

NO. 42280-8-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SCOTT EUGENE COLLINS,

Appellant.

BRIEF OF RESPONDENT

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A. ANSWERS TO ASSIGNMENTS OF ERROR

Cause No. 10-1-00623-8

1. The court should decline to review this assignment of error.
2. The court should decline to review this assignment of error.
3. Defendant's arrest did not violate either article 1 section 7 of the Washington Constitution nor the Fourth Amendment.
4. Defendant's arrest did not violate either article 1 section 7 of the Washington Constitution nor the Fourth Amendment.
5. The State's evidence was properly admitted and its admission did not violate the fruit of the poisonous tree doctrine.
6. The evidence was sufficient to support Defendant's conviction for Making a False Statement to a Public Servant.
7. The trial court did not allow the admission of propensity evidence.
8. The Defendant did not receive ineffective assistance of counsel.

Cause No. 10-1-01083-9

9. The evidence was sufficient to prove possession.
10. The State proved all the essential elements of possession.
11. The trial court did not deny Defendant a complete defense.

B. STATEMENT OF THE CASE

Cause No. 10-1-00623-8

1) Procedural History

Scott Collins was charged by information with, Count I, Possession of a Stolen Vehicle contrary to RCW 9A.56.068(1) and RCW 9A.56.140(1), Count II, Obstructing a Law Enforcement Officer contrary to RCW 9A.76.020(1), and Count III, Making a False or Misleading Statement to a Public Servant contrary to RCW 9A.76.175 from an incident occurring in Cowlitz County, State of Washington, on June 27, 2010. CP 1-2. Count II was dismissed on the State's motion. 4/14 RP 68. Mr. Collins pled not guilty to the charges and went to trial on April 20, 2010 in Cowlitz County Superior Court. 4/20 RP 9. Prior to trial, hearings were held pursuant to CrR 3.5 and CrR 3.6. RP 4/14 29-51, 4/19 RP 3-37. The Jury found Mr. Collins guilty as charged the next day. 4/21 RP 148, CP 31. Mr. Collins filed a timely notice of appeal. CP 51.

2) Statement of Facts

On June 27, 2010 Cowlitz County Deputies Robert Stumph and Cory Robinson were dispatched to a collision at 231 Holcomb Rd. 4/20

RP 114, 4/21 RP 10. The collision involved a truck entering Jethro Welter's yard and crashing through some bushes, a steel horse watering trough, and into a tree. 4/20 RP 69-70, 75. Upon arriving, witnesses indicated that Mr. Collins had been involved in the accident and had gone around the back of a nearby house. 4/20 RP 92-101, 107-109, 117-118. The deputies believed that Mr. Collins was a witness to the collision, which they did not think was criminal in nature and began to look for him. 4/21 15-16, 21-22, *see also* RP 4/14 29-51, 4/19 RP 3-37. As the deputies were looking around for Mr. Collins they decided, after getting permission, to enter the house. 4/20 RP 120-121, 4/21 RP 20. Before the deputies could enter, however, they noticed Mr. Collins through an open door coming down the stairs and exiting the house. 4/20 RP 120-121, 4/21 RP 20.

Next, the deputies made contact with Mr. Collins, outside the home, and asked him about the collision. 4/20 RP 124, 4/21 RP 22. Mr. Collins told the deputies that he was the passenger in the truck, he had been sleeping, and woke up at the time of the collision. 4/20 RP 124, 4/21 RP 7, 22-23. He also indicated that Chad Campbell had been driving truck at the time of the accident but claimed to not know his phone

number or address. 4/21 RP 23. The only additional information Mr. Collins was able to give the deputies about Chad Campbell was that he left towards Allan's house, though he was not aware of Allan's last name and only pointed to a general direction in regards to the location of Allan's house. 4/21 RP 23-24. Deputy Robinson, believing this information to be true, noted it in his report, kept trying to figure out where Allan's house was so he could speak with the driver of the vehicle, and wasted additional time investigating the fictitious story reported by Mr. Collins, such as running a check on Chad Campbell. 4/21 RP 26-27, 4/21 RP 58.

During the course of this conversation, Deputy Stumph left to speak with the reporting party, Jethro Welter, who stated to Deputy Stumph that he saw Mr. Collins exit the driver's side door of the vehicle immediately after the collision and that he did not see any other individuals. RP 4/19 4-14, RP 4/20 126-127. Mr. Welter testified to those same observations at trial. 4/20 RP 68-70, 75, 79. Upon learning that information, Deputy Stumph placed Mr. Collins under arrest. 4/20 RP 128. Next, Deputy Robinson confronted Mr. Collins with the information the deputies had learned. 4/20 RP 128, 4/21 RP 28. In response, Mr. Collins let out a sigh, said that he was the driver and sole occupant of the vehicle,

and admitted to making up Chad because he was scared and didn't know what to do. 4/21 RP 29. A search of Mr. Collins's person incident to his arrest turned up an ignition switch and several keys. 4/21 RP 29-32. A search of a bag that Mr. Collins indicated belonged to him revealed a key ring with numerous vehicle keys on it. 4/21 RP 45, 54. Deputy Robinson testified these types of key rings were often utilized in a manner that a person could try several in order to gain access to a vehicle without having to force entry. 4/21 RP 57.

Deputy Stumph then went to take a look at the vehicle that had been involved in the crash. 4/20 RP 129-130. At that point, Deputy Stumph noticed that the steering column had been torn apart and the ignition was lying on the passenger floorboard. 4/20 RP 130. Deputy Robinson also an opportunity to inspect the vehicle, take pictures of the damage done to steering column and ignition area, and opined at trial that the large amount of glass inside the vehicle indicated it had been broken from the outside. 4/21 RP 34-39. Confronted again that night, Mr. Collins told Deputy Robinson that he had borrowed the truck from Bruce, but could provide no other details. 4/21 RP 39-41. At trial, however, Mr. Collins testified that Chad Campbell did exist, was the driver of the

vehicle, and that he had picked up Mr. Collins in order to take him to Frank Cano's house. 4/21 RP 71. Mr. Collins also revived the claim that Chad had left the scene of the accident to go Allan's house. 4/21 RP 74. Mr. Collins testified that the only false statement he gave to police on the night in question was when he told them he was the driver. 4/21 RP 78. He also disclaimed any knowledge of the origins of the vehicle. 4/21 RP 77.

Due to the type of damage to vehicle, Deputy Stumph asked dispatch ("communications") who the registered owner of the vehicle was so he could call her, which he then did. 4/20 RP 131. That person, Gweneth McDonald, testified at length at trial to the damage that was done to the interior of her vehicle that was not there prior to that evening, that only she and her son had keys to vehicle, and that she did not know Mr. Collins nor give him permission at any point to drive her truck. 4/20 RP 27-60. Through Ms. McDonald the State admitted numerous exhibits showing the damage done to vehicle and the condition in which it was found. 4/20 RP 27-60.

C. ARGUMENT

I. REVIEW OF DEFENDANT'S FIRST AND SECOND ASSIGNMENTS OF ERROR SHOULD BE DECLINED BECAUSE DEFENDANT WAIVED THESE ISSUES BY FAILING TO RAISE THEM AT THE TRIAL COURT.

1) Waiver

Appellate courts will not generally consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Manifest errors of constitutional magnitude, however, are an exception to the rule. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Only when the defendant identifies a constitutional error and demonstrates how the alleged error affected his rights will an appellate court then review manifest errors of constitutional magnitude. *See State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) “[I]t is this showing of actual prejudice that makes the error ‘manifest’, allowing appellate review.” *Id.*

When the error arises from trial counsel's failure to move to suppress evidence, the defendant may not merely claim prejudice; instead, he “must show the trial court likely would have granted the motion if made, and that actual prejudice exists in the record.” *Id.* at 334.

Consequently, the defendant has the burden to make a showing that manifest error occurred at the trial court. *See State v. Sibert*, 168 Wn.2d 306, 316, 230 P.3d 142 (2010). “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *McFarland*. 127 Wn.2d at 333. The burden shifts to the State to prove the error was harmless beyond a reasonable doubt only if the defendant can successfully show his or her claim raises manifest constitutional error. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Here, at the trial court level Mr. Collins never argued that he was unlawfully seized prior to his arrest. Mr. Collins only challenged: (1) at a CrR 3.5 hearing the admissibility of his pre-arrest statements on the basis that he should have been read his *Miranda* rights sooner and (2) at a CrR 3.6 hearing the lawfulness of his arrest based on the announced crime of arrest. RP 4/14 46-48; RP 4/19 28-30. Thus, Mr. Collins’s assertion that he “moved to suppress all physical evidence on the grounds that both the initial detention and his subsequent arrest were unlawful” is inaccurate. Br. Appellant at 5.

Moreover, in assigning error to the trial court's suppression findings and conclusions Mr. Collins only cites to the record, and argues from the facts, of the CrR 3.5 hearing and not to the CrR 3.6 suppression hearing. *Id.* at 9-13. A CrR 3.5 hearing is held in order to determine whether a "statement of the accused . . . is admissible." CrR 3.5. The admissibility determination is made by enquiring into whether the statement was voluntary or given in a custodial interrogation situation after the suspect has been advised of his *Miranda* rights. *See generally* 4A Karl B. Tegland, Wash. Rules Prac. CrR 3.5 (7th ed. 2011). Unsurprisingly, the trial court court's oral findings and conclusions for the CrR 3.5 hearing focused on the admissibility of Mr. Collins's pre- and post-arrest statements, and the context in which they were made.¹ 4/14 RP 48-51. The court did not rule as to whether Mr. Collins was seized. Likewise the State's apparent concession during the hearing that Mr.

¹ "So, given that, I think that . . . his freedom of action was not curtailed to the level of a formal arrest. . . ." RP 4/14 50 (the trial court analyzing the pre-arrest statements); *See State v. Post*, 118 Wn.2d 596, 606, 826 P.2d 172 (1992). ("Custody for *Miranda* purposes is narrowly circumscribed and requires formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.").

Collins was not free to leave is immaterial as whether a seizure occurred was not at issue. RP 4/14 47.²

As a result, the issue of whether Mr. Collins was unlawfully detained prior to his arrest was not argued by Mr. Collins nor addressed by the trial court's conclusions. Furthermore, Mr. Collins has failed to make any showing that manifest constitutional error occurred, allowing him to raise the issue of whether he was unlawfully seized prior to arrest. This issue was waived.

2) Seizure

Even if Mr. Collins did preserve the issue, because Mr. Collins was not unlawfully seized, the trial court did not err when it refused to suppress Mr. Collins's pre-arrest statements or find them inadmissible.

A trial court's failure to submit written findings of fact and conclusions of law pursuant to CrR 3.5 and CrR 3.6 is considered harmless error "where the trial court's oral findings are sufficient to permit appellate review." *State v. Smith*, 67 Wn.App 81, 87, 834 P.2d 26 (1992); *State v. Cunningham*, 116 Wn.App 219, 226, 65 P.3d 325 (2003). In

² Had the issue been raised by Mr. Collins in his memorandum supporting his motion to suppress or argued by him at the CrR 3.6 hearing the State would have been able to research the issue and then rebut that specific argument in the trial court.

addition, when a party to an appeal is the respondent and seeks no affirmative relief that party is “entitled to argue any grounds supported by the record to sustain the trial court’s order.” *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000); RAP 2.4(a) and RAP 5.1(d). Consequently, when the State prevails on a suppression motion it needs not cross-appeal in order to present additional grounds for affirming the trial court’s decision. *See Bobic*, 140 Wn.2d 250 (holding the State could argue “open view” on appeal as a means to affirm the trial court’s denial of defendant’s motion to suppress even though it did not argue the issue at the trial court level); *State v. McNally*, 125 Wn.App. 854, 863, 106 P.3d 794 (2005) (“The State is entitled to argue any grounds to affirm the court’s decision that are supported by the record, and is not required to cross-appeal.”).

Whether a person is seized by the police is a mixed question of law and fact. *State v. Bailey*, 154 Wn.App 295, 299, 224 P.3d 852 (2010) *citing State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). “What the police said and did and what the defendant said and did are questions of fact.” *Id.* The legal consequences that flow from those facts are questions of law to be reviewed de novo. *State v. Lee*, 147 Wn.App. 912, 916, 199

P.3d 445 (2008). The burden of proving a seizure occurred is on the defendant. *State v. Thorn*, 129 Wn.2d 347, 355, 917 P.2d 108 (1996); *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998).

A seizure occurs when “considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority.” *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). “If a reasonable person under the circumstances would feel free to walk away” and terminate the encounter at his own choosing then the encounter with the police is not a seizure. *Id.* The standard is “a purely objective one, looking to the actions of the law enforcement officer.” *Young*, 135 Wn.2d at 501; *State v. O'Neill*, 148 Wn.2d 564, 575, 62 P.3d 489 (2003) (“Whether a seizure occurs does not turn upon the officer's suspicions. Whether a person has been restrained by a police officer must be determined based upon the interaction between the person and the officer.”).

A social contact is a contact between police and citizens that does not rise to the level of being considered a seizure. *Id.* At 665. “It occupies an amorphous area in our jurisprudence, resting someplace between in

officer's saying 'hello' to a stranger on the street, and at the other end of the spectrum, an investigative detention (i.e., *Terry* stop)." *Id.* While the term "social contact" suggests the lack of an "investigative component" that is not how the term is applied "in the field—and in th[e] court[s]." *Id.*; *O'Neill*, 148 Wn.2d at 577 ("[W]e reject the premise that under article I, section 7 a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a *Terry* stop."). The social contact doctrine acknowledges that citizens "expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizens' questions, comments, and information citizens may offer." *O'Neill*, 148 Wn.2d at 576. Thus, generally no seizure occurs where a police officer merely asks an individual whether they will answer questions or when the officer makes some further request that falls short of immobilizing the individual. *State v. Nettles*, 70 Wn.App. 706, 710, 855 P.2d 699 (1993). On the other hand:

"[e]xamples of circumstance that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person

of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.... In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.”

Young, 135 Wn.2d at 512 citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980).

Here, Mr. Collins was not seized by the deputies when he was contacted by them in an effort to ascertain more information about the reported accident.³ The records of the CrR 3.5 hearing and CrR 3.6 hearing show that Mr. Collins voluntarily exited the house that he was in before the deputies made contact with him. 4/14 RP 31, 37; 4/19 RP 20. At that point, Deputy Robinson asked Mr. Collins about the vehicle accident and Mr. Collins willingly responded with his version of what happened. 4/14 RP 32-33, 37; 4/19 RP 21-23, 25 This conversation between Deputy Robinson and Mr. Collins only lasted a few minutes, in which Mr. Collins was not cuffed, and Deputy Stumph left in the middle of it to question a witness. RP 4/14 32-34, 37; 4/19 RP 10-11, 23-24. In the minutes from the time Mr. Collins was first contacted until he was

³ That State concedes that had Mr. Collins been seized, his status as a potential witness would not have made the seizure lawful in this case.

arrested there is no evidence in the record to suggest the deputies acted in a threatening manner, displayed a weapon, made any physical contact with Mr. Collins, ordered him to do anything, patted him down, or used a tone of voice that suggested Mr. Collins's compliance with the deputies was compelled. Consequently, the objective actions of the deputies indicate that this contact was a permissible social contact.⁴ Mr. Collins cannot meet his burden to prove he was seized.

II. MR. COLLINS WAS LAWFULLY ARRESTED AND SEARCHED INCIDENT TO ARREST.

When a defendant challenges a trial court's denial of a suppression motion, "an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Findings of fact are verities on appeal provided "there is

⁴ Because the test for whether a seizure occurred is an objective one, the deputies' subjective belief that they were just investigating a traffic accident with no criminal component, consistent with a social contact, is as irrelevant as Deputy Robinson's belief that at some point Mr. Collins was not free to go. Moreover, that testimony is unclear as to whether Deputy Robinson was indicating that Mr. Collins was not free to go at the start of the contact or by the time the conversation was over. 4/14 RP 37 ("Q: How long do you think you talked to him? A: A few minutes. Q: Was he free to leave, at that point? A: No.")

substantial evidence to support the findings.” *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *Id.* A trial court’s conclusions of law following a suppression hearing are reviewed de novo. *Garvin*, 166 Wn.2d at 249.

A lawful custodial arrest requires an officer to have probable cause to believe that a person committed a crime. *State v. Gaddy*, 152 Wash.2d 64, 70, 93 P.3d 872 (2004). Once an “actual custodial arrest” takes place an officer can validly search the person arrested. *O’Neill*, 148 Wn.2d at 585. “Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer’s knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed.” *State v. Huff*, 64 Wn.App. 641, 646, 826 P.2d 698 (1992). Reviewing whether probable cause existed is an objective inquiry and takes into account not just all the facts within the officer’s knowledge at the time of the arrest but the officer’s special expertise and experience as well. *Id.* at 645; *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

“[I]t is well established” law that an officer’s “subjective intent to arrest for a particular offense is immaterial” so long as the officer “had objectively sufficient probable cause to arrest for *an* offense.” *State v. Louthan*, 158 Wn.App. 732, 743, 242 P.3d 954 (2010) (emphasis in original); *Huff*, 64 Wn.App at 646 (“[A]n arrest supported by probable cause is not made unlawful by an officer’s subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists.”). This rule recognizes that “[t]he law cannot expect a patrolman ... to always be able to immediately state with particularity the exact grounds on which he is exercising his authority.” *Huff*, 64 Wn.App at 646.

When an officer makes a warrantless misdemeanor arrest RCW 10.31.100 is implicated. That statute provides that “[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.” RCW 10.31.100. Exceptions to the presence requirement include when an officer has “probable cause to believe that a person has committed or is committing a violation of . . . RCW 46.52.010, relating to duty on striking an unattended car or other property” and when a “law

enforcement officer investigating at the scene of a motor vehicle accident . . . has probable cause to believe that the driver has committed in connection with the accident a violation of any traffic law or regulation.” RCW 10.31.100(3)(a), (4).

Here, contrary to Mr. Collins’s assertions, Deputy Stumph was the officer who placed Mr. Collins under arrest. 4/14 RP 33; 4/19 RP 13-14, 24-25. Moreover, Deputy Stumph lawfully arrested Mr. Collins because there was probable cause to arrest him for (1) making a false or misleading statement to a public servant pursuant to RCW 9A.76.175⁵ and/or (2) hit-and-run unattended – p roperty other than a vehicle pursuant to RCW 45.52.010(2).⁶ The first of which occurred in Deputy Stumph’s presence while the later is statutorily accepted from the presence requirement.

Mr. Collins made false statements to Deputy Robinson by claiming that he was not the driver of vehicle involved in the accident and

⁵ “A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. ‘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.” RCW 9A.76.175

⁶ “The driver of any vehicle involved in an accident resulting only in damage to property fixed or placed upon or adjacent to any public highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of the name and address of the operator and owner of the vehicle striking such property, or shall leave in a conspicuous place upon the property struck a written notice, giving the name and address of the operator and of the owner of the vehicle so striking the property. . . .” RCW 45.52.010(2)

implicating a Chad Campbell who claimed had gone to Allan's house. Deputy Robinson relied on this information by trying to figure out where Chad Campbell was, where Allan's house was located, and by including all this information in his traffic accident report. 4/19 24-26. Deputy Stumph was present when these statements were made and heard them. 4/19 RP 10-11, 21-23. Next, Deputy Stumph spoke to the 911 caller who indicated that he saw Mr. Collins exit from the driver's side of the vehicle after the collision and saw no other persons in the vehicle. After that conversation, Deputy Stumph placed Mr. Collins under arrest though he indicated aloud that the arrest was for driving a vehicle without a license and identification. 4/19 RP 14. The 911 caller's information, combined with statements from the other witnesses with whom the deputies spoke to upon arriving at the scene who stated Mr. Collins was somehow involved in the accident, provided Deputy Stumph with sufficient facts and circumstances to establish probable cause to arrest Mr. Collins for making a false statement.

Furthermore, there is no evidence in the record to suggest Mr. Collins complied with his duties as a driver in an accident that damaged property to "take reasonable steps to locate and notify the owner or person

in charge of such property of such fact” or by leaving “upon the property struck a written notice, giving the name and address of the operator and of the owner of the vehicle so striking the property.” In fact, given that he falsely accused someone else of driving the vehicle and left the scene of the accident, the record shows that at the time Deputy Stumph arrested Mr. Collins, there was probable cause to arrest him for hit-and-run in violation of RCW 45.52.010(2) . Consequently, the trial court did not err when it found Mr. Collins was lawfully arrested and his post-arrest statements admissible. 4/19 RP 34-37. Moreover, the lawful arrest provided the basis for a legitimate search incident to arrest. Thus, the trial court did not err when it did not suppress the physical evidence retrieved from the search incident to Mr. Collins’s arrest.

III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT MR COLLINS’S CONVICTION FOR MAKING A FALSE STATEMENT TO A PUBLIC SERVANT.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “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. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). In order to determine whether the necessary quantum of proof exists, the reviewing court “need not be convinced of the defendant’s guilt beyond a reasonable doubt but only that substantial evidence supports the State’s case.” *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citations omitted).

Under RCW 9A.76.175: “[a] person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. ‘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.” Because the statute provides that a statement is material if it is “reasonable likely to be relied upon” the State need not prove actual reliance on the false statement. RCW 9A.76.175; *State v. Godsey*, 131 Wn.App 278, 291, 127 P.3d 11 (2006). Thus, the

evidence is sufficient that a statement is material if a jury could reasonably infer the defendant made the statement believing officers would rely on the information. *Godsey*, 131 Wn.App at 291.

Here, while Mr. Collins had no duty to answer Deputy Robinson's questions that, however, did not give him license to proactively make false statements that the deputies were likely to rely upon in conducting their investigation into the vehicle accident. Moreover, as Deputy Robinson testified, when he first contacted Mr. Collins Deputy Robinson did not know who the driver of the vehicle was, whether there were any passengers, and how the accident occurred. 4/21 RP 21. As a result, Mr. Collins's story about Chad Campbell being the driver and leaving to Allan's house was reasonably likely to, and was in fact relied upon by Deputy Robinson who was trying to figure out where Allan's house was while Deputy Stumph interviewed witnesses. 4/21 RP 22-27. The most convincing inference from the evidence is that Mr. Collins wanted the deputies to believe his false statements so that he would not be connected with the stolen vehicle he was driving, which was involved in the accident that the deputies were investigating. Consequently, there was sufficient

evidence to support Mr. Collins's conviction for knowingly makes a false or misleading material statement to a public servant.

IV. THE COURT PROPERLY ADMITTED THE KEY-RING EVIDENCE PURSUANT TO ER 404(B).

Appellate courts review evidence admitted under ER 404(b) for abuse of discretion. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). A court abuses its discretion if it is exercised on untenable grounds or for untenable reasons. *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). ER 404(b) provides that: “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

The test for admitting evidence under ER 404(b) “is well established. To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify 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 against the prejudicial effect.” *State v. Hartzell*, 156 Wash.App. 918, 930, 237 P.3d 928 (2010).

Here, the trial court did not abuse its discretion when it allowed the State to admit evidence that Mr. Collins had a key ring on his person when he was arrested. To the extent that the trial court was not explicit in applying the above noted test for the admission of ER 404(b) evidence, the record is complete enough to deduce its conclusions. As the trial court indicated:

“The State’s position is that it goes to show knowledge that the vehicle was stolen. . . . I think here – I think the evidence is relevant. It has a tendency to prove a fact that’s at issue, more or less likely – so, I think it’s relevant. Then, I guess, the question is does it – is it propensity evidence, or is it the danger of unfair prejudice, is it outweighed by the probative value of it. I don’t think the a danger of unfair prejudice here outweighs the probative value; so – and, I don’t think it’s propensity evidence.”

RP 4/14 56.

The preponderance prong did not need to be addressed because the item was found on Mr. Collins’s person. Moreover, the excerpt from the record shows the judge properly addressed the other three prongs: the purpose of the evidence was to show Mr. Collin’s knowledge that vehicle at issue was stolen, which was relevant to prove an element of the crime charged, and the trial court found that the probative value of the evidence

outweighed the danger of unfair prejudice. Consequently, the trial court properly admitted the evidence.

Assuming *Arguendo*, the trial court did err in the way it applied ER 404(b) that error is harmless. An error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Here, there was overwhelming evidence of Mr. Collins's guilt and the admission of the key ring ended up adding little evidentiary support for the elements that the State was required to prove. The evidence was admitted, briefly touched upon in a redirect, and was not even mentioned by the State in either of its closing arguments. 4/21 RP 45-46, 57. As a result, any error in admitting the key ring evidence is harmless.

V. MR. COLLINS DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). A defendant is not guaranteed successful assistance of counsel. *State v.*

Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). It is the defendant's burden to show ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) counsel provided ineffective representation, and (2) counsel's ineffective representation resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). In order to satisfy the first requirement (deficiency), the defendant must show his counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. In order to satisfy the second requirement (resulting prejudice), the defendant must show a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different. *Id.* at 694.

Here, Mr. Collins cannot show ineffective assistance of counsel because even if his trial counsel had raised the suppression issue that Mr. Collins now asserts on appeal the result of the suppression hearing would not have been different. As argued above, Mr. Collins was not unlawfully seized when he was initially contacted by the deputies. Thus, offering an alternative argument for suppression would not have changed the outcome of the case. Mr. Collins's trial counsel was not ineffective.

D. CONCLUSION

For the reasons argued above, Mr. Collins's convictions should be affirmed.

E. STATEMENT OF THE CASE

Cause No. 10-1-01083-9

1) Procedural History

Scott Collins was charged with one count of Violation of the Uniform Controlled Substances Act for possessing methamphetamine in Cowlitz County, State of Washington, on September 15, 2010 contrary to RCW 69.50.4013(1). CP 1-2. Mr. Collins pled not guilty to the charge and went to trial on April 19, 2010 in Cowlitz County Superior Court. RP 20, CP 34. The Jury found Mr. Collins guilty as charged later that same day. RP 111-112. Mr. Collins filed a timely notice of appeal. CP 48.

2) Statement of Facts

Mr. Collins was driving his truck when Washington State Patrol Trooper Todd Surdam pulled him over for a seatbelt violation. RP 50-53. Upon contacting Mr. Collins, Trooper Surdam requested his identification. RP 56. Mr. Collins then pulled a folded piece of paper from his pocket. RP 58-59. When Mr. Collins unfolded the piece of paper a white crystal

substance fell out of the paper and onto his lap. RP 60. In addition, the piece of paper had Mr. Collins's name on it. RP 59-61. Trooper Surdam, based on his training and experience, immediately recognized that the white, crystal substance was methamphetamine. RP 60. He testified it was the "largest crystal chunk of meth that [he'd] ever seen." RP 68. As a result, Trooper Surdam asked Mr. Collins to step out of the truck. RP 61.

Next, Trooper Surdam stood back from the truck to allow Mr. Collins out and noticed that after Mr. Collins had exited that the substance had fallen into the doorjamb of the truck. RP 62. This doorjamb was right by where Mr. Collins was seated. RP 70. Mr. Collins was then arrested and placed in the back of Trooper Surdam's patrol vehicle. RP 64. Trooper Surdam read Mr. Collins his rights after which Mr. Collins stated that he knew it (the substance) was methamphetamine and that he knew it was there. RP 64. After speaking with Mr. Collins, Trooper Surdam put on a set of gloves, retrieved the crystal substance, and put it into a ziplock bag. RP 65. The bag with the substance was sent to the Washington State Patrol crime lab where Jason Dunn, a forensic scientist with the crime lab, identified the substance as methamphetamine.

F. ARGUMENT

I. THE STATE'S EVIDENCE WAS SUFFICIENT TO PROVE POSSESSION

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “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. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). In order to determine whether the necessary quantum of proof exists, the reviewing court “need not be convinced of the defendant’s guilt beyond a reasonable doubt but only that substantial evidence supports the State’s case.” *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citations omitted).

Here, there was sufficient evidence that Mr. Collins was guilty of the charge. Mr. Collins pulled a folded up paper with his name on it out of his pocket, and when he unfolded this paper a large piece of methamphetamine fell out onto his lap. Mr. Collins exited the car and then admitted to Trooper Surdam that he had known there was methamphetamine in his pocket. Trooper Surdam retrieved the methamphetamine from the Mr. Collins's truck's doorjamb. In addition, Mr. Dunn from the Washington State Patrol testified at trial that the lab tests he performed confirmed that the substance at issue was methamphetamine. Consequently, there was substantial evidence presented at trial that supported the State's case.

Mr. Collins's argument that the substance picked up from his truck's doorjamb was different from the substance that came out of his pocket is unconvincing. Admittedly, Trooper Surdam testified that he did not see the "crystal" fall from Mr. Collins's lap into the doorjamb when Mr. Collins stood up to get out of the vehicle. Trooper Surdam did not, however, express any doubt at trial that it was the same "crystal." Moreover, Mr. Collins's defense counsel made the same argument at trial and the jury rejected it. RP 108-109 The reasonable inference is that the

same “crystal” that fell onto Mr. Collins’s lap when he unfolded the paper then fell into the doorjamb, right where Collins had been sitting, when he got up to exit the vehicle. Because there was sufficient evidence to prove the charge the Court should affirm the conviction.

II. THE STATE PROVED ALL THE ESSENTIAL ELEMENTS OF POSSESSION.

Appellate courts review statutory construction issues and constitutional issues *de novo*. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). In addition, when a trial court’s decision to reject a proposed jury instruction is predicated upon rulings as to the law, the court’s decision is reviewed *de novo*. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996) (citation and quotation omitted). In a prosecution for simple possession of a controlled substance there is no intent requirement. *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). “The State need not prove either knowledge or intent to possess.” *Id. citing State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994). Consequently, “[a]side from the unwitting possession defense, possession is a strict liability crime.” *Id.* (citation omitted). Thus, the State must only prove two elements: “the nature of the substance and the fact of possession by the defendant.” *Staley*, 123 Wn.2d at 798. This area of the law is well-

settled. *See State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981) (holding that the mere possession statute did not contain a mens rea element); *State v. Bradshaw*, 152 Wn.2d 528, 534, 98 P.3d 1190 (2004) (refusing to overrule *Cleppe* and noting that in the 22 years “[s]ince *Cleppe* the legislature has amended RCW 69.50.401 seven times and has not added a mens rea element to the mere possession statute”).

Here, the State proved that the substance was methamphetamine and the fact of possession by the Mr. Collins. Mr. Collins’s argument that the State was required to prove, and the court required to instruct the jury, that he knowingly possessed a controlled substance is without a basis in the law.

III. THE TRIAL COURT DID NOT DENY DEFENDANT A COMPLETE DEFENSE

The alleged denial of a defendant's right under the Sixth Amendment to present a defense is reviewed de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *State v. Strizheus*, 163 Wn.App. 820, 262 P.3d 100, 105 (2011). A criminal defendant has the right to present a defense under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution. *State*

v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The right to present a defense, however, “is not absolute.” *Id.* at 924–25; *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996). For example, “a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.” *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

ER 106 and *State v. West*, 70 Wn.2d 751, 754-55 424 P.2d 1014 (1967) dictate that “[w]here 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.” As a result, self-serving hearsay statements by a defendant may be admissible if they are necessary “to: 1) [e]xplain the admitted evidence, 2) [p]lace the admitted portions in context, 3) [a]void misleading the trial of fact, and 4) [i]nsure fair and impartial understanding of the evidence.” *State v. Larry*, 108 Wn.App. 894, 910, 34 P.3d 241 (2001) *citing U.S. v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992). A trial court’s decision on the admission of redacted statements will not be disturbed absent an abuse of that court’s discretion. *Id.*

Here, the trial court did not abuse its discretion by refusing to admit Mr. Collins's full statement nor, by doing so, did it deny Collins his right to present a complete defense. The portion of Mr. Collins's statement in which he indicated that the drugs were not his was not relevant to the legal issues at trial, i.e., the nature of the substance and the fact of possession by Mr. Collins. In other words, Mr. Collins was legally guilty, even if the drugs were unquestionably not his, because he possessed a substance that was methamphetamine. Moreover, Mr. Collins did not assert the defense of unwitting possession. As a result, the trial court properly concluded that the portion of Mr. Collins's statement in which he indicated the drugs were not his was inadmissible.

Assuming *Arguendo*, the trial court did err in the way it applied ER 106 and *State v. West* to Mr. Collins's statement, that error is harmless. An error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Here, there was overwhelming evidence of Mr. Collins's guilt and the admission of Mr. Collins's full statement would not

have cast any doubt on the elements that the State was required to prove.
As a result, any error in failing to admit the full statement is harmless.

G. CONCLUSION

For the reasons argued above, Mr. Collins's conviction should be affirmed.

Respectfully submitted this 13th day of March, 2012.

SUSAN I. BAUR
Prosecuting Attorney

By: William J. M. Bartlett for :
AARON BARTLETT
WSBA # 39710
Deputy Prosecuting Attorney
Representing Respondent

APPENDIX A

RCW 9A.56.068 - Possession of stolen vehicle.

(1) A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.

(2) Possession of a stolen motor vehicle is a class B felony.

[2007 c 199 § 5.]

RCW 9A.76.175 - Making a false or misleading statement to a public servant.

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "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.

[2001 c 308 § 2. Prior: 1995 c 285 § 32.]

RCW 46.52.010 - Duty on striking unattended car or other property — Penalty.

(1) The operator of any vehicle which collided with any other vehicle which is unattended shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle of the name and address of the operator and owner of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck a written notice, giving the name and address of the operator and of the owner of the vehicle striking such other vehicle.

(2) The driver of any vehicle involved in an accident resulting only in damage to property fixed or placed upon or adjacent to any public highway shall take reasonable steps to locate and notify the owner or

person in charge of such property of such fact and of the name and address of the operator and owner of the vehicle striking such property, or shall leave in a conspicuous place upon the property struck a written notice, giving the name and address of the operator and of the owner of the vehicle so striking the property, and such person shall further make report of such accident as in the case of other accidents upon the public highways of this state.

(3) Any person violating this section is guilty of a misdemeanor.

[2003 c 53 § 241; 1979 ex.s. c 136 § 79; 1961 c 12 § 46.52.010. Prior: 1937 c 189 § 133; RRS § 6360-133; 1927 c 309 § 50, part; RRS § 6362-50, part.]

RCW 69.50.4013 - Possession of controlled substance — Penalty.

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

[2003 c 53 § 334.]

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 14th, 2012.

A handwritten signature in cursive script that reads "Michelle Sasser". The signature is written in black ink and is positioned above a horizontal line.

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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