

NO. 70653-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JOHNNIE LEE WIGGINS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. An erroneous admission of a conviction over ten years old under ER 609(b) is not reversible error unless the appellant demonstrates a reasonable probability that it materially affected the outcome of the trial. The State produced compelling evidence that Johnnie Wiggins beat the victim to death, and properly impeached Wiggins's credibility with evidence of a past robbery conviction. Under these circumstances, was the court's admission of Wiggins's prior conviction for possession of stolen property harmless?

2. The defendant bears the burden to prove that two or more offenses encompass the "same criminal conduct." Here, the State produced evidence that Wiggins's two past convictions for possession of stolen property were not considered the "same criminal conduct" when he was sentenced on those offenses, and the record does not compel a contrary conclusion. Did the trial court act within its discretion to count both convictions in Wiggins's offender score?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Johnnie Wiggins with the first-degree murder and second-degree felony murder of Prudence Hockley. CP 16-18. The State alleged that the murder was a domestic violence crime that was part of an ongoing pattern of abuse and that it was committed within sight or sound of Hockley's minor child. CP 16-18.

Following a trial before Judge Laura Gene Middaugh, a jury found Wiggins guilty of murder in the second degree. CP 53. The jury also determined that the offense was one of aggravated domestic violence because Wiggins and Hockley were in a dating relationship and the assault was committed within sight and sound of her minor child. CP 54-55.

At sentencing, the court rejected Wiggins's argument that two previous convictions for possession of stolen property (PSP) were the "same criminal conduct" and should count as a single point in his offender score. 13RP 27-30, 40-41.<sup>1</sup> Calculating a

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

score of five, the trial court determined a standard sentencing range of 175-275 months. 13RP 40-41; CP 159. The State requested an exceptional sentence of 480 months. 13RP 42. The court imposed an exceptional sentence of 360 months “based on the presence of the child,” and noted that the sentence “means that he basically will spend the rest of his life in prison.” 13RP 63; CP 158-66.

## 2. SUBSTANTIVE FACTS

In December 2011, Prudence Hockley was romantically involved with two men, Greg Brooks and Johnnie Wiggins. 4RP 109; 5RP 81. Hockley and Brooks had been close friends for more than ten years, but did not date exclusively. 4RP 105. Hockley had met Wiggins at a gym in early 2011. 9RP 153. Wiggins did not approve of Hockley’s relationship with Brooks and had given her an ultimatum to end her friendship with him. 5RP 12-13, 36-37.

On December 23, 2011, Wiggins struck Hockley, giving her a black eye, because he thought she was flirting with other men at a bar. 5RP 82. On December 24, he told Hockley, “I don’t know ... what would happen if I ever saw you with somebody.” 10RP 107-08; Ex. 65 at 40.

Later that day, Hockley and her 13 year-old daughter, MH, attended a Christmas Eve party. 4RP 53; 5RP 84-86; CP 4. Afterward, Hockley invited Brooks over for a drink. 4RP 108, 115. Not long after Brooks arrived, Hockley received a series of phone calls from Wiggins. 4RP 56, 110, 117-18. Wiggins was calling from outside of Hockley's house, but pretended that he was at home. 6RP 200-01; 10RP 77. Wiggins said he wanted to come over to exchange Christmas gifts. 4RP 118; 6RP 200-01. Hockley told him not to come over because she was tired and wanted to spend the holiday with MH. 4RP 59, 118.

Wiggins called again, asking whether Brooks drove a red truck. 9RP 207. Hockley confirmed that was so, and Wiggins pointed out that a red truck was parked outside Hockley's house at that moment. 9RP 207. Wiggins then started knocking on Hockley's door "like a madman." 4RP 201; 5RP 22. Hockley was "really, really upset," "scared," and "started freaking out." 4RP 118-20. She urged Brooks to leave out the back door. 4RP 120. Brooks initially resisted, but agreed to leave when Hockley told him that "this may be a problem." 4RP 120. Brooks left out the back door and was at the back gate when he saw Wiggins on the side of the house. 4RP 128. Wiggins shouted, "hey man, I want to talk to

you.” 4RP 129. Brooks told him, “hey, you know, I don’t have nothing to do with this, man,” and kept walking. 4RP 129.

Neither Hockley nor her daughter answered the door. 4RP 64. MH waited until she thought Wiggins had left and then looked out to see him walking around to the back of the house. 4RP 65. She told Hockley that he was going back there and Hockley instructed her to stay inside. 4RP 67. Hockley went outside. 4RP 68. MH heard a loud thump outside. 4RP 69. She ran outside to find her mother lying on the ground, unconscious, and breathing “weird.” 4RP 69. Hockley was not responding and there was blood around her head. 4RP 70-71. MH ran inside to get Brooks, who had already gone. 4RP 71-72. When she ran back outside, she saw Wiggins and yelled, “What did you do to her?” 4RP 76, 129; 9RP 214. Wiggins told her, “it wasn’t me. ... [I]t was Greg,” and that Wiggins was going to look for him. 4RP 77; 9RP 214; 10RP 9, 11; Ex. 44. Wiggins got into his car and left. 10RP 10.

When Brooks heard MH shouting at Wiggins, he came back to the house. 4RP 129. He saw Wiggins get into his car and drive off. 4RP 130. He saw MH come down from the porch, screaming and crying, and saw Hockley on the ground. 4RP 131. There was

blood coming out of Hockley's head and she was breathing heavily. 4RP 131. Brooks instructed MH to get a blanket, covered Hockley with it, and spoke to 911 after MH dialed. 4RP 131, 133.

Brooks and MH called 911 at 10:56 p.m. 5RP 108.

MH reported that her mother had been "pushed" and was bleeding. 5RP 117. Officer Vincent Feuerstein was the first to arrive on the scene. 5RP 110. Feuerstein found MH extremely frantic and Brooks appeared to be in shock. 5RP 111-12. Hockley had a massive head injury. 5RP 112-13. "[T]he scalp was detached from the skull and was kind of hanging down the back of her neck. She was bleeding significantly." 5RP 112-13. Hockley also had bruises and scratches all over her face and neck. 5RP 112-13.

MH called her older sister, Willa. 4RP 30-31. MH was very upset and said that something had happened to Hockley. 4RP 31. Willa could hear Brooks in the background saying "oh my God, oh my God, ... look what he did." 4RP 32. Willa rushed to Hockley's house and saw paramedics attending to her. 4RP 32. MH and Brooks were both extremely upset. 4RP 33-34. MH said Wiggins was responsible for Hockley's injuries. 4RP 33.

Hockley was taken to Harborview Medical Center. 4RP 37. Her injuries were severe, and she died at 3:35 p.m. on December

25. 5RP 178-82; 7RP 40, 129-58. An autopsy revealed that Hockley had suffered severe blunt force trauma to her head and face. 7RP 10-11; 9RP 117-18, 124. A minimum of three blows caused several skull fractures, including a diastatic fracture where the bones of the skull pulled apart and one overlapped the other. 7RP 135, 153, 159. "To get such an extensive fracture with that kind of overriding displacement again would require force sort of along the lines of a high speed motor vehicle collision or a fall from some height." 7RP 154. Hockley also had injuries on the backs of her hands and fingers that were consistent with defensive wounds. 7RP 138-39. There were marks on her face and neck in a pattern consistent with the sole of a shoe. 7RP 131; 8RP 167-71.

Immediately after leaving Hockley's house, Wiggins called the woman he lived with, Wendy Levine. 9RP 23. He was upset and told her that "my life has changed forever." 9RP 24. He told her that Hockley was hurt, but that he didn't mean for anything to happen. 9RP 31. He asked Levine to come with him for a drive, but she refused. 9RP 27; 10RP 14. He then drove by himself to Oregon. 10RP 17, 74. He continued calling Levine so frequently that she took her phone off the hook. 9RP 31-32.

Law enforcement officers obtained Wiggins's mobile phone number from Levine. 6RP 176. Detective James Cooper called Wiggins and left voice mail on December 25. 6RP 195. Wiggins immediately returned his call, falsely claiming that he was on his way to visit friends in Oregon for Christmas dinner. 6RP 195, 199; 10RP 74. In a recorded statement over the phone, Wiggins admitted that he had been at Hockley's house on December 24, but claimed that he had not seen her. 10RP 73; Ex. 44. He called back a few minutes later to let the detective know that "I'm a nice guy," to ask if he was a suspect, and to advise "that well, if I get stopped by the police I'm just going to give myself up." 6RP 207-08. Cooper and Wiggins agreed to talk on December 26, when Wiggins returned from Oregon. 6RP 205.

Wiggins called Detective Cooper again on December 26, asking for more time before they met. 6RP 213. Wiggins informed Cooper that "there's a lot of things on me that will make me look bad in this thing." 6RP 213. He also confided that "he thought about running" but he was "too old to do that" and his family had counseled him to stay and deal with the situation. 6RP 213. Wiggins further explained that he only went to Hockley's house to give her a gift, and "I didn't mean for anybody to get hurt, but when

I saw that guy going out the back door, it just went bad from there.” 6RP 213-14. He speculated, “I’m probably going to lose everything over this.” 6RP 214. Wiggins asked if an arrest warrant had been issued and what he would be charged with. 6RP 214. Wiggins called Detective Cooper again on December 27. 7RP 12. He asked about Hockley’s status and said, “I’m down on my knees hoping that she recovers.”<sup>2</sup> 7RP 12.

While Wiggins was in Oregon, he used his mobile phone to see whether he was listed among “Washington’s Most Wanted,” the Department of Justice’s Federal Fugitive Most Wanted, and similar websites. 9RP 47-51, 58. Several hours before Hockley actually passed away, Wiggins searched local news sites for “Seattle homicides” and “Homicide in Greenwood, Washington.” 9RP 52-54. He searched various sites to determine whether Brooks had been arrested. 9RP 56-57, 89; 7RP 44. He searched for information about whether it is possible to “trace a mobile phone location” or to “track someone on their cell phone.” 9RP 60-61. On December 27, Wiggins finally found a Facebook page, “RIP Prudence Hockley”; he then began searching for information about

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<sup>2</sup> At Detective Cooper’s request, Hockley’s death was not made known to the public until December 27. 6RP 193-94.

"How did Prudence Hockley die." 9RP 67-70, 96. Wiggins deleted from his phone all text messages between himself and Hockley on December 23 and 24. 10RP 84.

Wiggins gave his version of events at trial. He admitted that he was angry with Hockley on December 24 and that he hit her and knocked her down. 9RP 211-12. He claimed that he then walked less than 30 feet down the driveway to his car, stayed there for 30-40 seconds, and walked back toward Hockley when he realized that she had not gotten up. 9RP 213; 10RP 51-57. During this entire time, he did not see or hear anyone else in the area. 10RP 58. He did not see Brooks do anything to Hockley. 10RP 12. He saw that Hockley was bleeding and encountered MH, who asked him what he had done to her mother. 9RP 213-14; 10RP 9, 11. Wiggins claimed that he told MH that Brooks had done it to "calm her" and to "give her a little comfort to not have her scared and terrified." 10RP 12, 70. He did not check to see how badly Hockley was hurt, call 911, or offer any aid. 10RP 68. His primary concern was for himself. 10RP 68. Indeed, had Brooks been arrested as a result of Wiggins's statement to MH, Wiggins was unsure whether he would have come forward to admit his involvement. 10RP 152.

C. ARGUMENT

1. THE ERRONEOUS ADMISSION OF WIGGINS'S  
1999 CONVICTION FOR POSSESSION OF STOLEN  
PROPERTY WAS HARMLESS.

Wiggins contends that the trial court committed reversible error by allowing the State to impeach his credibility with a possession of stolen property (PSP) conviction that was more than 10 years old. Because any error in allowing a brief reference to this conviction was harmless, his argument fails.

Evidence Rule (ER) 609 allows a party to impeach a witness with evidence that the witness has been convicted of a crime that involved dishonesty or false statement. ER 609(a). If a prior conviction is more than 10 years old, however, it is not admissible "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." ER 609(b). The trial court must make this determination on the record, and the failure to do so is error. State v. Russell, 104 Wn. App. 422, 433-34, 16 P.3d 664 (2001). Rulings made under ER 609 are reviewed for abuse of discretion. State v. Rivers, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996).

Here, the trial court ruled that Wiggins's 1999 PSP conviction was admissible if he testified.<sup>3</sup> CP 42; 1RP 65-66. The court reasoned that, although the conviction was more than 10 years old, Wiggins's imprisonment during most of the intervening period essentially tolled the limitation period.<sup>4</sup> 1RP 65. The court concluded that excluding convictions simply because 10 years has passed "may defeat the whole purpose of the rule" if the defendant had not had the opportunity to abstain from further crimes of dishonesty due to incarceration. 1RP 66.

The trial court's reasoning reflects a determination that the 1999 PSP conviction retained probative value despite its

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<sup>3</sup> PSP is admissible for impeachment purposes under ER 609(a)(2) as a crime of dishonesty. State v. McKinsey, 116 Wn.2d 911, 912-13, 810 P.2d 907 (1991).

<sup>4</sup> The trial court explained:

... I think that the reason that we have the "unless the Court determines otherwise" [language in ER 609(b)] is, of course the reason for not allowing something that's ten years or older is because if you've managed to stay out in the community for ten years without committing a crime, then you shouldn't be prejudiced about that, you know, you're allowed to try to attempt to rehabilitate yourself, but if you – I think the caveat is there because that entire rule is defeated when you commit a crime, get out on that one, and then immediately go in jail for another one. You have not had an opportunity to prove to establish the inability or the ability to be out in the community and not commit a crime.

1RP 65.

remoteness. Arguably, the court's explanation lacks sufficiently specific findings as to the particular facts and circumstances it considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact. In any event, reversal is unwarranted because the error was harmless.

"[A]n erroneous ER 609 ruling is not reversible error unless the court determines that 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" Rivers, 129 Wn.2d at 706 (citations omitted). "Applying the harmless error standard the appellate court looks to the evidence at trial, the importance of defendant's credibility, and the effect the prior convictions may have had on the jury." State v. Hardy, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997).

The evidence against Wiggins was compelling. Wiggins, a body builder, was over six feet tall and about 250 pounds, while Hockley was only five feet tall and 100 pounds. 6RP 211. Wiggins admitted that he hit Hockley and knocked her down in the driveway, and that he believed it was possible that he had killed her. 10RP 72. He testified that he then walked to his car at the end of the driveway, sat there for 30-40 seconds, and returned to find blood flowing from

her head "like a faucet." 10RP 51-57, 89. His defense theory was that Brooks might have delivered the fatal blows during the short time that Wiggins was away from Hockley's body, but he admitted that he did not see or hear anyone in the vicinity. 10RP 58. Moreover, Wiggins had assaulted Hockley the day before and threatened that there would be consequences if he ever found her with someone else. 10RP 107-08. When Wiggins went to Hockley's house, he found her with the very man he had forbidden her from seeing. 10RP 119.

Wiggins argues that the evidence that he was responsible for Hockley's injuries was "far from indisputable." Brief of Appellant at 26. He argues that Brooks had motive and opportunity to harm Hockley, but cites only defense counsel's closing argument in support of that claim. In his argument, Wiggins's counsel argued that Brooks's motive was "a romantic relationship with Ms. Hockley." 11RP 39. But the only evidence was that Brooks did not want an exclusive relationship with her and did not mind if she saw other people. 4RP 106-06, 109. Brooks's "opportunity" to assault Hockley was limited to a matter of seconds between when Wiggins knocked her down and when he returned about a minute

later. During that short interval, MH came outside, discovered her mother hurt, and retreated to the house to find Brooks. But neither Wiggins nor MH saw or heard Brooks in the vicinity. Wiggins also argues that “Brooks took a step to act on that motive and opportunity by returning to Hockley’s location after initially retreating down the alleyway.” Brief of Appellant at 26. Nothing in the record supports that claim. Rather, Brooks testified that he returned only after he heard Hockley and Wiggins arguing, then a loud thump followed by MH shouting “what did you do, what did you do?” 4RP 128-29.

Wiggins contends that improperly admitting the PSP conviction was prejudicial because his credibility was crucial to the jury’s determination whether he committed murder or only second degree assault. But Wiggins’s conduct after beating Hockley more than established both his consciousness of guilt and a total lack of credibility. Wiggins lied to MH about who had injured Hockley and tried to fix blame on an innocent person. He knew that Hockley had serious injuries but failed to offer or summon aid and instead fled the state. He lied to Detective Cooper about where he was, what he was doing, and whether he had seen Hockley on the day of the

crime. He repeatedly searched law enforcement “most wanted” websites to see whether he was being pursued. He destroyed evidence of his communications with Hockley. He asked Levine to delete other evidence from his phone. And he admitted that he may not have come forward if Brooks had been accused of the murder.

Additionally, the jury was aware that Wiggins had been convicted of robbery in 2001 – a much more serious crime of dishonesty. On this record, there is no reasonable possibility that a single, brief reference to an old PSP conviction affected the outcome of the case.

In Russell, the trial court improperly admitted evidence of the defendant’s three convictions for robbery, theft, and attempted perjury, each of which was more than 10 years old, without balancing the probative value against the prejudicial impact. 104 Wn. App. at 429-30, 434. The error was harmless, however, in light of evidence that was “virtually airtight.” Id. at 439. This evidence established that Russell threatened his ex-girlfriend at a bar, was seen thereafter approaching his ex-girlfriend’s apartment and later leaving it after a loud “bang” and shortly before the

neighbor saw smoke billowing from the apartment. Id. at 438-39. Russell then admitted to a friend that he had started a fire in the apartment. Id. at 428. Russell's defense was that he was taking a long shower while these events took place. Id. at 431. Division Two of this Court held, "It is our view that this evidence is virtually airtight, and that with or without Russell's prior convictions, *any* jury would have rejected his claim that he was taking a 30 minute shower at the crucial time." Id. at 439.

The evidence here was at least as strong, and Wiggins's defense theory was just as implausible. With or without Wiggins's PSP conviction, any reasonable jury would have rejected his claim that Brooks snuck up during the few seconds that Hockley was alone and unconscious, stomped on her face and neck several times, walked away, and quickly returned to provide aid and summon help. The overwhelming evidence of Wiggins's guilt and equally overwhelming evidence of his lack of credibility leaves no reasonable probability that the erroneous admission of the PSP conviction had any effect on the outcome of trial. This Court should reject Wiggins's claim to the contrary and affirm his conviction.

2. THE COURT PROPERLY INCLUDED WIGGINS'S TWO CONVICTIONS FOR POSSESSION OF STOLEN PROPERTY IN HIS OFFENDER SCORE.

Wiggins next contends that the court erred by failing to find that his two past convictions for possession of stolen property were for the "same criminal conduct." Because the State presented evidence that the two offenses were not considered the same criminal conduct at the time they were sentenced, and the record supports that conclusion, this claim also fails.

The sentencing court calculates an offender's standard sentencing range based on the offender's other current offenses and prior convictions. RCW 9.94A.589(1)(a). Where a defendant has multiple prior convictions, they are presumptively scored separately. RCW 9.94A.525(5)(a). However, if two or more prior offenses were previously found to encompass the "same criminal conduct," they are thereafter counted as one offense. RCW 9.94A.525(5)(a)(1). Additionally, if multiple adult convictions were sentenced to be served concurrently, the current sentencing court must determine whether those convictions "shall be counted as one offense or as separate offenses using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a)[.]"

RCW 9.94A.525(5)(a)(1). This determination is required. See State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214 (1995) (interpreting a prior version of the statute).

“Same criminal conduct” refers to two or more crimes requiring the same criminal intent, committed at the same time and place, and involving the same victim. RCW 9.94A.589(1)(a); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). If any one of the three elements is missing, the offenses are not the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The definition of “same criminal conduct” is to be construed narrowly so that most crimes are not considered the same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Our supreme court recently held that the defendant bears the burden of proving that multiple *current* offenses were the same criminal conduct, because such a finding favors the defendant by lowering the offender score below the presumed score. State v. Graciano, 176 Wn.2d 531, 538-39, 295 P.3d 219 (2013).

The same thing is true with respect to multiple *past* offenses, so the defendant must bear the burden as to past offenses as well.<sup>5</sup> An appellate court reviews determinations of same criminal conduct for abuse of discretion or misapplication of the law. Graciano, 176 Wn.2d at 535-36.

Wiggins's criminal history includes two convictions for possession of stolen property in the second degree. CP 141-57. The basis for count I was possession of a stolen vehicle belonging to Richard Bentz. CP 141. Count II was for possession of a stolen credit card number belonging to the same individual. CP 141. The certificate of probable cause contains the factual basis for the plea. CP 143, 151. The certificate indicates that Wiggins attempted to use the stolen credit card at a hotel, whereupon the hotel manager contacted both Bentz and the police. CP 143. Bentz told her that "his car and wallet among other things had been stolen." CP 143. Police arrested Wiggins for possession of stolen property. CP 143. At the time of his arrest, Wiggins was carrying a briefcase in which

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<sup>5</sup> Whether the defendant bears the burden of showing that multiple past offenses were the same criminal conduct is currently pending in the supreme court in State v. Williams, No. 89318-7. If this Court concludes that the outcome of this case depends on which party bore the burden of proof, it should consider a stay pending the decision in Williams.

police found Bentz's passport and numerous other documents bearing his name. CP 143.

On the judgment and sentence for the two PSP convictions, there is a box for the court to check if it found that the offenses encompass the same criminal conduct and count as one crime in computing the offender score. CP 153. The box is not marked. CP 153. Additionally, the court counted the two offenses against each other in computing an offender score of 2.<sup>6</sup> CP 154. Wiggins was sentenced to time served on both counts. CP 155.

At sentencing in the instant case, Wiggins argued that the two PSP offenses should be considered "same criminal conduct" because the certificate suggests that the car and wallet were taken at the same time, from the same victim. 13RP 28-29. The court disagreed:

I did look through and I read through the material that I was provided, including the defendant's sentencing memorandum in that case. I am going to find that they are not the same criminal conduct. [Defense counsel] makes the assumption that well, they must have been taken on the same day, that the wallet with his credit card must have been in the car

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<sup>6</sup> RCW 9.94A.525(1) and RCW 9.94A.589(1)(a) direct the court to count other current offenses as if they were prior convictions for purposes of the offender score. Because Wiggins was convicted of two counts of PSP and there was only one prior shoplifting offense listed in his criminal history, the court must have included the shoplifting offense and one count of PSP in the offender score applicable to the other count. CP 154.

when the car was taken. But if you look at the certification, not only was the credit card taken, but the defendant was found to be in possession of the victim's passport and other documents. And these documents were contained in a separate suitcase that the defendant had separate from the car. And it makes no sense to me. While I think, I suppose it's possible that some people do leave their wallets in the car, why would he have his passport? That didn't – so that does not support your theory that just looking at this, that it's clear that these things were taken at the same time and that the wallet [was] in the car and that it was taken that way.

13RP 29-30.

Wiggins disagrees with the court's interpretation of this evidence, but that does not establish an abuse of discretion or misapplication of the law. “Under this standard, when the record supports only one conclusion on whether the crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result. ... But where the record adequately supports either conclusion, the matter lies in the court's discretion.” Graciano, 176 Wn.2d at 537-38. Here, at best, the record would support either conclusion. The court's determination that the two offenses were not the same criminal conduct was reasonable. There was no error.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Wiggins's conviction for murder in the second degree.

DATED this 5<sup>th</sup> day of June, 2014.

Respectfully submitted,

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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 Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. WIGGINS, Cause No. 70653-5 -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.

Dated this 5<sup>th</sup> day of June, 2014

W Brame

Name

Done in Seattle, Washington

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