

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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Court of Appeals No. 37507-9-II

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

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**State of Washington,**  
Respondent,

v.

**Doug Merino,**  
Appellant.

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

The Honorable Christine Pomeroy

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**OPENING BRIEF OF APPELLANTS**

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Christopher W. Bawn, WSBA #13417  
Counsel for Appellant  
1013 10<sup>th</sup> Ave. SE  
Olympia, WA 98501

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### **I. ASSIGNMENTS OF ERROR**

1. THE INFORMATION IS DEFECTIVE
2. THE TRIAL COURT ERRED IN REFUSING APPELLANT'S INSTRUCTIONS ON WITHDRAWAL FROM CONSPIRACY AND TERMINATION OF ATTEMPTED THEFT COMPLICITY
3. THE TRIAL COURT ERRED IN ADMITTING THE STATE'S ALLEGED "CO-CONSPIRATOR" STATEMENTS AND DENYING DEFENSE'S ALLEGED CO-CONSPIRATOR STATEMENTS
4. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS DUE TO INSUFFICIENT EVIDENCE

5. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL
6. THE SENTENCING COURT ERRED IN FAILING TO MERGE THE TWO OFFENSES AT SENTENCING

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether an information is defective if it fails to adequately inform the Appellant of a crime
2. When the State introduces an unavailable coconspirator's hearsay statements, is a criminal defendant permitted to introduce co-conspirator hearsay statements?
3. Whether a criminal defendant can withdraw from a conspiracy and from complicity in an attempted theft?
4. Whether there was sufficient evidence of a conspiracy or complicity to commit an attempted theft.
5. Whether a new trial should be granted as a result of jurors discussing extrinsic evidence before deliberations.
6. Whether a new trial should be granted as a result of the prosecutor withholding exculpatory evidence prior to trial, counseling a witness to avoid such testimony at trial, and presenting an inculpatory theory at trial despite the knowledge of the exculpatory evidence.
7. Whether the same conduct underlies the complicity and conspiracy counts such that the Appellant's convictions should be merged and treated as one offense for sentencing.

## **III. STATEMENT OF THE CASE**

**INFORMATION.** On May 25, 2007, the State charged Doug Merino with attempted first degree theft. RCW 9A.28.020(1)(attempt), RCW

9A.56.030(1)(a)(Theft). CP 5. In the certification of probable cause, the State's allegations were almost entirely based upon what an alleged accomplice, Ken Varner, had done in December 2005:

Allegation #1: Ken Varner claimed to have purchased a car from Doug Merino for \$59,000 in cash on December 6, 2005. CP. 6.

Allegation #2: Ken Varner insured the car with Farmer's Insurance agent Eric Snelson, after providing a bill of sale and "an appraisal he claimed was from Doug Merino for the value of the car being between \$60,000 to \$80,000" CP. 6. Ken Varner also gave the agent "color photos of what [he] claimed to be the car he had purchased." CP. 6.

Allegation #3: On December 8, 2005, Ken Varner told police that he allegedly left his 1949 Chevrolet "Woody" on the side of the road and it was stolen. CP.6.

Allegation #4: Ken Varner tried to collect the insurance, but the "insurance company felt that the claim was suspicious due the fact that [Ken Varner] had just insured the car two days before it was stolen and that [Ken Varner] left a \$60,000.00 car just sitting next to the road overnight. There was no proof of the money transfer because Ken [Varner] claimed he paid cash for the car.

Allegation #5: "Doug Merino was questioned by Farmer's Insurance and initially confirmed that the car was real and was sold to Ken Varner for \$59,500.00 on 12-5-05. Doug Merino later admitted that he gave a title to a 1949 woody hulk to Jim Varner only and never sold a car to Ken. Doug showed, days later Detectives where the hulk of the car is and Photos were taken." CP. 6.

The State later amended the information, re-alleging the December 8, 2005, attempted theft, but added new allegations that Doug Merino forged a "King's Kustom Kars" appraisal on October 4, 2005, he committed a theft on October 5, 2005, and Doug Merino engaged in a conspiracy to commit theft between November 1, 2005 and April 30, 2006. CP. 48-49.

Two of the new charges apparently stemmed from evidence obtained from an interview with Doug Merino in April 2007 and an ex parte judicial subpoena duces tecum issued to the Respondent for Washington State Employees Credit Union records showing that Doug Merino had obtained and repaid a loan in Lakewood, Washington, using a Kings Kustom Kars appraisal for what the car would be worth if it had been restored. CP. 69.

The trial court concluded that venue was improper for the allegations arising out of Pierce County (CP. 79), and the State amended the information, dropping two of the four charges, and leaving an "attempted

theft” between December 8, 2005 and April 30, 2006, and a conspiracy to commit theft between November 1, 2005 and April 30, 2006. CP. 129.

**OMNIBUS.** On July 12, 2007, the State signed an omnibus order that it disclosed “All Material known to the prosecuting attorney which tends to negate the defendant’s guilt” and “No custodial statements will be offered in the [State’s] case-in-chief or rebuttal.” CP. 23-24.

**MOTION IN LIMINE/EXCLUDE EVIDENCE.** Prior to trial the Appellant moved in limine to preclude coconspirator’s statements, such as the hand-written insurance claim dated December 16, 2005, because alleged author Ken Varner was “believed to be hiding in Mexico” (CP. 59), subject to an outstanding bench warrant, and not available. CP. 27-28, 33, and as refiled at CP. 36. The Appellant renewed its motion to exclude the evidence immediately prior to trial, because the State was not going to produce Ken Varner, and the State was not going to produce a records custodian it had identified from Farmer’s Insurance, and instead of bringing in a qualified witness, the State was “attempting to get around it by any means possible.” CP. 155.

**ALLEGED CO-CONSPIRATOR STATEMENTS of Ken and James Varner, orally to Mike Varner, orally to Janell Varner, a handwritten proof of loss to Farmers’ Insurance, and Photographs**

Prior to trial, the State's counsel (Joseph Wheeler) addressed the court on the subject of the Appellant's objections to admission of a few of the alleged co-conspirator hearsay statements the State planned to offer. The State explained that the conspiracy allegedly started with two absent co-conspirators: Jim Varner, who was deceased, and his son Ken Varner, who fled to Mexico "and there's a warrant for his arrest." RP. 19. In addition to oral hearsay statements of Jim and Ken Varner, the State sought to introduce "Exhibit 5" – a proof of loss statement, allegedly submitted by Ken Varner on December 16<sup>th</sup> to Farmer's Insurance as either a business record or admissible hearsay co-conspirator statement. RP. 35-36. The State conceded, however, that it was unable to have the business records custodian of Farmer's insurance present for trial (RP. 37), but that "the rules are pretty broad on business record exceptions" and the insurance investigator who kept the documents in her file could also be considered a records custodian. RP. 38. After hearing argument, the Court summarized the absent co-conspirator evidence the State wished to introduce over the objection of defense counsel:

COURT: Let me begin by saying what I need to rule on at 1:30 is the following: Mike Varner's statement that he heard Ken and Jim -- overheard a conversation with Ken and Jim about reporting a car stolen and making a fraudulent claim, whether that comes in or not. That's one statement.

COURT: No. 2, Janell Varner's statement on 12/1/05 about Jim driving her up to Bellingham, asking her to print photos, and I assume those photos are 1 through 4, or will she say those are the photos?

MR. WHEELER: 1 through 4.

COURT: She'll say those are the photos he asked her to print?

MR. WHEELER: No. What she's going to say is she printed photographs. These are copies of the photographs that she printed up.

THE COURT: And these are copies of the photographs that she gave to him at his request?

MR. WHEELER: She doesn't know what happened to the originals, but she's going to say these are the photographs that she printed and they have been reprinted by somebody else or resubmitted or something, but those are the photographs she printed for her dad.

THE COURT: Those are the photographs he asked her to print. Also you're also objecting to the statement by Jim to Janell that "these are for Duck"?

MR. FRANS: Correct.

...

THE COURT: And last, No. 5, is a document, and it is Exhibit 5, proof of loss document, whether or not this is a business record, whether it's accepted, or if it's not, you're saying it 's a coconspirator statement; is that correct? Have I missed anything?

MR. FRANS: No.

RP. 48

The trial court ruled that the conversation between Ken, Jim and Mike Varner was "essential, because of the players" and allowed it to be admitted. RP. 49. At trial, Defense counsel renewed his objection to admitting co-conspirator statements through a conversation involving only the Varners, which allegedly occurred while the Appellant was standing 25-30 feet away. RP. 144-145. The court again ruled that the co-conspirator statement could be admitted. RP. 144.

The court ruled that the conversation between Jim Varner and his daughter, Janell was admissible “if she can identify that yes, those are copies of the photographs that I, in fact, developed.” RP. 50. The trial court indicated that Exhibit 5, the Proof of Loss, was admissible as a business record by the insurance investigator. “ She’s not the person who holds it for Farmer’s but she is employed by Farmer’s as an insurance investigator and in her course of business has this as a business record.” RP. 50.

The Appellant’s counsel further objected to the admission of the conversation between Ken Varner and Jim Varner, allegedly overheard by Mike Varner, because there was no evidence, independent of the statements themselves at the time the statement occurred, to establish that a conspiracy was ongoing. RP. 54. The court ruled that there was “slight” evidence of an existing conspiracy and overruled the objection. RP. 56.

**AFFIRMATIVE DEFENSE: WITHDRAWAL/ABANDONMENT**

The Appellant also argued prior to trial the affirmative defense that he withdrew/abandoned the theft attempt or conspiracy, pursuant to RCW 9A.08.020. RP. 44. The State argued that such withdrawal/abandonment does not apply to a conspiracy. RP. 45. The court agreed to address that issue with the jury instructions.

## TRIAL

At trial, the State presented evidence that on Wednesday, November 30, 2005, Farmer's Insurance agent Eric Snelson discussed insuring an antique car with Jim Varner on the telephone. RP. 164, 167-168. Janell Varner testified that on December 1, 2005, she returned from Olympia to her school in Bellingham with her father, Jim Varner, and he asked her to print out some pictures, as follows:

Q Showing you what has been marked as 1, 2, 3, and 4, can you tell me if you recognize these picture?

A Yes.

Q And how do you recognize those pictures?

A These are some of the pictures I printed out. They're bigger than the pictures I printed out.

Q. Are those the pictures themselves, or are those copies of the pictures?

A Copies.

Q Did you print more than these four?

A Yes.

Q How many more did you print?

A I printed, I think, six.

RP. 161-162.

On the following Monday or Tuesday, December 5 or 6, insurance agent Snelson met with Jim and Ken Varner and took the application for insurance. RP. 164, 167-68. Snelson knew Jim Varner because they had worked together when Jim Varner was a reserve agent for Farmer's Insurance, and Jim Varner had purchased a variety of insurance policies from Eric Snelson. RP. 163. Snelson claimed that the Varners showed

him a bunch of photographs, and that he kept two before insuring the vehicle (Exhibit 2 and 3). Ex. 167. Snelson initially claimed to have seen the car through a window before insuring it, but after being told that the Appellant's airplane hangar had no windows, Snelson changed his story, claiming that he only saw a outline of a vehicle through a crack in the door. RP. 170, 177.

Thurston County Sergeant Raymond Brady testified that he responded to a stolen car claim by Ken Varner on December 8<sup>th</sup>, 2005, and that Varner claimed that Ken and Jim Varner were "test driving" an antique vehicle when it broke down, they left the car at the side of the road the evening before, and it was not there when he returned. RP. 102-103.

Because Farmer's Insurance was suspicious of the claim that Ken Varner turned in on December 8, it assigned Kamela Weddings to investigate and resolve any issues or red flags on December 14, 2005. RP. 76-77.

Wedding said "there were red flags on [the Varners'] insurance claim as soon as it was filed" because the policy was "brand new" when the car was reported stolen, it was a \$60,000 stated-value antique car, and Ken Varner was "pushy" to get the claim settled. RP. 57. Weddings said that on December 16, 2005, Weddings met with Varner in Tacoma, and he gave her a bill of sale, an appraisal, a vehicle registration, a police report,

the proof of insurance, as well as photographs (admitted on her authentication as Exhibits 1, 2, 3 and 4). RP 59.

On December 20, 2005, Weddings called the Appellant's phone number on the appraisal, and the Appellant allegedly told Weddings that "the car was in excellent condition, that Ken drove it away from his house and that it was drivable and it was in excellent condition and it was a fully restored Woody, and ... to his knowledge he said to me he thought that Ken Varner was taking the car to Mexico" where Ken Varner lived RP. 66. On cross-examination, Weddings admitted that in the December 20<sup>th</sup> conversation, the Appellant warned Weddings "that Ken Varner had been convicted for fraud" and the Appellant tried to get Weddings to look into Ken Varner's background. RP. 80-81. Weddings testified that she could not automatically void the policy because of Ken Varner living in Mexico because she later discovered that Jim Varner, Jim's wife Kendra, and Jim's daughter Janell were also listed on the policy. RP. 75. Weddings said that the Appellant told her that he "couldn't give an opinion" on whether Ken Varner had fabricated the insurance claim, but that the Appellant told her "it was very strange that the car had been reported stolen." RP 94-95.

Weddings testified that on December 21<sup>st</sup>, she spoke with Farmer's insurance agent Eric Snelson, since he had underwritten the car, RP.82, and that Snelson claimed to have gone to a warehouse where the car was stored and looked into the window and saw the vehicle that he insured. RP. 85-86.

On January 13<sup>th</sup>, Weddings had a follow-up conversation with the Appellant, who denied that he turned two keys over to Ken Varner, and instead the Appellant said he gave Ken Varner one key on a faub. RP. 60. In the same conversation, when Weddings told Merino about Snelson's claim to have seen the car through a warehouse window, Merino said that Snelson was lying, because the car was in an airplane hangar and there were no windows. RP. 86. Weddings therefore contacted Snelson, who changed his story each time Weddings asked for more information about where and when Snelson allegedly saw the car. RP. 86.

Weddings testified that the investigation was still open until January 31, 2006, when an attorney for Farmer's took a deposition of Ken Varner and Jim Varner (RP. 75), but that any chance of Farmers' paying the Varner insurance claim ended when Doug Merino came forward on February 2, 2006, and talked to Detective Kimsey. RP. 90, RP. 185-86.

Lewis County Detective Bruce Kimsey testified that on February 2, 2006, he arrived at an investigation scene for the death of Jim Varner, and there were several Varner family members there, including Ken Varner, and the Appellant was also there.. RP. 185-186. Ken Varner appeared to be “paranoid, not emotional to what was going on” and looked “suspicious” to the Detective. RP. 191. Detective Kimsey interviewed the Appellant, who was emotional, and the Appellant explained several things that could have been involved in Jim Varner’s death, including how Jim Varner had financial difficulties (RP. 197), and the Appellant’s knowledge of the insurance fraud that the Varners were perpetrating. RP. 191-192. The Appellant explained to Bruce Kimsey that the Appellant had offered the title to his 1949 woody to Jim Varner, so Varner could get a loan, and found out initially that his best friend, Jim Varner, had not done that when the insurance investigator called the Appellant about the 1949 woody being reported stolen, and that the Appellant did not want to say anything over the phone to the investigator that would incriminate Jim Varner. RP 187-188.

Detective Kimsey sent his investigation to the Thurston County Prosecutor in the hope that the prosecutor would prosecute Ken Varner. RP. 195.

When the Appellant’s attorney asked Detective Kimsey what story

Kenneth Varner gave him about the insurance fraud during an interview the Detective took of Kenneth Varner, the trial court sustained a hearsay objection by the State. RP. 199.

Detective Roland Weiss testified that he interviewed the Appellant on February 13, 2006. Merino explained that his friend, Jim Varner, had asked if he could borrow money from the Appellant because Jim Varner needed \$40,000 to \$50,000 on a condominium deal Jim Varner had gotten into with his son Ken Varner in Mexico. RP. 109. The Appellant, who deals with collectible cars, suggested to Jim Varner that he take out a bank loan, using a classic Chevy Impala convertible that Varner owned, but Varner instead suggested that if the Appellant gave him the title to an unrestored 1949 Chevy that the Appellant had, then Jim Varner could take out a loan on that (RP. 109-110), and so the Appellant gave him a title, bill of sale and appraisal so Varner could get a bank loan. RP. 113.

According to Weiss, the Appellant “played along” with Weddings when Weddings called the Appellant on December 16<sup>th</sup>, but then the Appellant called Jim Varner and said that Varner should drop the claim, and if the Appellant was deposed, he would tell the truth about the vehicle. RP 114. After Jim Varner was found dead on February 1<sup>st</sup> or 2<sup>nd</sup>, according to Weiss, the Appellant reported that he contacted Ken Varner and told him

that he was going to tell the truth about the fraudulent theft report. RP.

115. On cross-examination, Detective Weiss explained that the transfer of title appeared to have the wrong date on it (November 5<sup>th</sup>), because the other documents were dated December 5<sup>th</sup>. RP. 123.

Frank Alexander testified that Exhibits 1, 2, 3 and 4 were pictures of his 1950 “woody” wagon, as it was displayed at a car show in the summer of 2004, and that he still owned it, and it was not stolen. RP. 134. Mr. Alexander testified that he remembered “three individuals that came up, it was early on in the show, and they came up and, like, fell in love with my car and asked if I mind if they take some pictures and I said, “No, knock yourself out,” because I happened to be flattered that they were so impressed with it. RP. 135. When asked if the Appellant was one of the people, Alexander said “I can’t say for sure, no.” RP. 136. On cross examination, when asked if he had ever met the Appellant, Alexander said “Not to my knowledge.” RP. 138.

Detective Dunn testified that he also interviewed the Appellant, and that during that interview the Appellant explained that he had obtained loans of the 1949 Woody hulk before, using appraisals for the value of the vehicle upon completion, and he always paid the loans off. RP. 204.

At the conclusion of the State's case, the Appellant moved to dismiss, including a claim that the affirmative defense had been proven, that being withdrawal and abandonment of attempted theft, in that the Appellant had reported information that helped prevent the insurance claim from being paid in December to the insurance investigator, and again when he reported the insurance fraud to Detective Kimsey on February 2, 2006.

RP. 212. The State started its argument concerning Doug Merino's complicity with Exhibit 1, 2, 3 and 4.

MR. WHEELER: ... There is ample evidence that Doug Merino was helping in this attempt. We have the photographs. We don't know where they came from, but perhaps Doug Merino supplied them. There were three people, according to Mr. Alexander."

THE COURT: Excuse me. The photographs, I think, were supplied by Janell Varner. That's is what her testimony is, that they came from her, is it not?

MR. WHEELER: Yes, they came from her, but the photographs were taken of the car in the summer of 2004. So the photographs began a long time ago.

The Court denied the Appellant's motion to dismiss, concluding that the affirmative defense of abandonment was "a question of fact for the jury."

RP. 230.

Defense witness Craig Stevenson, a private loan officer testified that in late 2005, Doug Merino put the Varners in touch with him about loaning money to the Varners. RP. 236. Although the trial court permitted the

loan officer to testify that the Varners were in financial need and ultimately did not get a loan, when the Appellant's counsel asked Stevenson about the discussions during his meetings with Ken Varner, the trial court sustained the State's objections to Stevenson testifying about what Ken Varner said to Stevenson. RP. 236-237.

Paul Curtiss, a loan officer with the Washington State Employees Credit Union, testified that the Appellant had an excellent loan history with the credit union (RP. 246) and that Doug Merino had successfully obtained a loan and paid it back to the credit union, using his 1949 Woody as part of the collateral, in October 2005. RP. 247-249. Curtiss testified that the Appellant notified Curtiss in late November 2005 that he had given the Woody to Jim Varner, but that Jim Varner's credit was not as good as the Appellant's credit. RP. 249. Curtiss explained that he had been working with Doug Merino's antique car loans for twelve years, and was "absolutely" aware of the fact that Doug Merino could restore antique vehicles that people might think were worthless into vehicles worth \$100,000. RP. 264-265.

Car collector Mel Matsui testified that Doug Merino had recently sold him an unrestored 1938 Ford Woody for \$138,000, on the basis of Doug Merino restoring it. RP. 138-140. Matsui explained that Woody vehicles

are “the most desirable of almost anything” because “there’s very, very few Woodys left.” RP. 271. On cross-examination, Matsui explained that 1949 Woodys sell for \$61,000 to \$180,000, depending on the time and care that went into restoring them. RP. 274.

### **JURY INSTRUCTIONS**

The Appellant’s counsel took exception to the court’s failure to give the Appellant’s proposed Instruction #1, and #2, and #3. CP. 195, 196 and 197 and RP. 282-283. The objections concerning the failure to instruct as to withdrawal from a conspiracy and termination of complicity in an attempted theft. After deliberating, the jury found the Appellant guilty of Attempted Theft in the First Degree and of Conspiracy to Commit Theft in the First Degree. RP. 347-348.

### **MOTION FOR NEW TRIAL**

The Appellant filed a motion for new trial and for relief from judgment, CP. 251 – 263, claiming juror misconduct over jurors allegedly discussing checking the internet and researching the value of “woody” or classic cars, CP. 248 and CP. 250 and CP. 270-71, and for prosecutor misconduct over the prosecutor’s interactions with trial witness Janell Varner over her identification of the photographs she had printed and which were admitted into evidence, CP. 267-269, and the prosecutor’s failure to disclose

exculpatory evidence that the color photographs the State used as evidence contained a reflection in the bumper of the vehicle of three people and that the State's witness (Janell Varner) had previously excluded the Plaintiff from the people depicted in the photograph, and instead the prosecutor "broad-sided" the Plaintiff's attorney at trial with the color photographs and pursuing an inculpatory theory of three people taking the photographs. CP. 274, see also declaration of Appellant's prior counsel. CP. 330.

### **SENTENCING**

The trial court denied the motion for new trial and sentenced the Appellant on each count, to run concurrently. CP. 367. The Appellant seeks review in this court.

### **ARGUMENT**

#### **1. DEFECT IN CHARGING DOCUMENT**

The Sixth Amendment and Const. art. I, § 22 (amend. 10) require inclusion in the charging document of the essential elements, statutory and otherwise, of the crime charged so as to apprise the defendant of the charges against him and to allow him to prepare his defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The charging instruments must notify the defendant of both the illegal conduct and the crime with which he is charged. State v. Hopper, 118 Wn.2d 151, 155, 822

P.2d 775 (1992). Reversal is necessary when an Appellant is convicted on the basis of a defective information. State v. McCarty, 140 Wn.2d 420, 426, 998 P.2d 296 (2000)(information charging conspiracy to deliver methamphetamine was insufficient because it did not allege the essential element that three people were be involved in the conspiracy); State v. Gill, 103 Wn. App. 435, 442, 13 P.3d 646 (2000) (a missing element in one count cannot be drawn from its inclusion in another, similar count). In theft cases, the value of the property is an essential element of the crime, and must be identified in the charging documents. State v. Moavenzadeh, 135 Wn.2d 359, 956 P.2d 1097 (1998).

The test to determine the sufficiency of a charging document under Kjorsvik has two prongs: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" Kjorsvik, 117 Wn.2d at 105-106.

Here, the State's information charges the Appellant with attempted theft of property valued in excess of \$1,500 and for conspiracy to commit theft in the first degree. CP. 129. In the first charge of the information, it does not charge Doug Merino with complicity or conspiracy, nor does it

identify what the Appellant allegedly attempted to take, or from whom, and instead appears to rely upon the one-paragraph statement of probable cause (CP. 6). The statement of probable cause involves a report by Ken and Jim Varner that their car was stolen, and they attempted to obtain some unspecified amount of insurance proceeds. The only statement in the certification implicating the Appellant is as follows: "Doug Merino was questioned by the Insurance Company and initially confirmed that the car was real and was sold to Ken for \$59,500.00 on 12-5-05. Doug Merino later admitted that he gave a title to a 1949 woody hulk to Jim Varner only and never sold a car to Ken. Doug showed, days later Detectives where the hulk of the car is and Photos were taken." CP. 6.

That statement prejudiced the Appellant in that it does not state with sufficient specificity which alleged "victim" the Appellant supposedly attempted to commit a "theft" upon. To the extent the information alleged against the Plaintiff is considered "inartful" but relates to the insurance company as victim, there is no specification in the statement of probable that the Appellant knowingly furthered any attempted theft from the insurance company by initially responding to the insurance company

inquiry that he had sold the car to one Varner, but later reported to the police that he had just given the title of the car to the other Varner.

Finally, under the second count, the information is also clearly defective. It alleges that the Plaintiff was guilty of “conspiracy” because he, “as a principal or as an accomplice, did conspire with another” to commit first degree theft. By adding “accomplice” liability to the “conspiracy” charge, combined with the inartful statement of probable cause, the State failed to establish what conduct constituted the actual conspiracy. The punishable conduct in conspiracy is the plan itself. State v. Williams, 131 Wn. App. 488 (2006).

Although there was no objection to the charging document prior to this appeal, even the most liberal reading of the statement of probable cause cannot be twisted to establish that the Appellant was participated in any “plan” with Ken and Jim Varner. To the contrary, it appears more clear that the State realized its evidence was deficient, and defectively charged that the Appellant engaged in complicity to conspiracy. See State v. Smith, 131 Wn.2d 258, 262, 930 P.2d 917 (1997) (conspiracy to commit conspiracy to commit a crime is defective). At trial, this defect was obvious, since the State’s only “evidence” of a plan involving the Appellant was a meeting between Ken, Jim and Mike Varner, which

allegedly took place 25-30 feet away from the Appellant. RP. 144.

Although, over objection, the trial court allowed both parties to argue that the Appellant was not within earshot of the “plan” – the time for notifying the Plaintiff of this crucial element for purposes of a conviction is in the charging document, not at trial.

## **2. SUFFICIENCY OF THE EVIDENCE TO CONVICT OF CONSPIRACY**

The Appellant’s trial counsel moved to dismiss for lack of evidence. The test for determining the sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

As noted previously, the punishable conduct in conspiracy is the plan itself. State v. Williams, 131 Wn. App. 488 (2006). Here, over objection, the State was allowed to admit testimony of Mike Varner, indicating a “plan” between Jim and Ken Varner that was discussed between Ken Varner, Mike Varner and Jim Varner. RP. 144-145. The State’s evidence did not establish that the Appellant was aware of that plan, and instead the State invited the jury to impermissibly speculate that the Appellant might have overheard the conversation from 25-30 feet

away, and then to further speculate that the Appellant was a part of it. Even a rational fact-finder could not find guilt beyond a reasonable doubt upon the two levels of speculation involved in this evidence.

**3. ERROR INCLUDING STATE'S EVIDENCE OF ALLEGED Co-CONSPIRATOR STATEMENTS BUT PRECLUDING APPELLANT'S EVIDENCE OF Co-CONSPIRATOR STATEMENTS**

Review of Constitutional Confrontation Clause violations is conducted de novo. State v. Larry, 108 Wn. App. 894, 901, 34 P.3d 241 (2001), review denied, 146 Wn.2d 1022 (2002). Although out-of-court Statements by a witness are inadmissible hearsay, and violate a Defendant's constitutional right to confront witnesses under the Sixth Amendment, "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" can be admitted. ER 801. Before admitting the co-conspirator's statements, however, the trial court must find that the State presented sufficient independent evidence establishing a conspiracy and that the statements were made in furtherance of the conspiracy. State v. St. Pierre, 111 Wn.2d 105, 118-19, 759 P.2d 383 (1988), see also United States v. Adams, 446 F.2d 681, 683, cert. denied, 404 U.S. 943 (9<sup>th</sup> Cir. 1971)(must show by "independent evidence that at the time of the declaration, [that] the declarant and the other person were

engaged in a concert of action involving the claimed conduct in question.")

Here, over objection, the State sought to introduce hearsay statements by alleged co-conspirator Ken Varner and co-conspirator Jim Varner to Mike Varner, and between the Varners to an insurance company in order to secure insurance on a car, and statements Ken Varner gave to police days later, in furtherance of Ken Varner's effort to fraudulently report the vehicle as stolen, and to obtain the insurance money. Although the State pointed out that the Varners also submitted a bill of sale, title, and an appraisal to the insurance company, signed by the Appellant, the State failed to create the nexus between those items and the conduct of the Varners. In other words, the State failed to meet the requirements of State v. St. Pierre, because the title, bill of sale and appraisal do not establish sufficient independent evidence, especially at the time of Mike Varner's alleged conversation with Jim and Ken Varner or the subsequent conversations with the insurance company or police, that the Appellant was a member of the alleged conspiracy, which the State's information alleged. Obviously, every criminal who seeks to commit insurance fraud has to obtain a title, bill of sale and appraisal from someone, and the existence of such evidence should not independently elevate the person

providing those items to conspirator status in a subsequent insurance fraud, without some evidence linking the defendant to the planned fraud. t. The trial court erred in admitting Ken Varner's hearsay evidence against the Appellant.

For criminal defendants, cross examination and confrontation of witnesses is a matter of right. Davis v. Alaska, 415 U.S. 308, 315-316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). ER 806 provides that "{w}hen a hearsay statement {i.e., a statement offered to prove the truth of the matter asserted}. . . has been admitted in evidence, the credibility of the declarant may be attacked . . . by any ~~evidence~~ which would be admissible .. if {the} declarant had testified as a witness." It is reversible error to deny a defendant the right to impeach the chief prosecution witness. State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003). Exclusion of such evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant was guilty even absent the error. Spencer, 111 Wn. App. at 408; State v. Orndorff, 122 Wn. App. 781, 783, 95 P.3d 406 (2004), review denied, 154 Wn.2d 1010 (2005). Similarly, it is reversible error to preclude evidence impeaching the credibility of the State's "witness." State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980), State v.

McDaniel, 83 Wn. App. 179, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011, 932 P.2d 1255 (1997). To comport with the Defendant's constitutional rights, the State should not be allowed to bolster its witnesses with impunity. State v. York, *supra*.

As is apparent from the information, the State relied almost exclusively on the "testimony" of Ken Varner to tie the Appellant to the Varners' criminal conspiracy. It was error to exclude the Appellant's effort to impeach Ken Varner's credibility through the introduction of testimony of a loan agent who met with Ken Varner, before the Varners reported the car stolen, and through a detective who met with Ken Varner after the Varners reported the car stolen. Notably, ER 801 and 806, are not restricted to testimony offered by the State. It was reversible error to preclude the Appellant from challenging the credibility of the Varners' hearsay statements. It was also reversible error to preclude the Appellant from introducing the Appellant's own evidence of a conspiracy, involving the Varners alone, which would contradicted the State's conspiracy theory. A party confronted with hearsay conspiracy evidence should be entitled to introduce conflicting hearsay conspiracy evidence, to the extent both parties are using such evidence to establish a conspiracy that would result in a determination against the opposing party.

In sum, the State failed to meet the requirements of State v. St. Pierre, and should have not been permitted to introduce the hearsay statements of Ken Varner. Once admitted, the trial court erred in disallowing the contradictory testimony from the Appellant's witnesses.

**4. WITHDRAWAL FROM CONSPIRACY/TERMINATION OF COMPLICITY**

The State charged the Appellant with complicity to a conspiracy to commit theft between November 2005 and April 2006. The Appellant introduced evidence that, upon being first aware that Ken Varner had reported a stolen car to an insurance company in December 2005, the Appellant warned the insurance investigator who contacted him that Ken Varner had a prior conviction for fraud, and that Ken Varner was a Mexico resident, which at the time, the Appellant and investigator thought would have meant the investigator could void the claim. The Appellant then notified Jim Varner that the Varners should drop the claim, because the Appellant would tell the truth about the vehicle. As the information states, the Appellant subsequently contacted the police, and according to the evidence presented at trial, the Appellant's statements to police terminated any chance that Ken Varner's insurance claim would succeed.

The Appellant took exception to the trial court's refusal to instruct the jury concerning the defense of withdrawal.

The Washington Supreme Court has explained that a "withdrawal" defense to accomplice liability is expressly recognized by statute, RCW 9A.08.020(5)(b), but it is unclear whether a similar defense to an anticipatory offense is available. State v. Handley, 115 Wn.2d 275 796 P.2d 1266 (1990). As noted in the Appellant's trial brief, under federal law, a Defendant may introduce evidence of a withdrawal from a conspiracy on the basis of an affirmative action tending to defeat or disavow the purpose of the scheme and the abandonment must be complete and in good faith. U.S. v. Nowak, 448 F.2d 134 (7th Cir. 1971). See also Hyde v. United States, 225 U.S. 347, 369, 32 S.Ct. 793, 803, 56 L.Ed. 1114 (1912). A person may escape liability for the crime of conspiracy, even after satisfying the elements of the offense, by renouncing, abandoning, or withdrawing from the criminal enterprise. U.S. v. Freie, 545 F.2d 1217 (9th Cir. 1976).

The Ninth Circuit's model jury instructions explain the federal law concerning conspiratorial withdrawal:

"Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by

making reasonable efforts to tell the co-conspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal. The government has the burden of proving that the defendant did not withdraw from the conspiracy before the overt act—on which you all agreed—was committed by some member of the conspiracy.”

Ninth Circuit Model Criminal Jury Instructions, 8.19.

Apparently, the trial court felt that the “conspiracy” is a completed crime once there exists evidence of a “plan,” and therefore there is no opportunity to evade liability in the middle of the criminal activity – as there would be for an “accomplice.” This would clearly violate the policy behind allowing parties to withdraw from criminal activity. In this case, there is no evidence alleged in the information or in the statement of probable cause, indicating that the Appellant was ever part of any plan. As noted previously, the date of the alleged conspiracy was sometime after “November 1” but the statement of probable cause does not specify any charge or participation by Doug Merino until the afore-mentioned phone call he received from the insurance company.

The Appellant introduced evidence of withdrawal as well as evidence that the Appellant’s actions were what actually thwarted the success of the conspiracy. Under those circumstances, it was error for the

trial court to rule as a matter of law that the Plaintiff could not instruct as to withdrawal. The Plaintiff should have been entitled to an instruction, permitting the jury to weigh the evidence of withdrawal and determine whether the Appellant withdrew from the conspiracy. As noted in earlier argument in this brief, the Appellant was charged as a principal “or as an accomplice” to a conspiracy. It was clear error for the trial court to exclude the Appellant’s proposed withdrawal defense instruction.

#### **5. MOTION FOR NEW TRIAL - PROSECUTORIAL MISCONDUCT**

The trial court erred in refusing to grant a new trial over juror and protectoral misconduct. It is within the discretion of the trial court to determine whether juror misconduct occurred, whether it is prejudicial, and whether mistrial is warranted. Richards v. Overlake Hosp., 59 Wn. App. 266 (1990). The decision of the trial court will not be overturned on appeal absent an abuse of discretion. Richards, at 271. It is misconduct for a juror to “extra-judicially acquire case-specific information during the course of the trial...” State v. Tigano, 63 Wn. App. 336, 341 (1991). Juror use of extrinsic evidence is misconduct and entitles a defendant to a new trial if the defendant has been prejudiced. State v. Briggs, 55 Wn. App. 44 (1989). The court’s inquiry is an objective one, the question

being whether any extrinsic evidence could have affected the jury's determinations. State v. Boling, 131 Wn. App. 329 (2006), quoting, State v. Caliguri, 99 Wn.2d 501, 509 (1983). The court need not delve into the actual effect of the evidence and any doubts must be resolved against the verdict. Briggs, 55 Wn. App. at 55.

Three different jurors testified that the jurors overheard discussion about looking the case up on the Internet to see "what the big picture was all about" and one juror discussed researching the value of "woody" vehicles and antique vehicles in general. Although the Appellant was unable to establish in time for the motion for new trial that the individual jurors actually obtained specific outside information, the trial court abused its discretion in not granting a new trial in light of the undisputed evidence that the jury discussed obtaining such outside information.

Even greater grounds for review is the prosecutorial misconduct that occurred. Where prosecutorial misconduct is involved, a conviction must be set aside if there is any reasonable likelihood the undisclosed testimony could have affected the outcome. State v. Judge, 100 Wn.2d 706 (1984). When a prosecutor's failure to disclose may have had an effect upon the outcome of the trial reversal is warranted. State v. Finnegan, 6 Wn. App. 612 (1972).

In Washington, a prosecutor is not only an advocate, but also a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial. State v. Torres, 16 Wn. App. (1976). Furthermore, RPC 3.8 (d) requires prosecutors to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate guilt of the accused or mitigates the defense. See also CrR 4.7(a)(1)(v). The obligation on the State to disclose this information is continuing. State v. Greiff, 141 Wn.2d 910, 919-20, 10 P.3d 390 (2000). Where the originals in the prosecutor's possession contain evidence that the prosecutor intends to use, constitutional due process requires disclosure and Defense opportunity to review the actual evidence – as opposed to copies or samples. State v. Boyd, 160 Wn.2d 424, 432-33, 436, 158 P.3d 54 (2007).

As noted in the motion for new trial and without opposition by the prosecutor, the prosecutor did not disclose to the defense an exculpatory statement of Janelle Varner, and self-servingly influenced the testimony of Janelle Varner at trial, that the pictures introduced into evidence against the Appellant were the same pictures she had printed for her father. These pictures also spawned a Boyd “due process” violation. As noted in the Declaration of Janelle Varner, the prosecutor had Janelle Varner look

at an enlarged picture of the car with a magnifying glass. Particularly, the prosecutor wanted to know if the three people in the bumper of one of the photographs could be Jim Varner, Ken Varner, and Mr. Merino, which is exactly what the prosecutor argued in closing. However, Ms. Varner indicated to the prosecutor before trial that she did not recognize the people in the reflection. Further, she indicated that the clothes worn by those in the picture were definitely not the type of clothing that her dad and brother would wear. She also told the prosecutor that she did not believe any of the people in the picture could be Mr. Merino. Again, this information was never disclosed to the Defense, and neither were the color photographs or even a hint that the bumper contained a visible reflection that was not Doug Merino.

At trial the prosecutor elicited testimony from Mr. Alexander that three people approached him in 2004 and took pictures of his car. In closing, specifically during rebuttal, the prosecutor essentially argued that the three people spoke of by Mr. Alexander were Jim Varner, Ken Varner, and Mr. Merino. The prosecutor further argued that it only made sense that Mr. Merino was the one who in fact took the pictures, and further implied that perhaps the conspiracy started at that point. The prosecutor made these arguments with full knowledge that his own witness had told

him the three people in the reflection were not the Varners and Mr. Merino. If the prosecutor had disclosed this testimony to the Defense, it would have severely damaged his arguments, arguments he believed to be the difference-maker. The argument would have had little, if any, weight, and certainly would have subject to an ER 403 balancing challenge. The prosecutor undoubtedly knew this as he was careful to stay far away from any testimony regarding the reflection in the bumper, which went unnoticed by the defense based upon the discovery provided and the impression left with respect to how it would be used. The prosecutor elicited the testimony from Mr. Alexander regarding the three people taking the picture and used it to the fullest extent possible to infer Mr. Merino's guilt—all the while hiding and ignoring the fact that his own witness had provided him with information to the contrary.

The state relied heavily on the pictures in its argument to the jury regarding Mr. Merino's involvement. Janelle Varner's contradictory testimony was exculpatory in nature, particularly in consideration of the fact that the state argued Mr. Merino took the pictures and as a result the conspiracy may have begun at that point. This was a very close case, with compelling arguments and circumstantial evidence on both sides, without question the tainted and dishonest arguments made by the state most

definitely could have affected the verdict, and certainly is more than sufficient to undermine any confidence in the outcome.

This prosecutor had a duty to ensure that Mr. Merino received a fair trial. That duty was entirely disregarded. This prosecutor's conduct from start to finish was nothing short of outrageous—from bad faith negotiations, intentional delay tactics, tampering with witnesses, and suppression of evidence clearly favorable to Mr. Merino, there is scarcely a dishonest ground not covered by this prosecutor. The misconduct is clear and indefensible. Accordingly, Mr. Merino respectfully requests the court to find prosecutorial misconduct, that it prejudiced Mr. Merino's right to a fair trial, and grant the request for a new trial.

#### **6. SAME CRIMINAL CONDUCT – ONE CRIMINAL ACT FOR SENTENCING**

RCW 9.94A.589, formerly RCW 9.94A.400, covers consecutive or concurrent sentences. Subsection (1)(a) reads in pertinent part: "...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." To determine if two crimes share criminal intent, for purposes of deciding whether crimes constitute "same criminal conduct" for

sentencing purposes, the court should focus on whether the defendant's intent, viewed objectively, changed from one crime to the next and should consider whether one crime furthered the other. State v. Grantham, 84 Wn. App. 854 (1997); see also State v. Vike, 125 Wn.2d 407, 411 (1994)(the inquiry regarding intent can be resolved, in part, by determining whether one crime facilitated the other).

All elements for "same criminal conduct" are met with respect to the two crimes Mr. Merino was found guilty of, and consequently should be treated as one for the purposes of sentencing. Attempt or conspiracy to commit theft 1st degree is scored at 75% of the standard range, which at a score of 0 would be 0 to 90 days, with 75% of the range being 0 to 67.5 days. Partial confinement may be served on home detention for this offense, or up to 30 days may be converted to community service. The allegations made by the state easily establish "same criminal conduct." Because both crimes were alleged to have been committed over almost the same time frame, involved the same victim, and shared the same intent with respect to the alleged overall criminal purpose, the sentencing court erred in not merging the two for purposes of sentencing.

## **V. CONCLUSION**

In sum, the decisions of the trial court with regard to the trial and motion for new trial merit review and reversal. The sentencing court should have merged the convictions at sentencing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. W. Bawn', written in a cursive style.

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Christopher W. Bawn  
Counsel for Appellant

Court of Appeals No. 37507-9-II

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

State of Washington,  
Respondent,

v.

Doug Merino,  
Appellant.

CERTIFICATE OF SERVICE

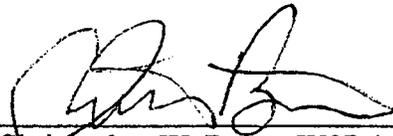
ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy  
Christopher W. Bawn, WSBA #13417  
Counsel for Appellant  
1013 10<sup>th</sup> Ave. SE  
Olympia, WA 98501

FILED  
COURT OF APPEALS  
DIVISION II  
09 MAR 11 PM 3:54  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

This will certify that on March 11, 2009, I delivered the Motion to Recall Mandate, Declaration of Christopher Bawn, Declaration of Sophia Chung, Declaration of Tony Rathburn, and Brief of Appellant to Joe Wheeler by leaving the same with his receptionist at the Thurston County Superior Court building. The receptionist indicated that Mr. Wheeler was somewhere in the courthouse, but I was unable to locate him.

I certify that the foregoing is true under penalty of perjury under the laws of Washington, and signed this in Thurston County on March 11, 2009.



Christopher W. Bawn, WSBA #13417

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY



On this date, I filed this proof of service in the Court of Appeals, confirming that Doug Merino was mailed a copy of the opening brief in his appeal on this date, together with this proof of service. If, after reviewing the brief, Doug Merino believes there are additional grounds for review that were not included in his lawyer's brief, the rules permit him to list those grounds in a Statement of Additional Grounds for Review under RAP 10.10 (see attached).

The mailing address for Doug Merino is: 4010 Patrick Ct. SE, Olympia, WA 98501. Doug Merino is identified in the court record as First Time Offender, No SID, use DOB: 02/25/1956, PCN: 766873162 and Booking No. C0137256.

I certify that the foregoing is true under penalty of perjury and signed this in Olympia, Thurston County on March 27, 2009.



Christopher W. Bawn

RULE OF APPELLATE PROCEDURE 10.10  
STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

(a) Statement Permitted. A defendant/appellant in a review of a criminal case may file a pro se statement of additional grounds for review to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel.

(b) Length and Legibility. The statement, which shall be limited to no more than 50 pages, may be submitted in handwriting so long as it is legible and can be reproduced by the clerk.

(c) Citations; Identification of Errors. Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. Except as required in cases in which counsel files a motion to withdraw as set forth in RAP 18.3(a)(2), the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review.

(d) Time for Filing. The statement of additional grounds for review should be filed within 30 days after service upon the defendant/appellant of the brief prepared by defendant/appellant's counsel and the mailing of a notice from the clerk of the appellate court advising the defendant/appellant of the substance of this rule. The clerk will advise all parties if the defendant/appellant files a statement of additional grounds for review.

(e) Report of Proceedings. If within 30 days after service of the brief prepared by defendant/appellant's counsel, defendant/appellant requests a copy of the verbatim report of proceedings from defendant/appellant's counsel, counsel should promptly serve a copy of the verbatim report of proceedings on the defendant/appellant and should file in the appellate court proof of such service. The pro se statement of additional grounds for review should then be filed within 30 days after service of the verbatim report of proceedings. The cost for producing and mailing the verbatim report of proceedings for an indigent defendant/appellant will be reimbursed to counsel from the Office of Public Defense in accordance with Title 15 of these rules.

(f) Additional Briefing. The appellate court may, in the exercise of its discretion, request additional briefing from counsel to address issues raised in the defendant/appellant's pro se statement. [December 24, 2002]