Supreme Court No. 94067-3
Court of Appeals No. 72727-3-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESSE MEJIA,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Jessie Mejia, the petitioner, asks this Court to review the Court of Appeals' decision affirming his convictions for possessing stolen vehicles. A copy of the unpublished opinion, dated October 17, 2016, and the order denying Mr. Mejia's motion for reconsideration, dated December 12, 2016, are attached in the appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Absent an exception, the State must obtain a warrant before a search. The State has the burden to prove an exception applies. Consent is an exception. The renter of a house consented to law enforcement entering the area around a nearby barn. The renter, however, did not rent the barn or the area around it. Did the Court of Appeals err in holding the State proved law enforcement had valid consent to enter the area around the barn when there was no evidence that the owner of the property consented to the search? RAP 13.4(b)(1), (2), (3), (4).

2. After their trespass, police located stolen vehicles in and around the barn. Police obtained a warrant to search not only the barn, but also a trailer near to the barn. Other than its mere proximity, nothing linked the trailer to the stolen vehicles. While police had reason to believe Mr. Mejia lived in the trailer, no information in the affidavit asserted he was involved with the stolen vehicles. Did the Court of Appeals err in concluding there

was probable cause to search the trailer for evidence of motor vehicles or parts? RAP 13.4(b)(1), (2), (3), (4).

3. Defendants have a constitutional right to call witnesses and exclusion of evidence is an extraordinary remedy. After surprising testimony from the renter of the house—a key state witness—Mr. Mejia sought to call three rebuttal witnesses. Over Mr. Mejia's objection and refusing to hear his offer of proof, the trial court excluded two of these witnesses because they were not disclosed prior to trial. The Court of Appeals held this rationale was unsound, but affirmed on the alternative theory that the testimony would have been properly excluded as collateral. The record did not support this alternative theory. And the trial court impliedly rejected this theory because it permitted Mr. Mejia to call one of the rebuttal witnesses even though the court believed this witness's testimony would be "collateral." Should the Court of Appeals have reversed when the trial court erred in excluding two key rebuttal witnesses? RAP 13.4(b)(1), (2), (3), (4).

C. STATEMENT OF THE CASE

William Everett rented a house from Norma and Douglas Rex. 10/28/14RP 22, 37, 59-60.[1] The house is adjacent to property, also owned

[1] There are multiple volumes of the report of proceedings. The transcripts are cited by their date.

by the Rexes, that used to be a dairy farm and includes a large barn. 10/28/14RP 25, 28, 34; Ex. 1, 8. Mr. Everett did not rent this other property or the barn. 10/28/14RP 22-24.

Still, Mr. Everett kept many old vehicles on the property, much to the annoyance of the Rexes. 10/28/14RP 22, 31, 37, 60-66; Ex. 13-18. He also let other people live on the property without the Rexes' permission. 10/28/14RP 40, 60. This included Jesse Mejia and his girlfriend, Eva Ruiz, who stayed in a trailer by the east side of the barn. 10/28/14RP 67-69; Ex. 12.

On November 12, 2013, law enforcement conducted a late night investigation into a possible "chop shop" at the property. 10/28/14RP 41, 108-09, 115-17. Before entering the property, law enforcement received permission from Mr. Everett, not the Rexes. CP 9-10, 58. They discovered evidence of stolen vehicles in and around the barn. 10/28/14RP 44-45, 111. The nearby trailer was secured with a padlock and no one answered when law enforcement knocked on the door. 10/28/14RP 111-12. Law enforcement obtained a search warrant for the premises, which included the house, barn, and trailer. CP 60-61; 10/28/14RP 86. More evidence of stolen vehicles was discovered inside the barn. 10/28/14RP 87, 100-01, 111. Inside the trailer, police found items and documents with Mr. Mejia's name, Ms. Ruiz's name, and Mr.

Everett's name. 10/28/14RP 118, 124, 138-41, 190; 10/29/14RP 49-51, 139-40. There were also some items which belonged to the owner of a stolen van found in the barn. 10/28/14RP 118, 124; 10/29/14RP 139-40.

Mr. Mejia was arrested and charged with four counts of possession of a stolen vehicle.[2] CP 7-8; 10/29/14RP 15, 38. Mr. Mejia's motion to suppress evidence was denied. CP 9-10, 54-64, 71. At trial, after hearing surprising testimony from Mr. Everett, Mr. Mejia sought to call three rebuttal witnesses. The court excluded two of these witnesses because they had not been disclosed before trial and the prosecutor had not been able to interview these two witnesses. 10/29/14 RP 12-13. Mr. Mejia testified and denied being involved with the stolen vehicles. 10/29/14RP 54. The jury convicted Mr. Mejia as charged. 10/30/14RP 135.

On appeal, Mr. Mejia argued (1) the trial court erred in denying his motion to suppress; (2) the court erred in excluding his witnesses; (3) the State had assumed an additional burden to prove the offenses and had not met this burden; and (4) that the State had not met its burden to prove Mr. Mejia's offender score. The Court of Appeals affirmed the convictions, but remanded for a new sentencing hearing. Mr. Mejia asks this Court to accept review on the first two issues.

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[2] Mr. Mejia was also charged with identity theft. CP 7-8. This charge was later dismissed with prejudice. 10/29/14RP 28-29.

D. ARGUMENT

1. The State did not prove by clear and convincing evidence that law enforcement had consent to enter the property around the barn. The Court of Appeals erred in holding that consent from a renter of a nearby house authorized the search.

Mr. Mejia moved to suppress all the evidence as a result of the unlawful search by police in entering the property around the barn. CP 54-64, 71. The evidence was that the State had obtained permission to search the property from William Everett, who rented the nearby house. CP 58-59. The State contended that Mr. Mejia lacked standing and that he was not entitled to an evidentiary hearing on the issue. CP 78-80, 87-90. The court denied Mr. Mejia's motion, reasoning (1) the deputies' entry onto the property around the barn was lawful; (2) Mr. Mejia lacked standing to contest the search except as to the trailer; and (3) probable cause supported issuing the warrant for the search of the trailer. CP 9-10.

The state and federal constitutions protect against unlawful searches and seizures. Const. art. I, § 7; U.S. Const. amend. IV.

The main issue of contention in the briefing concerned standing. Mr. Mejia argued he had "automatic standing." See State v. Jones, 146 Wn.2d 328, 334, 45 P.3d 1062 (2002). Mr. Mejia had automatic standing because a charged offense involved (1) possession as an essential element and (2) the State alleged Mr. Mejia was in possession of the stolen

vehicles at the time of the search. See State v. Bobic, 94 Wn. App. 702, 707, 972 P.2d 955 (1999) (defendant charged with possessing stolen property, which was seized in a storage unit rented to a third person, had automatic standing to contest search) (vacated on other grounds, 140 Wn.2d 250, 996 P.2d 610 (2000)).

Impliedly recognized that Mr. Mejia was correct as to standing, the Court of Appeals did not address the issue. Slip. op. 4 n.1. Rather, the court affirmed on the theory that police had valid consent when they entered the property and looked into the barn. Slip. op at 6-7.

Absent an exception, a warrantless search violates article I, § 7. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The State bears the burden to prove an exception by clear and convincing evidence. Id. at 250. Consent is an exception to the warrant requirement. State v. Thompson, 151 Wn.2d 793, 803, 92 P.2d 228 (2004).

The Court of Appeals reasoned there was valid consent based on the trial court's determination that "there is no indication that [Mr. Everett] was limited in his access to the land outside the barn" and concluded that law enforcement was lawfully on the property. CP 9. The Court of Appeals reasoned that Mr. Mejia cited nothing to contest this determination. Slip. op. at 6.

The record before the trial court, however, established only that Mr. Everett rented the house, not the barn, which were both divided by a driveway. CP 58-59, 62-64. Moreover, it was the State's burden to prove lawful consent, not Mr. Mejia's burden to disprove an exception to the warrant requirement. The evidence before the trial court consisted primarily of an affidavit of probable cause. CP 58-59. This affidavit did not assert that Mr. Everett rented the barn or the property around it. CP 58 ("the large barn with attached shed/work shop on the property is not part of Everett's lease"). It only recounted that he rented the house. CP ("Rex indicated he rents the house on the property to William Everett"). Thus, the State did not prove by clear and convincing evidence that Mr. Everett's consent to law enforcement provided them authority to enter the area around the barn. Because the renter did not have authority to grant consent to enter the area around the barn, this consent did not validate the search. State v. Eisfeldt, 163 Wn.2d 628, 639, 185 P.3d 580 (2008) (repairman did not have authority to let police into defendant's home); See State v. Ross, 141 Wn.2d 304, 314, 4 P.3d 130 (2000) (plurality opinion); (police not lawfully on property at 12:10 a.m., "an hour when no reasonably respectful citizen would be welcome absent actual invitation or

an emergency.").[3] This tainted the warrant, which relied on the evidence of stolen vehicles in and around the barn. Accordingly, the Court of Appeals erred.[4]

The Court of Appeals' analysis is contrary to precedent, which establishes that it is the State's burden to prove valid consent and that consent by a party lacking authority over property is ineffective. RAP 13.4(b)(1), (2). The Court of Appeals turned this fundamental principle on its head and shifted the burden to Mr. Mejia to prove that the renter's consent was ineffective. Additionally, the issue is constitutional. RAP 13.4(b)(3). And whether a renter of property can authorize the police to search property he neither owns nor rents is an issue of substantial public interest meriting review. RAP 13.4(b)(4).

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[3] Two justices concurred in Ross on broader grounds than the cited plurality opinion. Ross, 141 Wn.2d at 319 (Talmadge, J., concurring) ("If the police enter property to search for evidence of a crime without a warrant, the fruits of any such search should be inadmissible.").

[4] The affidavit indicates that after law enforcement trespassed on the property, they then obtained consent from Mr. Rex to search the barn. CP 59. This consent came too late. See State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (rejecting "inevitable discovery" exception to warrant requirement under article I, § 7).

2. Even if government entry onto the property was valid, probable cause did not support issuance of the warrant to search a nearby trailer, which was a residence.

The warrant police obtained authorized them to search the trailer, which was a residence, for "stolen vehicles, or stolen vehicle parts and accessories." CP 59. The Court of Appeals improperly concluded the affidavit established probable cause to justify issuance of this warrant.

"A search warrant may issue only upon a determination of probable cause." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Review of whether the search warrant was properly issued is limited to the four corners of the affidavit offered to establish probable cause. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The trial court's determination of probable cause is a legal conclusion reviewed *de novo*. Id.

"Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." Thein, 138 Wn.2d at 140. "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." Id. at 147. An "affidavit in support of a search warrant must be based on more

than mere suspicion or personal belief that evidence of a crime will be found on the premises searched." Neth, 165 Wn.2d at 183. "[C]riminal activity alone does not create probable cause to search a defendant's residence." State v. Espey, 184 Wn. App. 360, 371, 336 P.3d 1178 (2014). Alone, broad generalizations do not establish probable cause. Thein, 138 Wn.2d at 148-49.

The trial court's conclusion that there was probable cause to search the trailer for evidence related to the crime of possession of a stolen motor vehicle was erroneous. Besides its mere proximity to the stolen vehicles, there was no showing that the trailer or Mr. Mejia was connected to the stolen vehicles. The affidavit of probable cause only stated that there was "an electrical cord running from the inside of the barn to a trailer with a blue tarp over the roof parked outside of the barn." CP 59. The affiant did not claim that it would be common for people to store motor vehicle parts in their home. CP 58-60. Finding stolen property on a parcel of property does not license searches inside homes on that corresponding parcel of property. State v. Kelley, 52 Wn. App. 581, 586, 762 P.2d 20 (1988) (probable cause to search outbuildings for marijuana did not establish probable cause to search residence). Moreover, probable cause to search an outbuilding or residence on a parcel of property does not establish probable cause to search other structures when they are occupied by other

people. State v. Gebaroff, 87 Wn. App. 11, 17, 939 P.2d 706 (1997) ("if probable cause had existed for a search of the main residence, it did not exist for the search of [defendant's] separately occupied trailer.").

The affidavit also did not connect Mr. Mejia to evidence of stolen vehicles. The affidavit only asserted that Mr. Mejia had earlier told an officer he was living at the address where the stolen vehicles were later found. CP 58-59. While the affidavit recounted that Mr. Mejia had a criminal history, including convictions for possession of stolen property and taking a motor vehicle without permission, this did not establish probable cause to search his residence. CP 59. "A history of the same or similar crimes may be helpful in determining probable cause, but without other evidence, it also falls short of probable cause to search." Neth, 165 Wn.2d at 185-86.

Obviously, there were not whole motor vehicles inside the trailer. As for stolen vehicle parts or accessories, there were no generalizations from the affiant about her experience regarding where people would typically store stolen items, let alone stolen vehicle parts and accessories. Cf. State v. Maddox, 152 Wn.2d 499, 511, 98 P.3d 1199 (2004) (generalizations about habits of drug dealers "may support probable cause where a factual nexus supported by specific facts is also provided and where the generalizations are based on the affiant's experience."). In

Maddox, there was probable cause to search a home for drugs and drug paraphernalia because there had been a recent controlled buy at the home and the affiant provided generalizations about the habits of drug dealers. Id. at 511-12. In contrast, there was no evidence of illegal activity in the trailer and no generalized assertions from the affiant on how her experience led her to conclude that evidence of stolen vehicle parts would be found in the trailer.

Accordingly, the Court of Appeals erred in concluding that probable cause supported the warrant. Slip. op at 10. The court's ruling is contrary to the foregoing cited precedent. RAP 13.4(b)(1), (2). The issue is constitutional. RAP 13.4(b)(3). Whether law enforcement is entitled to search a person's home simply because stolen property is found nearby is an issue of substantial public interest meriting review because it is likely to recur. RAP 13.4(b)(4).

3. The trial court erred in excluding two key rebuttal witnesses. The Court of Appeals' affirmance on an alternative ground was not supported by the record and contradicts a related trial court ruling.

Mr. Mejia sought to call two witnesses to impeach Mr. Everett, the renter of house. 10/28/14RP 81-82, 106; 10/29/14RP 11. Mr. Everett was a witness called by the State, who testified that Mr. Mejia was at the property about every night. 10/28/14RP 68. In contrast, Mr. Mejia

maintained he had not been living at the property when police found the stolen vehicles. 10/29/14 RP 45. Hence, Mr. Everett's credibility was key to the State's theory of the case. In excluding the two rebuttal witnesses, the trial court inexplicably refused to hear Mr. Mejia's offer of proof remarking, "[e]ven if they were going to come in and testify that they were the ones that actually owned the cars and stole them and chopped them up themselves, I wouldn't, because it's too little, too late." 10/29/14 RP 14.

A defendant has a right, under both the state and federal constitutions, to present witnesses on his own behalf. State v. Franklin, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). Exclusion of defense evidence is an extraordinary remedy, which should be applied only in narrowest of circumstances. State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). Four factors guide whether exclusion is proper:

> (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

Id. at 882-83. The ordinary remedy is a continuance, not exclusion. Id. at 881. Neither the trial court nor the Court of Appeals applied the Hutchinson factors in justifying the exclusion.

The Court of Appeals agreed that the trial court erred in excluding Mr. Mejia's rebuttal witnesses on the basis that they were not disclosed

prior to trial. Op. at 14 ("He correctly observes that, as such, he was not required to give notice of the excluded witnesses prior to trial.") (citing State v. Finnegan, 6 Wn. App. 612, 625, 495 P.2d 674 (1972)). The court, however, affirmed on the alternative theory that the purpose of the testimony was to impeach Mr. Everett on "collateral" issues, and therefore were properly excluded. Op. at 14.

The appellate court has discretion to affirm decisions of the trial court on an alternative ground. But cf. State v. Larson, 88 Wn. App. 849, 852, 946 P.2d 1212 (1997) (refusing to affirm on theory argued for first time on appeal). However, it was not appropriate to do so here because it was not firmly established that the testimony from the two witnesses was only for impeachment of Mr. Everett on a collateral issue. See State v. Tyler, 138 Wn. App. 120, 129, 155 P.3d 1002 (2007) (refusing to address State's alternative argument in support of affirmance because there was an insufficient record to fairly decide the issue). The trial court refused Mr. Mejia's request for an offer of proof. 10/29/14RP 14. If the court had permitted the offer of proof, the record would show whether the testimony was material or merely collateral.

By denying Mr. Mejia's request, the trial court deprived Mr. Mejia of his opportunity to make a record. If the constitutional right to appeal is to be meaningful, the defendant must be provided the opportunity to make

a record. Const. art. I, § 22 ("In criminal prosecutions the accused shall have . . . the right to appeal in all cases."). The lack of a record as to what the witnesses would say should not have been held against Mr. Mejia.

Further, the trial court explained that even if the testimony was material and not merely collateral, its ruling would have remained the same. 10/29/14RP 14. Affirming on the theory that the court could have excluded the testimony as collateral is especially unsound because the trial court let Eva Ruiz testify as a rebuttal witness. Ms. Ruiz was also a witness who was not disclosed before trial, but the State had been able to interview her. 10/29/14RP 11-13. The court remarked, "Ms. Ruiz, I suspect what she's going to talk about is about as collateral as you can get, but I will allow her to testify." 10/29/14RP 13.

Even if the excluded testimony was "collateral," the testimony addressed Mr. Everett's credibility, a key issue. Mr. Everett claimed he saw Mr. Mejia on the property about every night, but Mr. Mejia maintained he had not been living there at the time of the charged offenses. 10/28/14 RP 68; RP 45. The jury may have credited Mr. Everett's testimony and then found that Mr. Mejia had possession of the stolen vehicles based on this testimony. Mr. Mejia had a constitutional right to present a defense, which included the right to challenge Mr. Everett's credibility. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.

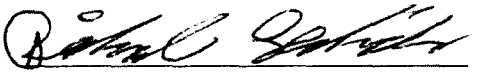
Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Thus, the rule against impeaching a witness on a collateral issue would have had to give way under these circumstances to ensure that Mr. Mejia was provided a fair trial. See State v. York, 28 Wn. App. 33, 36-38, 621 P.2d 784 (1980) (reversing where defendant was precluded from cross-examining state's witness on a "collateral matter," reasoning that credibility of witness was not collateral; "it was the very essence of the defense.").

The Court of Appeals' decision is contrary to the foregoing cited precedent. RAP 13.4(b)(1), (2). A defendant's ability to call rebuttal witnesses is also a constitutional issue and a matter of substantial public interest meriting review. RAP 13.4(b)(3), (4). This Court should grant review and provide guidance on the issue of when a defendant's rebuttal witness can be properly excluded in a criminal trial.

E. CONCLUSION

For the foregoing reasons, Mr. Mejia respectfully requests that this Court grant discretionary review on the issues related to his motion to suppress evidence and the exclusion of his two rebuttal witnesses.

Respectfully submitted this 11th day of January, 2017,



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Appendix

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 72727-3-I
v.	)	DIVISION ONE
JESSE MEJIA, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: October 17, 2016

SPEARMAN, J. — After deputies from the Skagit County Sheriff's Office found automobiles in various states of dismemberment on the property where Jesse Mejia allegedly had been staying, Mejia was charged and convicted of four counts of possession of stolen motor vehicles. On appeal, Mejia argues that the search of the property was unlawful, because the deputies had neither valid permission nor authority of a valid warrant to enter the area surrounding a barn, look inside the barn through openings in the walls, search inside the barn or inside a nearby trailer. He also argues that the State failed to meet its burden of proving every element of the crimes charged and that the trial court abused its discretion by excluding two of his witnesses. We find no error and affirm the convictions but because the parties agree an error occurred in calculating Mejia's offender score, we remand for resentencing.

FACTS

William Everett rented a house on Douglas and Norma Rex's property, located at 17108 SR 20, Burlington, Washington. Along with the house, the property also included a barn with an attached shed, a plot of farmland, and a storage area for old silage. Everett kept a trailer and a couple of nonfunctioning cars on the property. His lease did not include use of the barn or the attached shed.

Everett had given Jesse Mejia permission to stay in his trailer for a couple of months. Soon Everett began to see more cars left on the property, including some that were "torn apart," and either missing bodies or parts. Verbatim Report of Proceedings (VRP) at 71. On November 12, 2013, the Skagit County Sheriff's Department received information about a stolen vehicle and a chop shop on SR 20 near Avon Allen Road. The informant told the sheriff there were two stolen Hondas and a stolen GMC van inside the barn and that Mejia had been chopping cars and grinding off the vehicle identification numbers (VIN).

Deputy Wilhonen contacted Rex before going to the property. Rex informed Deputy Wilhonen that William Everett was renting the property and that he may have friends staying there as well. Rex also indicated that "the barn was not part of the lease, there should not be anyone there, and it should also be empty of any cars or other items." Clerk's Papers (CP) at 40. It is undisputed that Everett also gave the deputies permission to come onto the property.

Deputy Wilhonen and Deputy Moses walked around the outside of the barn and looked at the cars on the cement area near the barn. The deputies

discovered a red Acura Integra that had been dismantled and taken apart. A check of the VIN indicated that it had been reported as stolen. The deputies could see other vehicles inside the barn by looking through holes in the walls. One of the vehicles near an opening, a 1992 Honda Accord, had been cut in half. The deputies were able to see the VIN on the firewall and discovered that the vehicle had been reported stolen. There was also a GMC Safari van visible from the outside. After recording and running the plate number, the deputies learned that it had also been reported stolen.

Deputy Wilhonen contacted Rex again and obtained his written permission to enter the barn. The following day, November 13, 2013, the deputies obtained a search warrant for the house, the barn, the attached shed, and the trailer. Inside the barn they found another vehicle, a 1990 Honda Accord, also reported as stolen. Inside the trailer they found identity documents for different persons, including Everett's driver's license, tax documents, and mail. Id. at 137-139.

Mejia was arrested and charged with four counts of possession of a stolen motor vehicle and one count of identity theft in the second degree. Mejia moved to suppress the evidence found in the trailer and inside and around the barn. By agreement of the parties, the trial court considered only the affidavit in support of the search warrant request and the briefs in support of and in opposition to the motion. The court found that Everett had the authority to consent, and did consent, to the deputies' initial entry onto the property. Thus, it found the deputies' presence on the property was lawful, and any observations made while on the property, including those obtained by peering through openings in the

shed, were also lawful. As a result, the court concluded that the inclusion of those observations in the affidavit in support of the search warrant did not taint the warrant or the evidence obtained thereby. Accordingly, it denied Mejia's motion.[1]

At trial, Mejia sought to offer additional witnesses after the first day of testimony to impeach and rebut Everett's testimony that his van had been stolen. The trial court instructed Mejia's counsel to provide the State with access to those witnesses. When two of the witnesses refused to speak with the State's attorney or provide information about their testimony, the State moved to exclude them. The trial court excluded the two witnesses because the State had not been given timely notice and declined to delay the trial further.

Mejia was found guilty on all four counts of possessing a stolen motor vehicle. The trial court granted Mejia's motion to dismiss the identity theft charge. At sentencing, the State calculated Mejia's offender score and submitted a statement of criminal history. Mejia was sentenced to 50 months of confinement.

DISCUSSION

When reviewing a trial court's denial of a suppression motion, we review findings of fact for substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of

[1] The trial court also found that Mejia lacked standing to challenge the initial entry onto the property and the search of the barn. It is not necessary to resolve this question, however, because even assuming Mejia has standing, his challenge to the legality of the searches fails.

the finding. Id. Any unchallenged findings of fact are verities on appeal. State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014) (reversed and remanded, 141 Wn. App. 759, 364 P.3d 839 (2015)). We review conclusions of law de novo. Id.

Authority to Consent

Mejia argues that the deputies conducted an unlawful search when they entered the portions of the property near and around the barn and looked into the barn through the holes in the walls. He contends that the deputies were trespassing because they did not have the owner's consent before entering the area around the barn. Id. According to Mejia, the tenant had no authority to consent to a search of the barn or the area surrounding it. Thus, he argues that the observations of the vehicles in and around the barn were unlawfully obtained. He further argues that because the affidavit in support of the search warrant relied on this evidence to establish probable cause, the warrant that issued was tainted and any evidence seized pursuant to the warrant should have been suppressed.

It is well established that if information contained in an affidavit of probable cause was obtained by an unconstitutional search, that information may not be used to support the warrant. State v. Ross, 141 Wn.2d 304, 311, 4 P.3d 130 (2000). Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Under this provision, the warrant requirement is especially important, as it is the

warrant that provides the requisite "'authority of law.'" State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (quoting City of Seattle v. Mesiani, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)). Exceptions to the warrant requirement are to be "'jealously and carefully drawn.'" State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004) (quoting Hendrickson, 129 Wn.2d at 72). The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement. State v. Acrey, 148 Wn.2d 738, 746, 64 P.3d 594 (2003) (citing State v. Kinzy, 141 Wn.2d 373, 382, 5 P.3d 668 (2000)). Article I, section 7 of the Washington Constitution also provides greater protection of individual privacy than the Fourth Amendment. State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).

Consent to search is a recognized exception to the warrant requirement. State v. Thompson, 151 Wn.2d 793, 803, 92 P.3d 228 (2004) (citing State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1988)). It is the State's burden to establish that consent was lawfully given. Id. The State must show that (1) the consent was voluntary, (2) the person consenting had the authority to consent, and (3) the search must not exceed the scope of the consent.[2] Id. Mejia does not dispute that Everett had authority to permit the deputies to enter the property and search the residence, but he claims that the barn and its surrounding area were beyond the scope of that authority. He provides no basis for this restriction other

[2] CrR 3.6 governs motions to suppress evidence in criminal trials; review of this issue is therefore confined to the evidence before the trial court at the suppression hearing. Mejia argues that the State improperly relies on testimony presented at trial to show consent. The State cites to trial testimony in its brief but also cites the affidavit in support of the warrant.

than the fact that Everett did not have access to the barn or the shed. The trial court found that the area around the barn was within Everett's consent because "there is no indication that he was limited in his access to the land outside the barn." CP at 9. Mejia cites nothing in the record that disputes this finding. We agree with the trial court that Everett's consent to search the property included the areas around the barn.

Mejia next argues that the deputies exceeded the scope of the consent when they looked inside the barn through holes in the walls. He contends that the officers were required to get Rex's consent prior to looking inside the barn, and they failed to do so. We disagree. United States v. Hufford, 539 F.2d 32 (1976) (cert. denied, 429 U.S. 1002, 97 S. Ct. 533, 50 L. Ed. 2d 614 (1976), overruled in part on other grounds by U.S. v. Jones, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012)) and State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000) are instructive.

In Hufford, government agents entered the rental unit adjacent to the defendant's, with that renter's permission, and observed the drug manufacturing materials and equipment from a crack in the wall. Id. at 33. The Ninth Circuit affirmed that the view of the defendant's property from the adjacent stall was "permissible" because "he observed what was in plain view and did not trespass." Id. at 35 (citing Harris v. United States, 390 U.S. 234, 85 S. Ct. 992, 19 L. Ed. 2d 1067 (1968)). In Bobic, contents of the defendant's storage unit were observed from an adjacent unit through a small hole in the wall. Our state supreme court found that "the detective was lawfully inside the adjoining unit because the manager had given him permission to enter," and that the observations "were

made without extraordinary or invasive means and could be seen by anyone renting the unit." Bobic, 140 Wn.2d at 259.

Here, the deputies similarly observed the vehicles and obtained at least one VIN number and a license plate number through openings in the walls, without trespassing or using extraordinary or invasive means. We agree with the trial court that because the vehicles were in plain view, the observations were not unlawfully obtained. The inclusion of the evidence in the affidavit to establish probable cause for issuance of the warrant was not improper and the denial of Mejia's suppression motion was not error.

Probable Cause

Mejia argues that the officers did not have probable cause to search the trailer for evidence because its only connection to the stolen vehicles was proximity. He also argues probable cause is lacking because the affidavit "did not claim that it would be common for people to store motor vehicle parts in their home." Br. of Appellant at 20. Again, we disagree.

A search warrant may only issue upon determination of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Review of a determination of probable cause is de novo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The existence of probable cause is to be evaluated on a case-by-case basis. Thein, 138 Wn.2d at 149. Facts that would not support probable cause when standing alone can support probable cause when viewed together with other facts. State v. Garcia, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992). The application for a search warrant must be judged in the light of

common sense, resolving all doubts in favor of the warrant. State v. Partin, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977) (citing United States v. Ventresca, 380 U.S. 102, 88 S. Ct. 741, 13 L. Ed. 2d 684 (1965)).

Probable cause exists if the affidavit "sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." Thein, 138 Wn.2d at 140 (citing State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). Accordingly, "'probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" Id. (quoting State. v Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). A valid finding of probable cause requires more than mere suspicion or personal belief that evidence of a crime will be found in the area to be searched. State v. Neth, 165 Wn.2d at 182.

Mejia argues that there is no nexus connecting the stolen vehicles and the trailer, because no vehicles would fit in the trailer, and only its proximity to the barn would suggest that it might contain parts and accessories. Citing State v. Kelley, 52 Wn. App. 581, 586, 762 P.2d 20 (1988), he argues that "[f]inding stolen property on a parcel of property does not license police to go on fishing expeditions inside residences on that corresponding parcel of property." Br. of Appellant at 20. In Kelley, the affidavit included only observations about the two garages and barn on the property, not the home. The court rejected the State's argument that because the affidavit established probable cause to search the outbuildings, there was also probable cause to search the residence. Id. at 586-

87. Mejia also cites State v. Gebaroff, 87 Wn. App. 11, 12, 939 P.2d 706 (1997), where probable cause to search a mobile home did not extend to the travel trailer, because the two were not under the same person's control. But these cases are inapposite.

Here, there was sufficient connection among Mejia, the trailer, and the crimes under investigation to establish probable cause for the warrant. The affidavit indicated that no persons or vehicles were permitted in the barn; however, vehicles identified as stolen were found in various states of disassembly in and around the barn. An electrical cord was "running from the inside of the barn to a trailer with a blue tarp over the roof parked outside of the barn," indicating that the person using the barn was also using the trailer. CP at 59. The affidavit also stated that the trailer had a license plate number but no DOL record for such a number. Mejia had been seen coming and going from the property and had previously given the property's address as his residence. Taken together, these facts provide sufficient nexus between the trailer and evidence related to the stolen and dismantled vehicles. The trial court did not err when it denied Mejia's motion to suppress on this ground.

Sufficiency of the Evidence

Mejia points out that the to-convict instruction given in this case, without objection by the State, included as an element of the crime of possessing a stolen motor vehicle that "the defendant knowingly received, retained, possessed, concealed and/or disposed of a stolen motor vehicle...." CP at 24-27. (See also RCW 9A.56.140(1) defining "possessing stolen property.") Relying on

State v. Hayes, 164 Wn. App. 459, 477, 262 P.3d 538 (2011) and State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004), Mejia argues that as a result, under the law of the case doctrine, the State assumed the additional burden of proving each alternative definition of the crime. He also contends that the State's evidence was insufficient to prove each alternative, specifically, that he concealed and/or disposed of all of the vehicles. In its briefing to this court, the State agrees that under Hayes and Lillard, it is required to prove each alternative, but it disputes that the evidence is insufficient.[3]

Sufficiency of the evidence considers whether there was enough evidence proffered from which a jury could find beyond a reasonable doubt that the elements of the crime had been proved. State v. Berg, 181 Wn.2d 857, 872, 337 P.3d 310 (2014). "'A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.'" State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Credibility determinations are for the trier of fact and not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Mejia's claim that the evidence is insufficient to establish that he concealed and/or disposed of vehicles at issue in this case is not well taken.

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[3] In a statement of additional authority, the State cites State v. Makekau, 194 Wn. App. 407, 378 P.3d 577 (2016), decided after oral argument in this case. Makekau holds that even when included in the to-convict instruction, each alternative definition to "possession of stolen property" need not be proven so long as the alleged conduct "satisfied one of the disjunctive terms–received or possessed or concealed or disposed of the stolen vehicle." Id. at 420. Because neither party had an opportunity to address the applicability of Makekau to this case, we do not address it here.

There is sufficient evidence in the record that the vehicles had all been "disposed of,"[4] including testimony that each had been dismantled, had parts missing, and/or had been trashed inside. (See VRP (10/28/14) at 44-46, 53-55, 101, 110, 111-113, 119, 124). For example, Everett observed that the cars appearing on the property were "torn apart," "[l]ike they would take parts off the car," and "[s]ome of the bodies were gone too." Id. at 71. Deputy Moses testified that there was "a Honda Acura, a GMC van,...and... one or two other Honda type vehicles," that "looked to be cut up and dismantled, and some of them had been – just parts inside the barn." Id. at 110.

Counts I and II pertained to one 1992 Honda Accords, License No. AFM8003, the other 1990, License No. 287WFO. CP at 7-8; 24-25. Trooper Giddings testified that his report showed that the 1990 Honda Accord was "cut in half and the roof section was removed." VRP (10/28/14) at 101. While looking into the barn from the opening, Deputy Wilhonen saw that "there was a vehicle right near that opening that was cut in half, and basically it was all that was left was the firewall. . . ." Id. at 44. Detective Walker testified that inside the barn

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[4]Both parties include portions of the following definition in their briefs:

> 1 a : to place, distribute, or arrange esp. in an orderly or systematic way (as according to a pattern) . . . b : to apportion or allot (as to particular purposes) freely or as one sees fit . . . 2 a : to transfer into new hands or to the control of someone else (as by selling or bargaining away) : relinquish, bestow . . . b (1) : to get rid of : throw away : discard . . . (2) : to treat or handle (something) with the result of finishing or finishing with ... : complete, dispatch . . . c : destroy. Webster's Third New International Dictionary, 654 (1993).

Br. of Appellant at 26; Br. of Respondent at 27. Mejia urges us to apply a very narrow definition of "disposed of" – specifically, to "transfer into new hands or to the control of someone else," citing Hayes as controlling authority. Br. of Appellant at 26. But Hayes is inapposite because there, the parties agreed to use that particular definition. The record reveals no such agreement in this case.

there was "another Honda near the corner that was completely dismantled." Id. at 113.

Regarding the vehicle involved in count III, the Blue GMC Safari, License No. 770XJU (CP 8; 26), Detective Walker testified that it "was in pretty complete order," but that "it was obviously missing a battery." VRP (10/28/14) at 88. On the other hand, the owner testified that "it had been pretty much destroyed." She said there was "a hole in the gas line. It was totally trashed inside. There had been dogs staying in it, and there was dog droppings all over that van, and it was just not drivable." Id. at 119. She also testified that the dashboard was damaged and part of it "was missing." Id. at 124.

Finally, count IV was the red Acura Integra, License No. AFM8261. Deputy Wilhonen testified that outside the barn there was "a red Acura that had been dismantled and taken apart." VRP (10/28/14) at 44. Detective Sigman testified that there was "a red Acura outside that was stolen and stripped, no license plate recovered." Id. at 167. We find the evidence in the record more than sufficient to support a finding that Mejia "disposed of" all four of the vehicles.

Along the same lines, Mejia argues that there was also insufficient evidence that he "concealed" the Acura Integra because it was found out in the open.[5] The word "conceal" is not defined in RCW 9A.56.140. But its ordinary

[5] In his initial brief, Mejia identifies one of the Honda Accords as having been located outside of the barn. The State argues that this contention is not supported by the record–both of the Honda Accords were identified as being located in the barn. Mejia later corrects his earlier misstatement to indicate that he is challenging the sufficiency of evidence as to the count related to the Acura Integra. As a result, the State has not had an opportunity to respond to this argument.

definition from Merriam-Webster is "to prevent disclosure or recognition of..., or to place out of sight." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 469 (2002). While the Acura was not inside the barn, it had been stripped and its license plates were missing. VRP (10/28/14) 167. This evidence is sufficient to support the jury's finding that Mejia "prevented the disclosure or recognition of" the Acura.

Exclusion of Witnesses

The trial court excluded two of Mejia's witnesses because they were not timely disclosed. Mejia argues that in doing so the court abused its discretion and denied him a fair trial. But Mejia claims he was surprised by Everett's trial testimony and intended to call the witnesses for impeachment and rebuttal. He correctly observes that, as such, he was not required to give notice of the excluded witnesses prior to trial. State v. Finnegan, 6 Wn. App. 612, 625, 495 P.2d 674 (1972). But we may affirm on any ground supported by the record. State v. White, 137 Wn. App. 227, 230, 152 P.3d 364 (2007) (citing State v. Ellis, 21 Wn. App. 123, 124, 584 P.2d 428 (1978). And here, as the State points out, the exclusion of the witnesses was proper because the matter upon which Mejia sought to impeach Everett was collateral to any material issues at trial.

"The rule is firmly established in this state that a witness cannot be impeached by showing the falsity of his testimony concerning facts collateral to the issue." State v. Putzell, 40 Wn.2d 174, 183, 242 P.2d 180 (1952) (citing State v. Carpenter, 32 Wash. 254, 73 Pac. 357 (1932)). The test for whether a matter

is material or collateral is whether the cross-examining party is entitled to prove the matter in support of its case. Id.

Here, Mejia sought to have the excluded witnesses testify that Partida had not stolen Everett's van but that he had in fact loaned it to her. The proposed witness testimony would not have furthered Mejia's defense and would only have detracted from the issues to be decided in the case. The trial court did not err when it excluded the witnesses.

Criminal History

Mejia argues that the State improperly submitted a statement that purported to recount his criminal history, and the trial court used that information to calculate his offender score. While such a summary is prima facie evidence of the existence and validity of the convictions listed, the court must be satisfied by a preponderance of evidence that the proffered history exists and is accurate. RCW 9.94A.500(1). The State agrees that although Mejia did not object, remand for resentencing for the State to prove criminal history is the appropriate remedy.

Affirm but remand for resentencing.

WE CONCUR:

Trickey, ACJ

Spearman, J.

Leach, J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JESSE MEJIA, Appellant.	)))))))))))	No. 72727-3-I ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND RESPONDENT'S REQUEST FOR COST

On October 17, 2016, this court filed an opinion affirming Mr. Meja's convictions for possessing stolen motor vehicles, but remanding for resentencing because the State failed to prove Mr. Mejia's criminal history. On October 31, 2016, the State filed a cost bill under RCW 10.73.160 and RAP 14.3 seeking the imposition of $7,877.96 in costs. Appellant filed an objection to the cost bill asserting there has been no determination of his ability to pay the appellate costs.

In addition to an objection to the cost bill, appellant filed a motion for reconsideration asking, among other things, that the court to amend its opinion to direct that no appellate costs be imposed. The court called for an answer. On December 2, 2016, respondent filed an answer to the motion to reconsider the cost bill maintaining that upon release from prison Mejia has a realistic possibility of finding gainful employment that will allow him to pay appellate costs.

No. 72727-3-I/2

The hearing panel has considered the cost bill, objection, the motion for reconsideration, the answer thereto, the nonexclusive factors mentioned in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), and determined that both the motion for reconsideration and the State's request for appellate costs should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration and the request for costs is denied and that no appellate costs shall be awarded.

Done this 12th of DECEMBER, 2016.

FOR THE COURT:

Presiding Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72727-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Erik Pedersen
[skagitappeals@co.skagit.wa.us]
Skagit County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 11, 2017

WASHINGTON APPELLATE PROJECT

January 11, 2017 - 4:10 PM

Transmittal Letter

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Case Name: STATE V. JESSE MEJIA

Court of Appeals Case Number: 72727-3

Party Respresented: PETITIONER

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Trial Court County: ____ - Superior Court # ____

The document being Filed is:

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- ○ Statement of Arrangements
- ○ Motion: ____
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- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
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- ◉ Petition for Review (PRV)
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Comments:

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