

42280-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington

v.

Scotty Eugene Collins

42280-8

On Appeal from the Superior Court of Cowlitz County

Cause No. 10-1-01133-9

The Honorable Michael H. Evans

BRIEF OF APPELLANT

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II. **ASSIGNMENTS OF ERROR AND ISSUES**

A. **Assignment of Error, Cause No. 10-1-00623-8**

1. The record does not support the trial court's suppression findings of fact.
2. Appellants pre-arrest detention violated Wash. Const. art. 1, § 7 and the Fourth Amendment.
3. Arresting Appellant for driving with violated Const. art. 1, § 7 and the Fourth Amendment.
4. Arresting Appellant for making a false statement without probable cause violated Const. art. 1, § 7 and the Fourth Amendment.
5. The State's evidence was admitted in violation of the fruit of the poisonous tree doctrine of *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).
6. The evidence was insufficient to support Appellant's conviction for making a false statement to a public servant.
7. The trial court admitted propensity evidence in violation of ER 404(b).
8. Appellant received ineffective assistance of counsel, contrary to Const. art. 1, § 22 and the Sixth Amendment.

B. **Assignments of Error Cause No. 10-1-01083-9**

9. The State failed to prove the essential elements of possession of a controlled substance.
10. The State was relieved of its burden to prove the essential elements of possession in violation of Const. art. 1, § 22 and the Sixth Amendment.
11. The court violated art. 1, § 22 and the Sixth Amendment by denying Appellant's right to present a complete defense.

C. Issues Pertinent to the Assignment of Error, Cause No. 10-1-00623-8

1. Does substantial evidence support the trial court's findings that Appellant was not initially seized and that
2. May the police seize and detain a citizen to question him as a potential witness.
3. Is driving with an expired license while validly licensed in another state grounds for a custodial arrest?
4. Does probable cause exist to arrest for making a false statement where the statement is not learned to be false until after the arrest?
5. Was all the State's evidence obtained in violation of art.1, § 7 of the Washington Constitution and the Fourth Amendment?
6. Was the conviction for making a false statement to the police supported by sufficient evidence where the State did not show the declarant had an obligation to say anything or that the officer reasonably relied on the statement?
7. Was an alleged vehicle theft implement relevant to prove any legitimate fact other than propensity?
8. Was defense counsel ineffective in failing to present a dispositive argument for suppression of crucial evidence?

D. Issues Pertinent to the Assignment of Error, Cause No. 10-1-01083-9

9. Did the State prove the essential elements of possession?
10. Was the burden shifted to Appellant to prove the absence of an essential element of possession?
11. Did the court violate Appellant's right to a complete defense by admitting the incriminating part of his statement to the police and excluding the exculpatory part?

A. CAUSE NO. 10-1-00623-8

III. STATEMENT OF THE CASE

Cowlitz County Sheriff's Deputies Cory Robinson and Robert Stumph responded to a 911 call reporting a single-vehicle collision in the immediate vicinity of 231 Holcomb-Spur Road in Kelso, Washington. They had received information that Appellant, Scotty Eugene Collins, who lived in the vicinity, might somehow be involved. They located Collins to see if he had any information that would assist them in the investigation of the accident. 4/14pm RP 32.

Deputy Robinson spotted Collins coming out of his house. Robinson detained Collins and questioned him. 4/14pm RP 31. Robinson testified repeatedly and unequivocally that he had no suspicion that Collins had done anything wrong. 4/14pm RP 32; 35. Robinson was merely interviewing Collins as a possible witness to the collision. *Id.* People at the scene whom Robinson had spoken to had not seen the driver. They merely gave unspecified information that Collins "was involved with the accident in one form or another." 4/14pm RP 39-40. Robinson did not suspect that Collins was the driver of the crashed vehicle. 4/19pm RP 20. He learned for the first time that Collins allegedly was driving after

Deputy Stumph talked to an alleged eye-witness who had called 911.

4/14pm RP 40.

During pretrial suppression proceedings, the prosecutor asked Robinson the direct question whether Collins was free to leave during this initial contact. Robinson did not give a direct answer but equivocated: “Well, I needed — I’m trying to figure out if he was the driver of the car or not.” 4/14pm RP 32. Defense counsel clarified this on cross examination: Q: Was he free to leave, at that point? To which Robinson unequivocally answered: No. 4/14pm RP 37. In its bench ruling,¹ the court acknowledged this testimony by Robinson. 4/14pm RP 48. The court nevertheless ruled that Robinson had testified that Collins was free to leave. 4/14pm RP 32, 37, 49.²

In the course of his warrantless detention as a potential material witness, Collins told Robinson that an individual called Chad Campbell had been driving the vehicle. 4/19pm RP 21. He said that he, Collins, had been asleep in the passenger seat until he was awakened by the crash. 4/14pm RP 21. Robinson testified that he relied on this statement. 4/19 RP 22, 23. He claimed the statement, which Collins later admitted was

¹ Despite the procedural complexity of this record, the court entered no written findings and conclusions as required by CrR 3.5 and 3.6.

² The court ruled that Robinson’s statement on direct cancelled out his unequivocal statement on cross. 4/14pm RP 50.

false, hindered him in the performance of his duty by delaying the investigation. 4/19pm RP 26.

While Robinson talked to Collins, Deputy Stumph was interviewing the 911 caller. 4/14pm RP 33-34. But Stumph claimed to have overheard Collins telling Robinson he was not driving. 4/19pm RP 10.³ Stumph returned from interviewing other witnesses and told Robinson the 911 caller had told him that Collins was the sole occupant of the vehicle and was in fact driving. 4/14pm RP 34.

Dispatch had informed Robinson and Stump, while they were en route to the accident scene, that Collins's Washington driver's license had expired in 2003. 4/14pm RP 34, 35, 40.⁴

Based on the expired license status and the 911 caller's testimonial statement that Collins was driving, the officers arrested Collins for the offense of "No Valid Operator's License/Without Identification".⁵ 4/14pm RP 34, 35; 4/19pm RP 12.

On direct examination, Robinson admitted that he knew driving with an expired license was only an infraction. The prosecutor cut him off

³ At trial, Stumph changed his testimony and said he did not leave to interview the 911 caller until later. 4/20 RP 124. In reviewing the legality of police conduct, however, the version offered at the suppression hearing controls. *State v. Hill*, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994) (suppression ruling must be supported by substantial evidence.)

⁴ Dispatch routinely checks driver's license status without being asked. 4/14pm RP 38.

⁵ No statute is cited. Please see Appendix for text of relevant statutes.

mid-sentence. 4/14pm RP 40. And the prosecutor conceded that, at the point of arrest, the Sheriff's Office was in possession of a valid Texas license for Collins that deputies had seized while searching his house in an prior unrelated matter. 4/14pm RP 40, 42.

Collins was handcuffed, Mirandized, and searched incident to his arrest. 4/19pm RP 26. In his pocket, the police found an ignition key switch.⁶ 4/19pm RP 27. In the crashed truck, they found a bunch of keys of a type allegedly typical of a vehicle theft operation. 4/14pm RP 53-54. They placed Collins in a patrol car, and transported him to jail. 4/19pm RP 14. After his arrest, Collins admitted he invented "Chad Campbell" and that Collins was the driver. 4/19pm RP 27.

During proceedings to suppress Collins's incriminating statements, defense counsel argued that Collins was unlawfully arrested for driving without a valid license because his valid Texas license was in the possession of the Sheriff at the time of the events at issue here. Accordingly, Collins argued that all subsequently-obtained evidence, including Collins's statements, must be suppressed. 4/19pm RP 28.

The prosecutor conceded that Collins had not been not free to leave from the outset but argued, without citation to authority, that it was lawful for Robinson to detain Collins as a material witness to an accident.

⁶ Not the ignition itself, but the part where the key goes. 4/14pm RP 54.

4/14pm RP 47. The State claimed that, because Collins was not formally arrested, *Miranda*⁷ was not in effect. 4/14pm RP 45. The prosecutor argued against any Fourth Amendment implications regarding statements made in the course of an unlawful arrest. 4/14pm RP 43. The court agreed. The judge asked, “Does it really matter, as far as the 3.5? I mean, if he’s in custody, whether it’s a legal arrest or not — doesn’t the same analysis apply?” 4/14pm RP 42. Defense counsel went along with this. 4/14pm RP 43. The court ruled the pre-arrest statements were admissible. 4/14pm RP 51. The court found that Collins was not in custody for Fifth Amendment purpose, on the grounds that Robinson had testified that Collins “was free to leave and that he was not cuffed” at that point. 4/14pm RP 39. The court thought it significant that the initial detention was of short duration. 4/14pm RP 49-50. Likewise, the court ruled that Collins’s post-arrest statements were admissible under *Miranda*. RP 51.

Collins also moved to suppress all physical evidence on the grounds that both the initial detention and his subsequent arrest were unlawful. 4/19pm RP 28. The prosecutor conceded that the warrantless arrest of Collins for driving without a license was unlawful but argued that Robinson had probable cause to arrest Collins on the alternative ground of making a false statement to a public servant in the performance of his duty

⁷ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

— but Robinson just did not know it. 4/19pm RP 32. The trial court accepted this argument and admitted the physical evidence. 4/19pm RP 33, 37.

Collins was tried by jury in cause number 10-1-01623-8. The State dismissed Count II, obstructing a police officer. 4/19pm RP 68. Trial proceeded on the remaining two charges of Count I, possession of a stolen vehicle in violation of RCW 9A.56.068(1) and RCW 9A.56.140(1); and Count III, making a false statement to a public servant, RCW 9A.76.175. 623-8 CP 1-2. Please see page 7, *infra*.

Collins was convicted of all the charges in both causes. 083-9 CP 34; 623-8 CP 30, 31. He was sentenced on June 9, 2011 on all counts. 6/9 RP.

Collins's standard range for Count I, possessing a stolen vehicle, was 14 – 18 months. The court imposed the maximum of 18 months. 623-8 CP 44. The range for Count III, the gross misdemeanor of making a false statement was 0-365 days. 623-8 CP 41. That sentence was the maximum 365 days with 335 days suspended, to run consecutively to the 18 months sentence in 623-8 and concurrent with the sentence in 083-9. 0623-8 CP 46.⁸

⁸ Please see page 30 of this brief for the facts and argument on 083-9.

Collins filed timely notices of appeal in both causes. 083-9 CP 48; 623-8 CP 51. This Court consolidated the two causes on appeal.

IV. **SUMMARY OF THE ARGUMENT**

Robinson's convictions for possessing a stolen vehicle and making a false statement must be reversed and dismissed.

Robinson detained Collins without a warrant while investigating a non-injury, one-vehicle collision, with no suspicion of any criminal activity. Collins was not free to leave. In response to Robinson's questions, Collins made a false statement that he had not driven any vehicle. The State introduced that statement as the essential element of "false statement" in a subsequent criminal prosecution for making a false statement to a public servant in the exercise of his official duties.

The prosecutor characterized the initial stop by Robinson as a lawful *Terry* stop⁹ and argued that, because Collins was not formally arrested, Miranda was not in effect and the State could use his statement against him. Defense counsel argued that the exclusionary rule prohibited the State from using in a subsequent criminal prosecution an unwarned incriminating statement obtained from a person detained in these circumstances.

⁹ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

While Collins was unlawfully detained as a possible witness, the police unlawfully arrested him for driving with an expired license while validly licensed in another state. While thus unlawfully arrested, Collins confessed that his earlier statement to Robinson that he was not driving was false. Also, during the search incident to the unlawful arrest, the police found the physical evidence the State would use to prosecute Collins for being in possession of a stolen vehicle.

Collins contends that:

- (a) He was unlawfully seized during his initial encounter with Robinson.
- (b) Any statement Collins made while thus unlawfully seized is fruit of the poisonous tree.
- (c) Collins was unlawfully arrested for driving.
- (d) This arrest was not rendered lawful after the fact on the alternative ground that probable cause existed to arrest him for making a false statement.
- (e) Collins's confession while unlawfully arrested that his statement to Robinson was false is fruit of the poisonous tree.
- (f) Evidence obtained in the search incident to the unlawful arrest is fruit of the poisonous tree.

(g) Therefore, the State could present no evidence of either charged offense that was not tainted by unlawful police conduct.

(h) Therefore, the Court should reverse Collins's convictions for possessing a stolen vehicle and making false statements and dismiss the prosecution with prejudice.

V. **ARGUMENT**

1. THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S SUPPRESSION FINDINGS.

As a preliminary matter, the record does not support the trial court's finding that Collins was free to leave during the initial contact by Robinson and that he was not seized.¹⁰

This Court will reverse the erroneous denial of a suppression motion if the trial court's findings are not supported by substantial evidence and its conclusions of law do not follow from the findings. *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997); *State v. Hill*, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994). The trial judge's findings must be supported by substantial evidence sufficient to convince a reasonable person the facts are true. *State v. Setterstrom*, 163 Wn.2d 621, 625, 183 P.3d 1075 (2008), citing *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004). Conclusions of law are reviewed de novo. *Id.*

¹⁰ All we have is oral findings from the bench. No written suppression findings or conclusions were entered, contrary to CrR 3.5 and 3.6.

Here, the trial court erroneously ruled that substantial evidence supported a finding that Robinson testified that Collins was not seized. The record simply does not support this.

Robinson testified on direct examination that Collins was not in restraints and was not told he was under arrest. But, when asked the direct question whether Collins was free to leave, Robinson equivocated: “Well, I needed — I’m trying to figure out if he was the driver of the car or not.” 4/14pm RP 32. This sounds more like a “yes” than a “no.” Robinson gave an unequivocal answer on cross examination:

Q: Was he free to leave, at that point? A: No.

4/14pm RP 37.

Moreover, the prosecutor unequivocally conceded that Collins was not free to leave from the moment Robinson detained him. 4/14pm RP 47. Therefore, despite the trial court’s ruling, Collins was seized.

The trial court also misinterpreted the record with respect to the testimony of the two witnesses Robinson interviewed. The judge thought Robinson said those witnesses told him they saw Collins in the crashed car. 4/14pm RP 39. Robinson did not say that. To the contrary, he said the bystanders did not see the driver, but merely gave Robinson unspecified information that Collins might be “involved with the accident in one form or another.” 4/14pm RP 39-40, 47.

The court relied on these unsupported findings in concluding that Robinson's initial detention of Collins was lawful. As discussed below, besides resting on an erroneous view of the facts, the court's conclusions of law were also wrong.

2. ROBINSON UNLAWFULLY DETAINED COLLINS AS A POTENTIAL WITNESS.

Collins was unlawfully seized from the outset of this encounter with the police, such that all subsequently obtained evidence is inadmissible.

Collins was seized. A seizure under Article I, Section 7 of the Washington State Constitution occurs when an individual's freedom of movement is restrained and when, considering all the circumstances, a reasonable person would feel he was not free to leave or to decline to cooperate due to an officer's display of authority. *Setterstrom*, 163 Wn.2d at 625.

Here, two Sheriff's Deputies tracked Collins down and apprehended him. The lead officer, Robinson, testified unequivocally that Collins was not free to leave, and the State conceded that Collins was in fact seized. It stretches credulity to suppose that Robinson and Stumph, as experienced officers, failed to display sufficient authority to

communicate to Collins by word or deed that they, not he, were going to decide when he could leave.

The Seizure Was Unlawful. Const. art 1, 7 prohibits the police from seizing a person merely because they think he might have useful information about a non-criminal incident. “There is no authority,—either statutory or otherwise—permitting an officer to seize a witness without a warrant, absent exigent circumstances or officer safety, neither of which applies to this case.” *State v. Carney*, 142 Wn. App. 197, 203, 174 P.3d 142 (2007).

The facts of *Carney* are almost identical. There, an officer detained the occupants of a car because he thought they might have information about an incident of alleged reckless driving. This did not justify an intrusion into these people’s private affairs. Even if an individual is thought to possess information about a suspected crime (let alone an accident), this does not justify a warrantless seizure. The police must have a reasonable suspicion, based on objective facts, that the person of interest is involved in criminal conduct. *Carney*, 142 Wn. App. at 203, citing RCW 10.31.100; *State v. O’Neill*, 148 Wn.2d 564, 576, 62 P.3d 489 (2003).

The only plausible authority for detaining witnesses is RCW 10.52.040, and that requires a judicial hearing to determine whether a

material witness should be detained. CrR 4.10 also permits the arrest of a material witness, but only if a warrant is issued and certain non-germane requirements are met. *Carney*, 142 Wn. App. at 203-04.

This is not to say that the police cannot seek helpful information from innocent bystanders. But, if while doing so they detain a person without a warrant or probable cause to believe the person is engaged in criminal conduct, they cannot use that person's statements against him in a subsequent criminal prosecution.

Here, Deputy Robinson was merely investigating an accident, not a crime. Seizing Collins violated art. 1, 7. This tainted the remainder of the interaction in its entirety, such that the State possessed no evidence against Mr. Collins that was not tainted fruit of this poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963).

The remedy is to reverse the convictions.

3. COLLINS WAS SUBJECTED TO A WARRANTLESS ARREST WITHOUT PROBABLE CAUSE FOR DRIVING WITH AN EXPIRED LICENSE.

The trial court erroneously concluded that Collins was lawfully arrested based on the 911 caller's report that he was driving. 4/14pm RP 48, 51.

It is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state. RCW 46.20.342(1). However, driving while license suspended or revoked in the first degree is a gross misdemeanor. RCW 46.20.342(1)(a). The prosecutor argued that Deputy Stumph's knowledge that the 911 caller saw Collins driving created probable cause to arrest him, when combined with the information that Collins's Washington license was "suspended". 4/14pm RP 45.

First, the prosecutor misrepresented the evidence. Robinson knew that Collins's license was expired, not suspended. "Suspended" and "expired" are not the same thing. Collins's Washington license was not revoked or suspended, and neither Robinson nor Stumph had any reason to imagine it was. Dispatch informed both officers independently that Collins's license expired in 2003.

There is a big difference between "revoked or suspended" and "expired". Namely, driving while revoked or suspended is a felony. Driving with an expired license is an infraction. RCW 46.20.342; 46.20.005. Moreover, driving with a revoked or suspended Washington license but with a valid out-of-state license is not a felony, but a gross misdemeanor. RCW 46.20.345.

“A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant.” RCW 10.31.100. By contrast, “[a] police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer[.]” *Id.*

Collins did not drive a motor vehicle in the presence of either Robinson or Stumph. Therefore, the officers needed a warrant to lawfully detain Collins on suspicion of driving even if his license had been revoked. RCW 10.31.100. Driving with an expired license while licensed in another jurisdiction is not even an infraction. RCW 46.20.005.

Defense counsel correctly argued that Collins did not commit any sort of unlicensed driving offense because he had a valid Texas license. The prosecutor conceded that Collins had a valid Texas license which Sheriff’s Office personnel had previously seized while searching his house in an unrelated matter. The prosecutor did not see how that was relevant to Collins’s motion to suppress, however. The trial court agreed. “Does it really matter, as far as the 3.5? I mean, if he’s in custody, whether it’s a legal arrest or not — doesn’t the same analysis apply?” 4/14pm RP 42.

The Court should reverse the trial court’s erroneous conclusion that the officers had probable cause to arrest Collins for driving.

4. THE POLICE LACKED PROBABLE CAUSE TO ARREST COLLINS FOR MAKING A FALSE STATEMENT.

The trial court was persuaded by the prosecutor's argument that, although arresting Collins for driving was clearly unlawful, Robinson nevertheless had probable cause to arrest him on the alternative ground of making a false statement to a public servant in the performance of his duty, even though Robinson did not know he had probable cause. 4/19pm RP 32, 33, 37. This was wrong.

An arrest is lawful where, although the police knew of several felonies for which they *could have* arrested the defendant, but ultimately arrested him for an act that was *not* a felony. *State v. Vangen*, 72 Wn.2d 548, 552, 433 P.2d 691 (1967). The arrest of Vangen was permissible because the police "had knowledge, at the time of the arrest" of felonies for which they could have arrested him. *Vangen*, 72 Wn.2d at 553. Likewise, in *State v. Knighten*, 109 Wn.2d 896, 748 P.2d 1118, (1988), the arresting officer had knowledge of facts sufficient to create probable cause to arrest Knighten, he just mistakenly thought he did not. *Knighten*, 109 Wn.2d at 898.

This is different from the argument the trial court found persuasive in Collins's case. Here, while Deputy Robinson was unlawfully detaining Collins without a warrant as a possible material witness, Collins told

Robinson that a fictitious person called Chad was driving the crashed car. But Robinson did not learn that this statement was false until after he arrested Collins. This was too late to constitute probable cause. Had Robinson spotted Collins's lie immediately, he might arguably have had probable cause to arrest him for lying. But, by his own testimony, it did not occur to Robinson at the time Collins might be fabricating the story that someone else was driving.

The elements of probable cause to arrest are well settled. Probable cause requires that the facts and circumstances justifying the arrest must be within the arresting officer's knowledge. *State v. Gluck*, 83 Wn.2d 424, 426–27, 518 P.2d 703 (1974). That is, within the arresting officer's knowledge at the time of the arrest. *State v. Fricks*, 91 Wn.2d 391, 398–99, 588 P.2d 1328 (1979). That is not what happened here.

Here, Collins's false statement to Robinson did not constitute a crime, and, even if it did, Robinson was not in possession of sufficient facts and circumstances upon which to base a belief that the statement was false or that he had probable cause to arrest Collins for making it.

Robinson did not learn that Collins lied to him until after he was arrested for driving and admitted that he had not told the truth. Until Collins confessed, all the officers had between them was conflicting statements by two witnesses. And Robinson did not even have that,

because the witnesses statement was made to Deputy Stumph, not to Robinson. Even had Robinson had knowledge of the conflicting statements, that was no more grounds to arrest Collins than to arrest the 911 caller.

Without probable cause and a warrant, an officer cannot arrest a suspect or search him. *Setterstrom*, 163 Wn.2d at 626. Neither may the police arrest and search people merely because they tell inconsistent versions of events. *State v. Neth*, 165 Wn.2d 177, 184, 196 P.3d 658 (2008), citing *State v. Coyne*, 99 Wn. App. 566, 574, 995 P.2d 78 (2000) (suspicious story is not reasonable suspicion justifying investigative detention), *Setterstrom*, 163 Wn.2d at 627 (officer must have some basis beyond suspect's nervousness and lying to justify a frisk).

The court's erroneous ruling that Collins's arrest was lawful prejudiced Collins because it was the basis for denying the defense motion to suppress the fruits of the search incident to this arrest. Reversal is required.

5. ALL THE STATE'S EVIDENCE, INCLUDING STATEMENTS AND PHYSICAL EVIDENCE WAS INADMISSIBLE FRUIT OF THE POISONOUS TREE.

Washington's exclusionary rule differs from that of the Fourth Amendment to the United States Constitution, which balances the benefits

of its deterrent effect against the cost to society of impairing the truth-seeking function of criminal trials. “In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions.” *State v. Chenoweth*, 160 Wn.2d 454, 472 n.14, 158 P.3d 595 (2007). The intent behind art.1, § 7 is “to protect personal rights.” *State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009), citing *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982), *abrogated on other grounds by State v. Potter*, 156 Wn.2d 835, 132 P.3d 1089 (2006) (“the emphasis is on protecting personal rights rather than on curbing governmental actions”).

Accordingly, our state constitutional provision requires an exclusionary rule that “provides a remedy for individuals whose rights have been violated.” *Winterstein*, 167 Wn.2d at 632 (emphasis added). “[W]henever the right is unreasonably violated, the remedy must follow.” *Id.* (quoting *White*, 97 Wn.2d at 110).

Here, all the State’s evidence was poisoned fruit.

Collins’s initial false statement that he was not driving was obtained while Robinson interrogated Collins while unlawfully detaining him without a warrant. Evidence that the statement was false was

obtained in the form of Collins's confession while he was unlawfully arrested for a suspected traffic infraction.

The Fourth Amendment requires suppression of incriminating statements obtained in the course of an unlawful detention. *State v. Byers*, 88 Wn.2d 1, 6, 559 P.2d 1334 (1977) (overruled on other grounds by *State v. Williams*, 102 Wn.2d 733, 741, 689 P.2d 1065 (1984); *Chenoweth*, 160 Wn.2d at 473; *White*, 97 Wn.2d at 110; *Wong Sun*, 371 U.S. at 488.

The State's Miranda argument is inapposite. Voluntariness is a test of the admissibility of a confession under the common law prohibition of compulsory self-incrimination. *State v. McCullum*, 18 Wash. 394, 51 P. 1044 (1897); 3 J. Wigmore, EVIDENCE 826 (rev. 1970). Its constitutional relevance is to the Fifth and Fourteenth Amendments. *See, e.g., Culombe v. Connecticut*, 367 U.S. 568, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961); *Bram v. United States*, 168 U.S. 532, 42 L. Ed. 568, 18 S. Ct. 183 (1897). But voluntariness is not at issue here. Rather, the issue is the Fourth Amendment question of whether a confession rooted in an arrest made without probable cause is "fruit of the poisonous tree." *Wong Sun*, 371 U.S. at 487-88.

All Collins's statements were inadmissible because they were tainted by his unlawful seizure. Whether or not they were "voluntary," in the sense of not coerced, all Collins's statements were clearly born of his

unlawful warrantless seizure and subsequent arrest, “and therefore must fall with [them].” *Byers*, 88 Wn.2d at 8.

The Court should reverse the trial court’s ruling denying suppression of Collins’s statements.

Physical evidence supporting the charge of possessing a stolen vehicle was obtained while searching Collins and the vehicle incident to the unlawful arrest. 4/14pm RP 53-54. This evidence was unlawfully obtained.

Wash. Const. art 1, § 7 mandates that evidence derived from the government’s illegality is inadmissible in any Washington court for any purpose. *Chenoweth*, 160 Wn.2d at 473; *White*, 97 Wn.2d at 110. The remedy is to reverse the convictions.

6. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR FALSE STATEMENT.

Even with the inadmissible evidence, the State failed to prove the essential elements of the crime of false statement.

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining whether the necessary quantum of proof exists, the Court need not be convinced of the defendant’s guilt beyond a reasonable doubt, so long as it

is convinced that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992). In reviewing a sufficiency challenge the Court views the evidence in the light most favorable to the State and decides whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007).

Elements of the Offense. A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. RCW 9A.76.175. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties. *Id.*

The State failed to prove that lying to Robinson was a crime or that Robinson relied on the statement.

A motorist stopped by a police officer investigating a suspected infraction has an obligation to truthfully identify himself. RCW 46.61.021(3). But, where a citizen has no obligation to make any statement to police, his failure to do so does not create probable cause to arrest him. *State v. Moore*, 161 Wn.2d 880, 886, 169 P.3d 469 (2007). Likewise, making a statement that is less than truthful is not grounds to arrest a person with no obligation to speak. *See, e.g., Setterstrom*, 163

Wn.2d at 627 (a suspect's lying about his name was not grounds even for a frisk); *Neth*, 165 Wn.2d at 184 (it is unconstitutional to violate a person's right to be left alone simply because they gave inconsistent accounts while being questioned by police.)

Here, the State did not establish that Collins committed a crime because the evidence did not show that Collins had any obligation to talk to Robinson, or even to remain in his presence. Therefore, misleading Robinson may have been rude, but it was not a punishable offense.

Moreover, the State could not show that Robinson reasonably relied on Collins's denial that he was driving. The standard of reasonableness of an officer's conduct takes into consideration the experience and expertise of the officer. *Fricks*, 91 Wn.2d at 399.

First, Robinson took no action based on this statement and delayed no legitimate action. Even if Collins had immediately told Robinson he was driving, so what? The eye-witness testified that the truck was within the 25 m.p.h. speed limit when it crashed. 4/20 RP 67. It is not a crime to drive or to have an accident while driving. Robinson would have continued with his investigation exactly as he did.

Second, even if Robinson had relied, such reliance would not have been reasonable. As a seasoned police officer, Robinson would reasonably be expected to know, based on his training and experience, that

people who have committed a driving offense and think there are no witnesses lie to the police more often than they tell the truth.

The Remedy is To Dismiss With Prejudice. As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). The Court should reverse the conviction for making a false statement and dismiss the prosecution with prejudice.

7. THE COURT MISCONSTRUED ER 404(b).

The court erroneously denied Collins’s motion to exclude the allegedly incriminating key-ring found in the truck because it served no legitimate evidentiary purpose other than to show propensity. 4/14pm RP 53.

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). Such propensity evidence is¹¹ not prohibited

¹¹ “Although orders on motions in limine are sometimes characterized as tentative and advisory, it has been held that, when the trial court enters a pretrial order regarding the admissibility of evidence, and the order appears to be a final ruling and on a complete record, the fact that defendant does not renew his objection to the ruling at trial does not

because it is irrelevant; rather, it carries too much weight with the jury so that they prejudge a person with a bad general record and deny him a fair opportunity to defend against the particular charge. *State v. Herzog*, 73 Wn. App. 34, 49, 867 P.2d 648 (1994), quoting *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948), review denied, 124 Wn.2d 1022 (1994). Evidence of other wrongs or acts “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

Because ER 404(b) explicitly prohibits admission of evidence to prove a defendant has a criminal propensity, a trial court must always begin with the presumption that evidence of prior misconduct is inadmissible. ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995), citing *Carson v. Fine*, 123 Wn.2d 206, 221, 867 P.2d 610 (1994). The court must presume that evidence of prior bad acts is inadmissible and decide in favor of the accused in close cases. *See State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008). Before admitting evidence under an exception to ER 404(b), “the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify

preclude review by the appellate court.” 2A Karl B. Tegland, *Washington Practice: Rules Practice RAP 2.5*, author’s cmts. at 230 (6th ed. 2004).

the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.” *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

Where the trial court does not make an explicit finding on the record, the reviewing court makes that determination based on the entire record. *State v. Kilgore*, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002).

Here, the trial court did not conduct an ER 404(b) analysis on the record and did not establish that the evidence was relevant for any purpose other than to show propensity. Moreover, the court conflated ER 403 and ER 404(b).

First the court framed the issue as whether the key ring found in the search for Collins’s arrest for the suspected driving infraction was propensity evidence or whether its potential for unfair prejudice under ER 404(b) was outweighed by its probative value under ER 403. 4/14pm RP 55. Then the court rendered the following analysis:

I don’t think the danger of unfair prejudice here outweighs the probative value; so — and I don’t think it’s propensity evidence, I think that’s allowable under the Rules of Evidence under 403 and also 404. So, I’m going to deny the ... motion, and the State is free to introduce evidence related to the — bring the keys with multiple batch of vehicle keys on it.

4/14pm RP 56.

This ruling fails to state whether the evidence is probative of anything other than propensity. But if no legitimate purpose is apparent other than to establish an impermissible inference, then the evidence is inadmissible under ER 404(b), regardless of how strong its probative value under ER 403.

Thus, even if the evidence had been constitutionally obtained, it was erroneously admitted in violation of ER 404(b). The Court should reverse the conviction for possession of a stolen vehicle.

8. DEFENSE COUNSEL WAS INEFFECTIVE
IN FAILING TO CHALLENGE COLLINS'S
WARRANTLESS DETENTION.

A claim of ineffective assistance of counsel is reviewed de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). To prove ineffective assistance of counsel, Appellant must show that (1) counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced him, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The reviewing court presumes counsel's performance was not deficient until the defendant shows otherwise based on the record. *Thomas*, 109 Wn.2d at 226.

A lawyer's performance falls below the objective standard of reasonableness when he fails to discover relevant case law. *State v. Kylo*, 166 Wn.2d 856, 865-69, 215 P.3d 177 (2009). Counsel has a duty to "investigate all reasonable lines of defense." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 744, 101 P.3d 1 (2004), citing *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

Here, defense counsel misconstrued the law governing the warrantless detention of a potential witness. Counsel accepted the prosecutor's argument that Robinson's warrantless detention of Collins was a lawful *Terry* stop.¹² 4/14pm RP 47. This blinded counsel to the Fourth Amendment implications regarding Collins's pre-arrest statement. Thus counsel argued solely Fifth Amendment grounds to suppress Collins's statements, when the voluntariness of the statements was not at issue.

Counsel argued that Robinson should have Mirandized Collins before questioning him while detaining him as a witness. 4/14pm RP 46. "It's not to say that they can't be questioned, but if they're not free to leave, it's a *Terry* situation short of an arrest, and I think there are cases that are contrary to that. I think that that's — from the citizen's perspective, I think they should be advised." 4/14pm RP 48.

¹² *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Counsel should have recognized that, contrary to the State's argument, Robinson's initial stop of Collins was not a *Terry* stop, lawful or otherwise. The prosecutor went to great pains to establish repeatedly that Robinson did not suspect Collins of any sort of criminal conduct. Rather, Robinson simply wanted to know what Collins knew about a one-vehicle collision near his house. As discussed in Issue 2, however, this warrantless seizure violated art. 1, § 7 and the Fourth Amendment.

Counsel's *Miranda* argument had no chance of success. A *Terry* stop is not "custody" for purposes of determining whether statements made during the stop are admissible under *Miranda*, even though the suspect is not free to leave. *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992); *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). "Thus, a detaining officer may ask a moderate number of questions during a *Terry* stop to determine the identity of the suspect and to confirm or dispel the officers suspicions without rendering the suspect 'in custody.' *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).¹³

Failing to present the only valid argument for suppression of all the evidence was per se deficient performance, fully reviewable on the record of the suppression hearings.

¹³ The trial court may have had this in mind when it opined that a stop of short duration is always lawful. 4/14pm RP 49-50.

Counsel's error prejudiced Collins by failing to suppress all the subsequently obtained evidence as fruit of the poisonous tree. This included Collins's initial denial that he was driving, his later confession that he was driving, and the items recovered from his pockets. Where defense counsel fails to identify and present a dispositive defense that is supported by the evidence, the defendant did not receive a fair trial. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009). In *Powell*, counsel failed to present the only plausible defense to the charge. Here, counsel failed to present an argument that would have resulted in suppression of Collins's statements, including that the fictitious Chad Campbell was driving, not Collins.

Without this evidence, the State could not have maintained the spurious "false statement to a public servant" charge.

Accordingly, the Court should reverse and dismiss Collins's convictions.

CAUSE NO. 10-1-01083-9

VI. STATEMENT OF THE CASE

In cause number 10-1-01083-9, Collins was charged with a single unrelated count of possessing methamphetamine on September 15, 2010, contrary to RCW 69.50.4013(1). 083-9 CP 1-2. He pleaded not guilty and was tried by jury. 4/19am RP 20.

Trooper Todd Surdam of the Washington State Patrol testified. 4/19am RP 48. On September 15, 2010, Surdam was on traffic duty and noticed that Collins's seat belt was not across his chest. 4/19am 50, 52. He stopped him. 4/19am RP 53. Surdam approached on the driver's side. 4/19am RP 55. Collins was wearing his seat belt, but it was under his arm. 4/19 am RP 55. Surdam explained that the belt had to be over the shoulder and asked Collins for identification. 4/19am RP 55-56. Collins did not have his wallet so he removed a folded paper from his pocket. 4/19am RP 56-57. The officer recognized it as an item that would reliably identify Collins. 4/19am RP 60. As Collins unfolded the paper, a chunk of crystalline substance fell into his lap. 4/19am RP 60. Surdam suspected it was methamphetamine, and ordered Collins out of the vehicle. 4/19am RP 61.

As Collins complied, Surdam lost sight of the chunk of material. He stood back from the door so Collins could get out. 4/19am RP 70. Surdam did not see anything fall from Collins's lap. 4/19am RP 70. But when Collins was standing on the pavement, Surdam spotted a chunk of crystal in the jamb of the open door. 4/19am RP 62, 70. Surdam arrested Collins, Mirandized him, and walked him back to his patrol car. 4/19am RP 62, 65. Collins said he knew the substance was meth and knew it was there, but that it was not his. 4/19am RP 10.

Surdam collected the material from the door-frame and sent it to the WSP crime lab where it was identified as methamphetamine. 4/19am RP 65, 67, 70-71.

During pretrial proceedings, the court granted the State's motion in limine to admit the statement that Collins knew the substance was methamphetamine and that it was there, but to exclude his statement that it was not his. 4/19am RP 13-15.

At the request of the State, the court instructed the jury solely on actual possession and omitted an instruction for constructive possession. Defense counsel asked for an instruction that proximity alone is not sufficient to establish constructive possession. 4/19am RP 85. The State objected. 4/19am RP 85-86. The prosecutor then argued against giving any constructive possession argument, because Collins actually possessed

the alleged rock because it was on his person. 4/19am RP 88, 89. Defense counsel deferred to the prosecutor's preference, agreeing that the State had presented no evidence of constructive possession. 4/19am RP 89. The State proposed the following instruction defining possession:

Possession means having a substance in one's custody.
Possession occurs when the item is in the actual physical custody of a person charged with possession.

4/19am RP 91. Both parties accepted this instruction. 4/19am RP 91.

That is the instruction the jury received. Instr. No. 8, 083-9 CP 30.

In closing, the State made an election that the substance Collins was accused of possessing was the crystal Surdam saw fall out of the paper from Collins's pocket. 4/19am RP 107. Defense counsel argued that the only substance identified as methamphetamine was the crystal from the doorframe, not the one from the pocket, and the State had not proved that the two crystals were one and the same. 4/19am RP 107, 109.

Sentencing was consolidated with that of cause no. 632-8 and was held on June 9, 2011. Collins received the maximum 18 months on a standard range of 6+ to 18 months. 083-9 CP 39, 42. Collins filed timely notices of appeal in both causes. 083-9 CP 48; 623-8 CP 51 This Court consolidated the two causes on appeal.

VII. **ARGUMENT**

9. THE EVIDENCE WAS INSUFFICIENT
TO PROVE POSSESSION.

The sufficiency of the evidence may be challenged for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

In reviewing a challenge to the sufficiency of the evidence the Court views the evidence in the light most favorable to the State and decides whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *Brown*, 162 Wn.2d at 428. “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. In determining whether the necessary quantum of proof exists, the Court need not be convinced of the defendant’s guilt beyond a reasonable doubt, so long as it is convinced that substantial evidence supports the State’s case. *Galisia*, 63 Wn. App. at 838. The State must present enough evidence to allow the jury to find each element beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When reviewing whether the evidence is substantial, the Court will not be persuaded by guess, speculation, or conjecture. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001).

Here, the State presented evidence of two alleged crystalline chunks. One allegedly fell from a folded paper into Collins's lap. That chunk was not mentioned again. The State presented no evidence that the police searched the interior of Collins's vehicle for this first suspicious chunk. It was never collected and never tested. All the State proved was that Trooper Surdam saw a chunk of something that looked to him like it probably might possibly be methamphetamine.

Then, Surdam stepped back from the vehicle while Collins opened the door and got out. Surdam then noticed a chunk of something in the door jamb. This substance was collected, tested, and identified as meth. But there is no evidence Collins ever touched it.

Therefore, accepting the truth of the State's evidence and all reasonable inferences therefrom, the evidence is insufficient to prove the essential elements of possession. The State simply did not prove that the only controlled substance in the case was ever in Collins's possession as defined by the State's own instruction. It was not in Collins's custody. It was lying on the floor in the door frame.

As a matter of law, insufficient evidence requires dismissal with prejudice. *Stanton*, 68 Wn. App. at 867. "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the

remedy.” *Hickman*, 135 Wn.2d at 103. The Court should reverse the convictions and dismiss with prejudice.

10. THE STATE WAS RELIEVED OF ITS
BURDEN TO PROVE THAT COLLINS
KNEW HE WAS IN POSSESSION OF
METHAMPHETAMINE.

Defense counsel asked the court to instruct the jury that criminal possession must be knowing. 4/19am RP 83-84. Denying this instruction relieved the State of its burden to prove that a crime was committed.

“Criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.” *State v. Tamalini*, 134 Wn.2d 725, 746, 953 P.2d 450 (1998) (Sanders, J., dissenting), quoting *Commonwealth v. Matchett*, 386 Mass. 492, 436 N.E.2d 400, 409 (1982), quoting *People v. Aaron*, 409 Mich. 672, 708, 299 N.W.2d 304, 328 (1980). There are two components of every crime. One is objective — the actus reus; the other subjective — the mens rea. The actus reus is the culpable act itself, the mens rea is the criminal intent with which one performs the criminal act. *State v. Utter*, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). It is essential to the actus reus that no crime can be committed without an unlawful act. *Utter*, 4 Wn. App. at 140. A culpable state of mind is an essential accompaniment to the unlawful act,

but the state of mind alone cannot constitute a crime. *Utter*, 4 Wn. App. at 139.

The Uniform Controlled Substances Act, upon which the Washington statutes is based made “knowingly” and “intentionally” elements of simple possession of a controlled substance. Our Legislature left out those words.’ *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). But the Washington Legislature commonly does not bother to include “knowledge” as an element of possession with no intention to create a strict liability crime.

For example, RCW 66.44.270(2)(a) makes it unlawful for any person under the age of twenty-one years to **possess**, consume, or otherwise acquire any liquor. But our Supreme Court had no trouble implying a knowledge element. “[T]he language “possession of intoxicating liquor” is “clear, plain and unambiguous.” *State v. Hornaday*, 105 Wn.2d 120, 124-125, 713 P.2d 71 (1986), quoting *State v. Johnson*, 129 Wash. 62, 66, 224 P. 602 (1924). **A defendant “possesses” a controlled substance when the defendant knows of the substance’s presence**, the substance is immediately accessible, and the defendant exercises “dominion or control” over the substance. *Hornaday*, 105 Wn.2d at 125, emphasis added.

Likewise, it is a crime to “possess” a stolen access device. RCW 9A.56.160(1)(c). Again, this is judicially interpreted as “knowingly possess”. *State v. Hayes*, ___ Wn. App. ___, 262 P.3d 538, 546 (2011).

Under RCW 9A.56.068(1), it is unlawful to possess a stolen motor vehicle. But the Legislature itself defined “possess” as **knowingly** to do so in that statute. RCW 9A.56.140(1). This definition was adopted by the Court.

Finally, knowledge is an implied element of unlawful possession of a firearm, even though RCW 9.41.040 is silent on the mental element.¹⁴ *See State v. Barnes*, 153 Wn.2d 378, 384-85, 103 P.3d 1219 (2005), citing *State v. Anderson*, 141 Wn.2d 357, 363-66, 5 P.3d 1247 (2000).

Moreover, the Legislature included unwitting possession as an affirmative defense to a charge of simple possession of a controlled substance. That is, possession without knowledge is no possession at all. *Cleppe*, 96 Wn.2d at 381.

First, if guilty knowledge or intent to possess are not elements of the crime, this provision is superfluous. Washington courts do not interpret statutes so as to render any part superfluous. “Statutes must be interpreted and construed so that all the language is given effect, with no

¹⁴ RCW 9.41.040(1)(a) “A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm ...”

portion rendered meaningless or superfluous.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

Second, it is semantic smoke and mirrors to hold both that “possession” necessarily and by definition means “knowing possession” but that knowledge is not an essential element. Such an interpretation renders the prohibition of possession in the controlled substances statute unconstitutional, because Wash. Const. art. 1, § 22 and the Sixth Amendment mandate that the State must prove every essential element of a charged crime. This burden may not be shifted to the defendant. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

The same question was resolved in favor of the defendant in *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000), in the context of whether unlawful possession of a firearm was a strict liability offense. *Anderson*, 141 Wn.2d at 361. Prior to *Anderson*, the Washington decision that had come closest to addressing that question was *State v. Semakula*, 88 Wn. App. 719, 946 P.2d 795 (1997) *review denied*, 134 Wn.2d 1022 (1998). In that case, the court held that, while knowledge that the possession was unlawful was not an element of the offense, the State did have to prove that the defendant “knew he possessed the firearms.” *Semakula*, 88 Wn. App. at 726; *see also State v. Reed*, 84 Wn. App. 379,

383, 928 P.2d 469 (1997), citing with approval the federal case of *United States v. Smith*, 940 F.2d 710, 714 (1st Cir.1991). *Anderson* adopted the holding of *Semakula* that, even where unwitting possession was a defense to a crime, the State still had to “prove that the defendant knew the facts that constitute the criminal conduct.” *Semakula*, 88 Wn. App. at 726. *Anderson*, 141 Wn.2d at 361. *Anderson* rejected the notion that the Legislature would intentionally address a problem “by sweeping entirely innocent conduct within this statute.” *Anderson*, at 362.

Cases cited to illustrate instances in which the Legislature has created strict liability crimes are distinguishable. In *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004), the court relied heavily on *State v. Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995), in holding that the legislature has the authority to create a crime without a mens rea element. *Bradshaw*, 152 Wn.2d at 532. But *Rivas* simply holds that, in a vehicular homicide while intoxicated case, the only causal connection the State is required to prove is that between the act of driving and the death; the State does not have to establish that the intoxication caused the death. *Id.* at 452. When a person is killed by a drunk driver, the State is not required to prove intent or negligence. It is sufficient to show the victim died as a result of the defendant’s drinking and driving, even if the driving was perfectly proper. *Rivas* 126 Wn.2d at 447.

The reasoning was that some statutory crimes (felony murder is another) are “predicated upon being committed while one is engaged in the commission of another and separate offense ...” *Rivas*, 126 Wn.2d at 447, quoting *State v. Stevick*, 23 Wn.2d 420, 430, 161 P.2d 181 (1945), *overruled in part by State v. Partridge*, 47 Wn.2d 640, 289 P.2d 702 (1955). *Rivas* also cites *State v. Engstrom*, 79 Wn.2d 469, 487 P.2d 205 (1971), for the same proposition. *Rivas* at 448.

The crimes of negligent homicide and felony murder share two common features absent from simple possession of drugs: Someone (a) died, (b) at the hands of a defendant who was engaged at the time in another offense. In such crimes, specific conduct results in a specified result, and the defendant’s conduct is the “legal” or “proximate” cause of the result. 1 Wayne R. LaFave & Austin W. Scott, Jr., *SUBSTANTIVE CRIMINAL LAW* § 3.12, at 390 (1986). The legislature therefore decided that drunk driving is so inherently dangerous that the State need not prove a causal connection between the defendant’s intoxication and the death. *Rivas*, at 449. The Legislature can make driving while drunk the sole causation element in a prosecution for vehicular homicide.

But this rationale has no application to a simple possession of contraband case. *Rivas* does not hold that the Legislature can scrap the Sixth Amendment and relieve the State of its burden to prove the

defendant knew he was in possession where the sole charge is simple possession.

Bradshaw also cited *State v. Henker*, 50 Wn.2d 809, 314 P.2d 645 (1957), for the proposition that the Legislature has unfettered discretion to relieve the State of its burden to prove facts that render conduct criminal. *Henker* is also distinguishable. There, Henker knew there was marijuana in his back yard, and **the jury was instructed that knowledge was an element.** *Henker*, at 811-12. The language the Legislature was deemed to have properly deleted from the unlawful possession statute required (a) knowing possession, (b) *with intent to sell, furnish, or dispose of the illegal substance.* Not simple possession.

But even strict liability punishments, i.e., those crimes and sentence enhancements having no mens rea requirement, require some degree of a volitional element. “There is a certain minimal mental element required in order to establish the actus reus itself. *This is the element of volition.*” *Utter*, 4 Wn. App. at 139 (emphasis added). At least one author has noted:

At all events, it is clear that criminal liability requires that the activity in question be voluntary. The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be

no reason to impose punishment on this basis as to those whose actions were not voluntary.

State v. Eaton, 143 Wn. App. 155, 160-161, 177 P.3d 157 (2008), quoting Wayne R. La Fave, *SUBSTANTIVE CRIMINAL LAW* § 6.1(c), at 425–26 (2d ed.2003). A voluntary act requires an ability to choose which course to take— *i.e.*, an ability to choose whether to commit the act that gives rise to criminal liability.” *Eaton*, at 161, quoting *State v. Tippetts*, 180 Or. App. 350, 43 P.3d 455, 458 (2002).

Collins’s conviction for possessing methamphetamine cannot stand without proof by the State beyond a reasonable doubt of every essential element of a crime. That implicitly includes knowledge even if the statute omits it. The Court should reverse the conviction and dismiss the prosecution.

11. COLLINS WAS DENIED HIS RIGHT
TO PRESENT A COMPLETE DEFENSE.

The right to present testimony in one’s defense is guaranteed by both the United States and the Washington Constitutions.¹⁵ *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). This right is not absolute,

¹⁵ Article I, section 22 of the Washington Constitution guarantees that “[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf.” The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.”

as “a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.” *Hudlow*, 99 Wn.2d at 15. However, given that the threshold to admit relevant evidence is very low, even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

(a) Over a defense objection, the trial court granted the State’s motion in limine to exclude what the prosecutor characterized as “self-serving hearsay” by Collins in the form of his statement to the officer that the methamphetamine concealed inside a folded up paper he unfolded under the nose of the officer in an attempt to establish his identity was not his. 4/19am RP 7. This was error. This statement was not hearsay. It was not offered for the truth of the matter asserted, but merely to show Collins’s state of mind.

A relevant state of mind may be proven by a person’s own, out-of-court, uncross-examined statement as to its existence. *Raborn v. Hayton*, 34 Wn.2d 105, 109, 208 P.2d 133 (1949). This rule is conditioned on the existence of two circumstances: (1) there must be some degree of necessity to use the out-of-court, uncross-examined declaration, and (2) there must be circumstantial probability of the trustworthiness of the statement. *Raborn*, 34 Wn.2d at 108.

Here, the first *Raborn* factor satisfied because Collins exercised his right not to testify. The second factor was satisfied because the entire circumstances strongly corroborated Collins's claim that he did not know the methamphetamine was in his possession. Only an idiot would unfold a paper containing a large chunk of methamphetamine under the nose of a police officer.

(b) The State opened the door to Collins's statement to the officer.

Under the "open door" doctrine, the trial court has the discretion to admit otherwise inadmissible evidence when the opposing party raises a material issue. *State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). Once the State has raised a material issue, the defense is permitted to explain, clarify, or contradict on cross examination. *Berg*, 147 Wn. App. at 939.

The doctrine is independent of the Rules of Evidence and is not superseded by any rule of exclusion. *State v. Brush*, 32 Wn. App. 445, 451, 648 P.2d 897 (1982). That is because the doctrine is intended to ensure fairness by preventing one party from bringing up a subject to gain an advantage and then barring the other party from further inquiry. *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995), citing *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

Here, the State accused Collins of perpetrating a crime by having an unlawful substance in his possession. By definition, that implied both a criminal act and a criminal state of mind. This opened the door for Collins to rebut that accusation by testifying to his innocent state of mind. This was admissible, not to prove the matter asserted, but to prove that he had not engaged in any volitional conduct that is a prerequisite for a criminal conviction.

This prejudiced Collins, because if the jury had heard his side of the story, they might very well have believed him and concluded that he did not commit a punishable act.

(c) The court misconstrued the rule of completeness.

Defense counsel argued that excluding only the exculpatory portion of Collins's statement was not fair because it permitted the State to tell only part of the story. Accordingly, the Rule of Completeness and ER 106 required the court either to exclude the entire statement or admit all of it. 4/19 RP at 12.

Under the rule of completeness, a trial judge must admit the remaining portions of a statement that are needed to clarify or explain the portion already received. *State v. Simms*, 151 Wn. App. 677, 214 P.3d 919, review granted in part 168 Wn.2d 1011, 227 P.3d 295 (2009). In *Simms*, the trial court did not abuse its discretion by excluding statements

defendant allegedly made to a police officer because the defendant did not explain how his the excluded portion related to or explained the portion included in the officer's trial testimony. *Simms*, 151 Wn. at ___ 214.

The rule of completeness was defined in *State v. West*, 70 Wn.2d 751, 424 P.2d 1014 (1967) as follows:

Where one party has introduced part of a conversation[,] the opposing party is entitled to introduce the balance thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved. This is true though the evidence might have been inadmissible in the first place.

West, 70 Wn.2d at 754-55.

Washington case law interpreting ER 106 requires that the evidence the proponent seeks to admit must be relevant to the issues in the case. *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001). Once relevance has been established, the trial court should ask whether the offered evidence (1) explains the admitted evidence, (2) places it in context, (3) avoids misleading the trier of fact, and (4) insures a fair and impartial understanding of the evidence. *Id.*, citing four-part test set forth in *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir.1992).

Generally, a defendant's self-serving hearsay statement is not admissible unless it is "part and parcel of the very statement a portion of which the

Government was properly bringing before the jury.’ “ *Id.* at 909, 34 P.3d 241, quoting *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir.1993).

Here, Collins made a compound statement in response to a substance falling in his lap. He said he knew the drugs were there, but that they were not his, that they belonged to “the others.” 4/19am RP 13. Accordingly, the exculpatory statement was part and parcel of the incriminating statement. It was error to allow the State to introduce the first part and exclude the remainder.

The judge invented a fictional test whereby the court looks at each part of a compound statement and determines whether or not it is “self-serving.” If it is incriminating, it is admissible; if it is exculpatory, it is not. 4/19am RP 13-15. That analysis essentially eliminates the completeness doctrine altogether. The whole point is to admit the ameliorating part to balance the prejudice of the incriminating part.

This prejudiced Collins by denying him the right to present a complete defense. Constitutional concerns override strict application of court rules. *State v. Frawley*, 140 Wn. App. 713, 720, 167 P.3d 593 (2007).

VIII. **CONCLUSION.** For the reasons stated, Scotty Collins asks the Court to reverse his convictions and grant him a new trial.

Respectfully submitted, this 6^h day of December, 2011.

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served electronically via the Division II portal: sasserm@co.cowlitz.wa.us

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A paper copy was deposited in the U.S. mail, first class postage prepaid, addressed to:

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Jordan B. McCabe Date: December 6, 2011
Jordan B. McCabe, WSBA No. 27211, Bellevue, Washington

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