Reek. 4RP 40-43, 59; 5RP 18-19; 6RP 27; 9RP 63; Ex. 28.

Within hours of Wade's arrest on October 9, he began making a series of frantic phone calls to Cody, imploring him in crudely-coded language to remove and hide the guns. 5RP 128-31, 134-61. Christiansen created a rough transcript of seven calls: (1) October 9, 2012 at 8:32 p.m., 8:55 p.m., and 9:13 p.m.; (2) October 11 at 6:19 p.m.; (3) October 13 at 5:15 p.m.; and (4) October 15 at 8:11 p.m. and 9:11 p.m. 4RP 157-59; 5RP 128-31, 158-61; Ex. 68, 69.

During the calls from October 9, Wade begs his brother repeatedly that "if you ever want to see us in life ever again," he needs to get rid of the "dunt-dunt-da-dunt-dunt-dalas . . . that's [sic] located in Barney, the dinosaur" and that "Barney needs to be clean and sober."[3] Ex. 68, p. 2-3, 5-7, 11; Ex. 69. By 9:13 p.m. that night, Cody reassures Wade that "Barney is clean." Ex. 68, p. 7; Ex. 69. Wade also expresses concern that the police had seen him pop the

[3] The court found that "Barney, the dinosaur" was "undoubtedly" Cody's purple Yukon, not only because of that explicit admission in the calls but the obvious reference to the car's distinctive, bright purple color. CP 170; Ex. 33.

trunk at the house and discusses the ongoing investigation, including how "they towed Cody's truck . . . they towed the purple thing," and his concerns that Patterson (nicknamed "Shitty") might "snitch." CP 169-70; Ex. 68, p. 8, 11-12; Ex. 69. In the last call, he tacitly confesses to the crimes, insisting:

> We don't deserve this right now, you know what I'm saying? We ain't done nothing wrong . . . We don't be hurting nobody, you know what I'm saying? We just come for what we come for, you know what I mean, and just get what we gotta get and be out, you know what I mean. There's a reason, you know what I'm saying? We don't be doing nothing . . . . We try taking care of our folks, our family, you know what I mean.

Ex. 68, p. 13; Ex. 69.

The cell phone records for Wade, Cody, and Berhe, including information from cell tower hits, revealed that their cell phones had been used near each house at the time of each respective burglary during the three-hour period. CP 169; 5RP 108-19; Ex. 60, 82. On October 9, at 12:59 p.m., 1:01 p.m. and 1:02 p.m., there were three calls between Wade's phone (206-235-4949) and Cody's cell phone (206-403-7550) hitting towers near the Vu house . CP 169; 5RP 108-19; Ex. 60. The last call was about 13 minutes long. 5RP 114; Ex. 60. At 1:40 p.m. and 2:02 p.m., Wade and Cody exchanged two more calls near the Reek house. CP 169; 5RP 108-19; Ex. 60. At

11:44 a.m. near the Vu home during the time period of that burglary, Berhe's cell phone (206-707-5196) also made a 25-minute call to Cody's cell phone. CP 169; 5RP 108-19; Ex. 60, 82. Christiansen testified that burglars working in groups often maintain an open phone line so that those outside can immediately alert the people inside that someone is coming. 5RP 106-07.

Subscriber information for Wade's phone (206-235-4949) and Cody's phone (206-403-7550) further established their ownership of each. CP 169; 5RP 28-33, 45-47. Wade's cell tower hits also corresponded time-wise with his known movements from his home in South Seattle to the arrest at Monorom Jewelry and ultimately to the booking facility at Bellevue City Hall. 5RP 111-13; Ex. 60.

Patterson testified at trial but recanted his earlier statements to Detective Christiansen identifying Wade as one of the burglars and the person handling the guns. 8RP 57-66. In its findings of fact and conclusions of law, the trial court found that Patterson believed that being labeled a snitch had now endangered his life. 11RP 7; CP 68. The trial court also noted that not only was Patterson's trial testimony not credible, but his earlier statements of identification, resulting from a panicked attempt to help himself, "must also be viewed with some skepticism based upon Mr. Patterson's demonstrated willingness to

state whatever seems to be in his best interests at the time." 11RP 7-8, 11; CP 168.

The court termed Wade's behavior at the trunk "undeniably suspicious" and his act of parking away from the jewelry store "strongly suggest[ive]" of his knowledge that they were acting illegally "in light of the fact that an abundance of other stolen property was in the car." 11RP 11-12; CP 169. The five gloves found in the Camry corresponded "notably" with the lack of fingerprints at the burgled homes. 11RP 12. The court also found the glass fragments in the black North Face jacket to be "significant" given the two broken sliding glass doors at the Vu and Wu homes, noting that the oversized coat would not have fit any of the suspects but the "fairly large" Wade. 11RP 12.

Finally, the trial court found that Wade's highly incriminating phone calls "are the most telling aspect of the evidence in several respects" and "provide the most damning evidence of his involvement in the burglaries." 11RP 13-16. In those calls was his "semi-confession" that "[w]e just come for what we come for . . . and just get what we got to get and be out." 11RP 14; CP 170. Wade's "panicked, desperate phone call[s] . . . [and] poorly disguised request to destroy or hide evidence located in Barney . . . [which was]

undoubtedly . . . the purple GMC Yukon" demonstrated that "at the very least, he knew of the crimes and wanted the evidence hidden." 11RP 13. As the court queried: "If the defendant was not involved in the burglaries and was arrested solely on an outstanding bench warrant, why did he call his brother in an effort to eliminate evidence of a crime he neither committed nor knew of?" 11RP 13.

C. ARGUMENT

1. THE COURT DID NOT ERR IN ADMITTING PATTERSON'S STATEMENTS UNDER ER 801(d)(1)(iii).

Although Wade concedes that the language of ER 801(d)(1)(iii) permits the admission of Christopher Patterson's statements of identification, he argues that the rule was not intended to permit this and attempts to distinguish this Court's prior decision in State v. Grover, 55 Wn. App. 252, 777 P.2d 22, rev. denied, 113 Wn.2d 1048 (1989).[4] The Court should reject this argument. Both caselaw and the rule on its face allowed Detective

[4] In his brief, Wade cites several times to State v. Grover, 55 Wn. App. 923, 780 P.2d 901 (1989), rev. denied by State v. Peeler, 114 Wn.2d 1008 (1990). App. Br. 9-10. However, the case relied on by the trial court and the parties was State v. Grover, 55 Wn. App. **252** (emphasis added); 8RP 7-16; 9RP 4-12. The case cited by Wade pertains to Grover's co-defendant, Kenneth Peeler. Both Grover and Peeler argued that ER 801(d)(1)(iii) prohibited statements of identification by a defendant's name rather than by photographic montage/lineup. 55 Wn. App. at 255-58; 55 Wn. App. at 932 n.1. Because the issue is more fully discussed in Grover's appeal, upon which the trial court relied, the State addresses only Grover's actual case.

Christiansen to recount the statements. Furthermore, any alleged error was harmless.

a. Relevant Facts.

After supplemental briefing and argument, the trial court admitted Patterson's two statements of identification under ER 801(d)(1). 8RP 5-16, 107; 9RP 4-12, 26-27. Prior to their introduction, the trial court emphasized that it was very aware of the fact that Patterson was a co-defendant and might have had his own motivations for implicating someone at the time, stating the statements' admissibility did not mean that they were conclusive: "It's just admissible evidence that the court can consider and whether the court finds it persuasive or not is a different question." 9RP 11-12.

During Christiansen's testimony regarding Patterson's two statements, the court further stressed that any statements in addition to the two statements of identification were explicitly noted as impeachment only, emphasizing, "Believe me, I'll be very cognizant of how this evidence can and cannot be used for adjudicative purposes." 9RP 26-27.

Patterson, who was granted immunity by the State for his testimony, initially refused to testify and had to be admonished and

compelled to do so by the trial court.[5] 8RP 5-7, 17-18. Patterson admitted his own culpability in court and his nickname of "Doo-Doo" but claimed he had committed the crimes alone, denying that he had identified Wade as one of the burglars or the handler of the guns. 8RP 17-74. He stumbled at least once when attempting to claim sole responsibility for the crimes, testifying that Cody and Berhe had picked him up to go to the pawn shop "because we had stuff that we burglarized." 8RP 33. He admitted that being a snitch "puts my life in jeopardy." 8RP 37.

b. The Trial Court Properly Admitted The Statements Under Grover.

An appellate court reviews the interpretation of an evidentiary rule de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, the trial court's decision to admit or exclude evidence under a correctly interpreted rule is reviewed for an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007); State v. Jenkins, 53 Wn. App. 228, 230-31,

[5] Patterson was not required to testify as part of his earlier plea agreement. 2RP 5. Furthermore, although Wade asserts in his brief that "[t]he State well knew that Patterson would deny that Wade assisted him in committing the burglaries," Wade cites to nothing in the record to support this. The report of proceedings shows only that the State knew Patterson did not want to testify, that they expected him to confirm that the guns were stolen, and that "[i]t sounds like there will be parts of his testimony that are from a previous statement, but not the entire thing." 8RP 7-10.

766 P.2d 499, rev. denied, 112 Wn.2d 1016 (1989) (evidence admitted under ER 801(d)(1)(iii) is reviewed for abuse of discretion). Discretion is abused only where no reasonable person would take the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

Under ER 801(d)(1)(iii), a court may admit an out-of-court "statement of identification" made by a declarant after he perceives a person, as long as the declarant testifies at trial. The declarant need not introduce the statement, which may be elicited from another person who heard or saw the identification, such as an officer. Jenkins, 53 Wn. App. at 233 n.3.

In Grover, this Court applied ER 801(d)(1)(iii) to a case with dynamics very similar to this situation. 55 Wn. App. at 254-59. There, two defendants came to victim Angela Hughes' house shortly after her friend's stepchildren, Carlanne Gardner and Michael Parker, also arrived seeking cash. Id. at 254. One of the defendants assaulted Hughes while demanding money and threatening to kill her and her baby. Id. When Gardner and Parker's stepfather returned, the defendants attacked and robbed him, too. Id. Curiously, neither Gardner nor Parker was attacked or robbed, and the defendants

were found nearby in Parker's car, joined by Parker's own brother. Id. at 254-55.

Gardner initially identified the two men by name to a detective, but later claimed at trial that she only vaguely remembered giving her statement, denied any memory of the robbery or her identification of the robbers, and stated that she was reluctant to testify. Id. at 255. This Court noted that Gardner had to be booked on a material witness warrant and receive a grant of immunity before she would testify. Id.

This Court held that the trial court properly allowed the detective to testify as to Gardner's prior statement of identification under ER 801(d)(1)(iii). Id. at 258. Rejecting the defendant's attempt to exclude the naming of suspects already known by witnesses, the court noted that no such distinction existed in the language of ER 801(d)(1)(iii) and that "the rule, read literally, is dispositive." Id. at 256. The court further held that if a declarant is present at trial and "'subject to unrestricted cross-examination,'" there is no constitutional requirement that the prior identification must have "particularized guarantees of trustworthiness." Id. at 258 (quoting United States v. Owens, 484 U.S. 554, 560, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)).

Wade acknowledges that the language of ER 801(d)(1)(iii) permits the use of Christopher Patterson's statements in the case against him. Yet he insists that this is not dispositive, claiming that it was never intended to be used in situations involving a former co-defendant. His argument fails in the face of Grover. This Court noted the distinctive circumstances surrounding the declarant and her brother in that case, recounting the brother's connection to the defendants and declarant Gardner's own grant of immunity before she could even be compelled to testify. Id. at 255. Yet this Court admitted her prior statement of identification.

This case presents similar dynamics. Patterson, who was undisputedly involved in the charged events, was a reluctant witness similarly forced to testify under subpoena, court admonishment, and a grant of immunity because of his role in the incident. Wade cites to only one source of authority, the 1972 comment to the Federal Rules of Evidence, to argue that the rule was intended only to avoid the suggestiveness of courtroom identifications. App. Br. 10. In doing so, he ignores more recent federal caselaw that attests to the contrary. In United States v. Elemy, the court pointed to legislative history showing that Congress enacted the federal equivalent of ER 801(d)(1)(iii):

> to remedy two perceived problems: (1) the typical situation where the witness's memory no longer permits a current identification and he therefore can only testify as to his previous identification; and (2) the instance where before trial the witness identifies the defendant and then because of fear refuses to acknowledge his previous identification. It is plain that in the second situation the witness's prior identification can only be introduced into evidence by a third party who was present at the original identification.

656 F.2d 507, 508 (9th Cir. 1981) (citing 121 Cong. Rec. 31, 866-87 (Congressmen Hungate and Wiggins)).

Thus, it is clear that Congress was aware of the phenomenon of the reluctant witness who recants out of fear in addition to one whose memory fades with time, and the necessity for this rule as a remedy. Here, the record is clear that Patterson was attempting to retract his identification of Wade because being a "snitch . . . puts my life in jeopardy." 8RP 37. The introduction of his earlier statement thus squares with the purpose of the rule. The fact that Patterson was once a fellow defendant does not render ER 801(d)(1)(iii) inapplicable.

Wade's restrictive reading of ER 801(d)(1)(iii) is also refuted in United States v. Fritz, 580 F.2d 370, 375-76 (9th Cir. 1978) (holding that a police officer permissibly made a statement of identification under the federal equivalent of the rule when he told a fellow officer

that he remembered the defendant and his previous case).

ER 801(d)(1)(iii) applies whether the declarant is a stranger, an acquaintance, or even a police officer. "Particularized guarantees of trustworthiness" are not required, as noted in Grover; concerns about bias or unreliability can be explored by thorough cross-examination.

Wade further contends that even if the trial court correctly admitted Patterson's statements, the scope of ER 801(d)(1)(iii) limited his identification to testimony that Wade was "with" Patterson on October 9, 2012, with no reference to the activity itself. He cites to no authority for his position, nor can he. The courts have rejected his interpretation. See State v. Stratton, 139 Wn. App. 511, 517, 161 P.3d 448 (2007) (citing Porter v. United States, 826 A.2d 398, 409-10 (D.C.App.2003) ("[a] description of the offense itself is admissible . . . to the extent necessary to make the identification understandable to the jury")).

Furthermore, the rule would have no meaning or relevance if a statement was limited simply to the recitation of a name or face, with no context. All of the relevant caselaw involves identification of the suspect as the person who "did" something observed by the declarant, not simply someone who was "with" the witness or at a location. See e.g., Grover, 55 Wn. App. at 254; State v. McDaniel,

155 Wn. App. 829, 877, 230 P.3d 245 (2010) (witness' statement identifying defendant "as the man who shot him" properly admitted under ER 801(d)(1)(iii)).

Patterson's statements identifying Wade as one of the burglars in the house and the handler of the guns were admissible.

c. Any Alleged Error Was Harmless.

Even if this Court finds that the trial court erred in admitting Patterson's two statements, Wade must still establish prejudice. Evidentiary error is grounds for reversal only if it results in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Id.

Wade cannot meet this burden. The trial court was abundantly clear in the record about its skepticism of Patterson's statements on the stand and to the police, the scant weight it gave the two statements of identification, and the primacy of Wade's jail calls and other neutrally-sourced evidence in its finding of guilt. The trial court found that Patterson's earlier identifications "must . . . be viewed with some skepticism based upon Mr. Patterson's demonstrated willingness to state whatever seems to be in his best

interests at the time." 11RP 7-8, 11; CP 168. This does not constitute error that had a material effect on the outcome.

As will be further argued below, even absent the statements from Patterson, substantial evidence showed that Wade committed burglary, theft of a firearm, theft in the second degree, trafficking in stolen property, and unlawful possession of a firearm. Wade focuses primarily on the tenability of his UPFA conviction. Contrary to his assertion, ample evidence existed to establish his culpability for this crime even absent Patterson's statement of identification.

Possession of contraband may be actual or constructive. State v. Summers, 45 Wn. App. 761, 763, 728 P.2d 613 (1986). Constructive possession requires the defendant to have dominion and control over the items. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). "Dominion and control" means that the item may be reduced to actual possession immediately. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A court will review the totality of the circumstances, including the proximity of the property and ownership of the premises where the contraband was found, to determine constructive possession. State v. Lakotiy, 151 Wn. App. 699, 714, 214 P.3d 181 (2009).

Courts have found sufficient evidence of constructive possession where the defendant was the driver of the vehicle where guns were found within his reach. State v. Chouinard, 169 Wn. App. 895, 899-900, 282 P.3d 117 (2012), rev. denied, 176 Wn.2d 1003 (2013); see also State v. Turner, 103 Wn. App. 515, 524, 13 P.3d 234 (2000) ("Where there is control of a vehicle and knowledge of a firearm inside it, there is a reasonable basis for knowing constructive possession."). In Turner, the court held that additional evidence such as the proximity of the firearm, its extended time period in the car, and the fact that Turner "did nothing to reject the presence of the firearm" in the truck constituted sufficient evidence for his constructive possession of the gun. Id.

Here, the State correctly argued at trial that even without Patterson's statement identifying Wade, substantial circumstantial evidence existed of his constructive possession of the stolen Makarov handgun: "[G]iven the nature and the amount of circumstantial evidence in this case, relying on . . . . eyewitness testimony is not something that the court will have to spend a great amount of time doing in this particular case." 10RP 99. The State further argued that circumstantial evidence can often be more compelling than direct evidence, especially when " the direct

evidence may come from a questionable source such as an eyewitness identification." 10RP 120.

When Wade admitted to the burglaries and thefts of the guns during the phone calls, he necessarily admitted to either constructive or actual possession of the guns. As noted by the trial court, by the time Wade made the calls he knew that the police had his gold Camry, and thus custody of all of the stolen items except for the guns. His desperate entreaties to his brother to remove the "duh-duh-duh"'s from the purple Yukon could therefore only have been in reference to the firearms. This established his keen awareness of culpability for the theft and possession of the weapons; only if he had been responsible for their taking and possession would he have been that frantic about their removal.

Evidence supported Wade's role as an "inside man" in the Reek burglary. Cell phone evidence showed that Wade was present at Reek's residence during the time of that burglary and theft of the guns. Reek's neighbor, Vanessa Simpson, saw a thin dark-skinned man matching Berhe's description sitting in a brownish-gold car similar to a Camry in front of the house with the engine running at the time of the burglary, further establishing that Wade was one of the people inside actively handling the guns.

The defendants used one car during the Reek burglary; this was established by Simpson's sighting of the Camry outside the Reek home, Hana Trnka's sighting of the Camry at the Wu residence right before the Reek burglary, and the surveillance team's observation of Wade driving the burglary crew home in the Camry shortly after the last burglary. This means that Wade, as the driver, knowingly transported the guns either inside the car as he drove the crew home, or in the trunk. The former act has already been established as sufficient for constructive possession. The evidence, however, is even more substantial regarding the latter.

Detective Christiansen observed Wade open the Camry trunk and then push it down, alarmed, when a Seattle Police vehicle went by. Wade himself admitted on a jail call that when he saw police at that moment, he was scared. Of all the goods stolen, no item would warrant this kind of reaction except a firearm because none of the goods stolen could reasonably be expected to elicit that kind of immediate concern from anyone, whether passerby or police, except a gun. The action itself strongly indicates that the guns were close enough at hand for him to worry about being seen by a passing car.

Christiansen further saw Wade manipulate items in his car trunk and stand directly adjacent to his brother when Cody Wade took the plastic bag, weighed down by something heavy, out of the trunk and ultimately to the purple Yukon. Wade's frantic phone calls about the "dunt-dunt-dunt"'s in Barney began a few hours later. The .35-caliber special ammunition found in the bag two days later matched those stolen from Carl Reek, in the type of bag taken from his home. All of these facts are sufficient to show that, at the very least, Wade constructively possessed the six stolen guns, participated in their theft, knowingly transported them in his car, and stood at the trunk and manipulated either the guns or items nearby, where his brother ultimately took them out in his presence.

2. SUFFICIENT EVIDENCE SUPPORTS ALL OF WADE'S CONVICTIONS.

Wade challenges the sufficiency of the evidence of his convictions for burglary, theft of a firearm, theft in the second degree and unlawful possession of a firearm, saying there was only sufficient evidence for trafficking or possession of stolen property. Specifically, he argues there was insufficient evidence identifying Wade as the perpetrator of these crimes. This argument fails because the State

produced substantial evidence for a rational trier of fact to find that he committed these charged crimes.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the State. Id. Circumstantial and direct evidence carry equal weight when reviewed by an appellate court. Id.
A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107, rev. denied, 141 Wn.2d 1023 (2000).

a. Residential Burglary.

RCW 9A.52.025 states that "[a] person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle."

There was substantial evidence that Wade committed the residential burglaries against Carl Reek, Paul Wu and Binh Vu, either as principal or accomplice. Although the trial court placed comparatively little weight on Patterson's statements of identification, even Wade concedes that the court found additional evidence convincing beyond a reasonable doubt, most prominently in Wade's jail calls. The court characterized Wade's "poorly disguised request to destroy or hide evidence" and "semi-confession to his crimes" as "damning evidence": "[W]e don't do nothing wrong, we don't be hurting nobody . . . *we just come for what we come for*, you know what I mean, *and just get what we gotta get and be out*, you know what I mean." 11RP 13-14; Ex. 68, p. 13; Ex. 69 (italics added). Wade contends that there is no way to determine the crimes to which he refers, but the reference is obvious. He is trying to rationalize the burglaries, thefts and trafficking as harmless property offenses.

Wade's confessions were also corroborated by the crew's casing of Carl Reek's house earlier that month; Vanessa Simpson's sighting of Berhe pressed back into the driver's seat of the gold Camry trying to hide; and Hana Trnka's identification of Berhe in the Camry across the street from the Vu house. Cell records revealed that phones belonging to Wade, Cody and Berhe were in contact with each other during each burglary using cell towers near each home.

Wade's own actions also incriminated him. Surveillance detectives saw him driving the Toyota Camry, with all four suspects inside, soon after the final burglary; acting in an "undeniably suspicious" manner when a Seattle Police vehicle drove by as he opened the trunk; and behaving suspiciously when he drove the group to Monorom Jewelry to sell some of the stolen goods. Items stolen from all three burglaries were found in Wade's car. A size XXL North Face jacket, which could not fit any suspect but Wade, was found in Wade's car with broken glass fragments similar to those caused by forced entry at the Wu and Vu burglaries. Five gloves were found inside the Camry. These matched the number of the three "inside men" almost perfectly and were deemed to be "burglary tools" by the court, consistent with the three burglaries in which not a single fingerprint was found despite evidence of frenetic activity.

Taken in the light most favorable to the State, the evidence was sufficient to convince a rational trier of fact that Wade committed all three burglaries, either as principal or as an accomplice.

b. Theft Of A Firearm.

RCW 9A.56.300 states: "A person is guilty of theft of a firearm if he or she commits a theft of any firearm."

There was sufficient evidence that Wade committed theft of a firearm either as accomplice or principal. It was undisputed that six firearms were stolen from the Reek house during the burglary. As stated above, there was substantial evidence that Wade participated in the burglary of Reek's home. The person that Vanessa Simpson saw in the driver's seat during that burglary was a thin African-American man, indicating that Wade (a "fairly large man" who would fit into a size XXL jacket) was one of the burglars inside the home assisting with the theft of the firearms. Police then observed Wade driving the whole crew home mere hours after the final burglary and transporting contraband of which he was acutely aware, judging by his visibly alarmed response when a police vehicle drove by.

From the moment he was booked, Wade began begging his brother in poorly-disguised code on jail calls to remove the

"dunt-dunt-duhs" from the purple GMC Yukon where Cody Wade had taken the plastic bag prior to Wade's arrest. This bag was similar to those strewn about the Reeks' bathroom, providing further circumstantial proof that Wade, Patterson and Cody had taken it mid-burglary to carry the Reeks' stolen guns. As the trial court stated in its oral findings, "If the defendant was not involved in the burglaries and was arrested solely on an outstanding bench warrant, why did he call his brother in an effort to eliminate evidence of a crime he neither committed nor knew of? The answer is because at the very least, he knew of the crimes and wanted the evidence hidden before it was discovered."

There is sufficient evidence to convince a rational trier of fact that Wade entered the Reek house with his brother, acted in concert with him to steal the guns, helped transport them, and then frantically tried to hide the evidence after being arrested at the car wash.

c. Unlawful Possession Of A Firearm.

RCW 9.41.040(1)(a) states: "A person . . . is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . of any serious offense."

As argued in detail earlier, the trial court's finding of guilty on the UPFA charge would have remained the same absent Patterson's identification. Factoring in the statement directly identifying Wade as the handler of the guns, the evidence is necessarily more substantial. At the very least, Wade constructively possessed the Makarov 9mm because of his tacit admission of the burglary from which all the guns were stolen; the group's confined quarters and his necessarily close proximity to the guns during transport in the Camry; cell phone evidence establishing his presence and communication with Wade at the Reek house; Wade's role as the Camry's driver back home and his posture at the trunk manipulating the items inside when Wade removed the plastic bag; evidence that the guns were in the bag that Wade then carried to the purple Yukon; and Wade's subsequent efforts to eliminate evidence of the guns from the Yukon once arrested.

d. Theft In The Second Degree.

RCW 9A.56.040(1)(a) states: "A person is guilty of theft if he or she commits theft of property or services which exceed(s) seven hundred fifty dollars in value . . . other than a firearm."

Wade claims insufficient evidence identifying him as an accomplice or principal in the theft of Vu's personal property. As

noted above, there was ample evidence that Wade burglarized Vu's home, which necessarily involves the intent to commit a crime against property therein. Vu testified that his personal property was taken during the burglary and his house ransacked. Wade confessed to the burglaries and thefts in his jail calls ("*[W]e just come for what we come for . . . and just get what we gotta get and be out*"). There were three calls between Wade's phone and Cody's phone hitting cell towers near the Vu house during the time of that burglary; the last call was about 13 minutes long, suggesting the "open line" consistent with burglary crews. Police found broken glass consistent with the broken glass of a sliding glass door inside the North Face jacket that could only have fit Wade, located in his car, a few hours after the burglary. Some of Vu's property was found in Wade's car. There was therefore sufficient evidence identifying Wade as an accomplice or principal in the crime of theft in the second degree.

3. THE COURT PROPERLY CALCULATED WADE'S OFFENDER SCORE WITHOUT ENGAGING IN A "SAME CRIMINAL CONDUCT" ANALYSIS.

Wade argues that the trial court should have applied RCW 9.94A.589(1)(a) and conducted a "same criminal conduct" analysis for the six counts of theft of a firearm. He is incorrect. RCW 9.94A.589(1)(a), by its very terms, does not apply; it instead

directs a sentencing court to follow 9.94A.589(1)(c), which does not use a same criminal conduct analysis. Wade bases his argument on cases referencing an older, different version of the Sentencing Reform Act (SRA). Furthermore, he ultimately requests an offender score analysis that would produce the same score as the one given.

a. Relevant Facts.

Wade does not dispute his score of 5 for prior convictions, plus 1 point for his community custody status at the time of these offenses. CP 162; Supp. CP __ (Sub 84, Statement of Prosecuting Attorney). His current offenses were scored as follows: 1 point each for the three residential burglary convictions, and 1 point for the charge of trafficking in stolen property.[6] The trial court thus gave him a final offender score of 10 on each count of theft of a firearm.

b. The Plain Reading Of The Applicable Statute Is Unambiguous.

Interpretation of a statutory provision is a question of law, and is reviewed de novo. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). However, when reviewing a sentence under the SRA, a reviewing court will generally defer to the discretion of the

[6] The trial court calculated Count X (theft in the second degree) as the same criminal conduct as Count III (residential burglary) under RCW 9.94A.589(1)(a); it thus did not count as a current conviction or affect Wade's sentencing range for his other crimes, nor was Wade sentenced on Count X. Supp. CP __ (Sub 84); CP 161.

sentencing court and reverse a sentencing court's determination of "same criminal conduct" only for "clear abuse of discretion or misapplication of the law." Id. (quotations omitted).

Statutory construction begins by reading the text of the statute; if the language is unambiguous, a reviewing court must rely solely on the statutory language. State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). An unambiguous statute is not subject to judicial construction. Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). A court may not delete language from an unambiguous statute. Roggenkamp, 153 Wn.2d at 624. Nor will courts construe statutes so as to render their language meaningless. Haddock, 141 Wn.2d at 112.

RCW 9.94A.589(1)(a) states in relevant part:

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

> then those current offenses shall be counted as one crime.

(emphasis added).

> RCW 9.94A.589(1)(c) states:
>
> If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, *the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions.* The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(emphasis added).

Wade relies solely on RCW 9.94A.589(1)(a) for his position that the trial court should have engaged in a same criminal conduct analysis of the six convictions for theft of a firearm. In plain and unambiguous language, that subsection states that the same criminal conduct analysis does not apply because Wade was convicted of a combination of unlawful possession of a firearm and theft of a firearm charges as listed in RCW 9.94A.589(1)(c). Subsection (1)(c) subsequently directs a court to engage in a separate scoring scheme

for that combination of gun offenses. Wade makes no mention of this clear directive in the statute and appears to simply read RCW 9.94A.589(1)(a) to strip out the language "[e]xcept as provided in (b) or (c) of this subsection."

c. Wade Relies On The Incorrect Statutory Provision And Cases That Cite An Obsolete Version Of The SRA.

Given the nature of Wade's convictions, it is clear that the correct statutory provision governing his offender score is RCW 9.94A.589(1)(c). Wade makes no mention of subsection (1)(c) anywhere in his brief. Not only does he ignore its clear language eliding the "same criminal conduct" analysis, he also overlooks the "fundamental rule of statutory construction that where a general statute and a subsequent special statute relate to the same subject matter, the provisions of the special statute will prevail unless it appears that the legislature intended expressly to make the general statute controlling." State v. Conte, 159 Wn.2d 797, 803-04, 154 P.3d 194 (2007) (internal quotations omitted).

In this case, the specific statute is RCW 9.94A.589(1)(c), as opposed to the general scoring provisions of RCW 9.94A.589(1)(a). Subsection (1)(c) unambiguously lays out a special scoring scheme for certain combinations of firearms crimes, originally enacted as part

of the Hard Time for Armed Crime Act (HTACA).[7] The legislature's intent with the HTACA was to increase the penalties for carrying and using deadly weapons. Laws of 1995, ch. 129 (Initiative 159). Thus, it is clear that the more specific provisions of subsection (1)(c) apply.

Under subsection (1)(c), when a defendant is convicted of theft of a firearm or possession of a stolen firearm, or both, *and* unlawful possession of a firearm, his offender score is calculated by counting all current offenses *unless* they are also convictions for theft of a firearm, possession of a stolen firearm or unlawful possession of a firearm. There is no same criminal conduct analysis. The sentences are then required to be served consecutively.

Nevertheless, Wade cites to several older cases to support his argument for the applicability of the "same criminal conduct" doctrine. His reliance is misplaced. The sentencing guidelines explicitly state that the version of the SRA that applies to a particular sentence is the version in effect *at the time the offense was committed.* RCW 9.94A.345. All of the cases cited by Wade refer to obsolete

[7] The relevant portions of the HTACA were originally codified in in1996 under RCW 9.41.040 and 9.94A.400. RCW 9.94A.400 was recodified as 9.94A.589 in 2001.

versions of the SRA, with dates of violation *preceding* the adoption of the special firearms scoring provision now known as RCW 9.94A.589(1)(c). That subsection came into effect on July 25, 1999. Wade's cases are thus irrelevant and lack persuasive authority.

State v. Murphy involved one count of first-degree burglary, five counts of theft of a firearm, and five counts of unlawful possession of a firearm committed on January 23, 1998. 98 Wn. App. 42, 44-46, 988 P.2d 108 (1999). RCW 9.94A.589 was then codified under RCW 9.94A.400 and read in relevant part:[8]

> Except as provided in (b) of this subsection,[9] whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

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[8] The court in Murphy recognized that the version of the SRA that applied was the one in effect at the time of the commission of the crime, and so looked to the SRA "[a]s [it] stood on January 23, 1998." 98 Wn. App. at 50.

[9] Subsection (b) referred, as it does now, to scoring of serious violent offenses.

d. Even Under Wade's Theory Of Same Criminal Conduct, The Sentence Would Be The Same.

Even if this Court were to apply the "same criminal conduct" analysis here, Wade's score would remain *exactly the same*. This is because RCW 9.94A.589(1)(c) does not score current offenses for theft of a firearm or UPFA against one another, regardless of whether they constitute "same criminal conduct" or not.

Assuming that he could meet his burden of establishing same criminal conduct, none of Wade's current offenses for theft of a firearm would count against one another. This would leave him with a total offender score of 10: this includes 5 points for his prior offenses, 4 points for his current offenses (1 point for each of the three burglaries plus 1 point for trafficking in stolen property) and 1 point for being on community custody status at the time of the offense. The offender score as calculated by the trial court under RCW 9.94A.589(1)(c) *was also 10*: this includes 5 points for his prior offenses, 4 points for current offenses minus the firearms charges, and 1 community custody point.

Wade asks for no further remedy than a recalculation of his offender score. This Court should reject his argument and find no prejudice in any case.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Wade's convictions and sentence.

DATED this 9 day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
NAMI KIM, WSBA #36633
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Elliott, the attorney for the appellant, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. MICHAEL WADE, Cause No. 71095-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

10-09-14
Date