

NO. 45058-5

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

STATE OF WASHINGTON, RESPONDENT

v.

SOEUN SUN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 12-1-00068-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion when it properly denied defendant's motion to suppress as the officers had a reasonable, articulable suspicion to stop defendant?
2. Whether sufficient evidence was presented for the jury to find defendant was armed with a firearm during the commission of the crimes of burglary in the first degree, conspiracy to commit burglary in the first degree and trafficking in stolen property in the first degree, and trafficking in stolen property in the first degree?
3. Whether the trial court properly instructed the jury on the nexus issue concerning defendant being armed with a firearm in accordance with the relevant case law?
4. Did the trial court properly exercise its discretion in not instructing the jury on the lesser included offenses of burglary in the second degree and conspiracy to commit burglary in the second degree when there was insufficient evidence presented at trial to support such an instruction?
5. Whether the trial court properly exercised its discretion in declining to give a limiting instruction about evidence which was admitted for multiple purposes under multiple evidence rules?
6. Has defendant failed to meet his burden of showing defense counsel was ineffective by neglecting to review an exhibit or object to a single misstatement of the evidence during closing when the entire record of his performance and the evidence against defendant is reviewed?
7. Whether defendant's constitutional rights were violated when the law does not require defendant's previous strike offenses be proved to a jury beyond a reasonable doubt?

8. Whether distinguishing between a prior conviction as a sentencing factor and an element violates equal protection when a rational basis exists in the purpose for doing so?

B. STATEMENT OF THE CASE.

1. Procedure

On January 5, 2012, the Pierce County Prosecutor's Office charged SOEUN SUN, hereinafter "defendant," with one count of unlawful possession of a firearm in the first degree and one count of possession of a stolen firearm. CP 1-2. The case was continued multiple times for several reasons including continued investigation, attorney scheduling conflicts and the withdrawal and substitution of defense counsel. 1RP¹ 4; 2RP 4; 3RP 8; 4RP 2; 5RP 2; 6RP 3; 7RP 8; 8RP 10-12.

The case originally involved three co-defendants and was called for trial on April 23, 2013, but recessed until May 14, 2013, to accommodate the attorneys' schedules and allow them to interview newly added witnesses. 9RP 2, 16-20; 10RP 24-30. The three other co-defendants pleaded guilty during the time the trial was recessed. 10RP 24-30. When the trial resumed, a CrR 3.5 hearing was held where the court ruled defendant's statements were admissible. 10RP 46-81. Defendant

¹ The verbatim record of proceedings is contained in 15 volumes and will be referred to as follows: 1RP - 3/21/12; 2RP - 6/4/12; 3RP - 8/20/12; 4RP - 9/14/12; 5RP 10/3/12; 6RP - 12/13/12; 7RP - 1/24/13; 8RP - 4/22/13; 9RP - 4/23/13; 10RP - 5/7/13, 5/14/13, 5/16/13, 5/20/13, 5/28/13 (corrected); 11RP - 5/29/13; 12RP - 5/30/13; 13RP - 6/3/13; 14RP - 6/4/13, 6/5/13; 15RP - 6/6/13, 6/7/13, 6/27/13.

also filed a written motion to suppress and after hearing argument the court denied defendant's motion. 10RP 46-81.

A second amended information was filed on June 4, 2013, charging defendant with one count of unlawful possession of a firearm in the first degree, one count of theft of a firearm, one count of burglary in the first degree, one count of conspiracy to commit burglary in the first degree, one count of trafficking in stolen property in the first degree and one count of conspiracy to commit trafficking in stolen property in the first degree. CP 79-81; 14RP 697.

At the conclusion of the State's case, defendant moved to dismiss multiple charges and enhancements on the basis that the State did not prove defendant or his accomplices were "armed with a firearm" during the commission of the crimes. 14RP 708- 712; CP 143-150. Defendant also requested the court dismiss all counts based on insufficient evidence. 14RP 713-716. The court denied both of defendant's motions. 14RP 724. Defense counsel also proposed a limiting instruction about Andrew Stearman's interview with Detective Nolta being offered only for purposes of impeachment which the court denied. 14RP 636-638, 725-732.

Defendant requested lesser included instructions for burglary in the second degree and conspiracy to commit burglary in the second degree. 14RP 712. After hearing argument, the court chose not to give either.

14RP 737-738. The jury found defendant guilty of all counts and answered yes to the special verdict forms finding defendant or an accomplice was armed with a firearm during the commission of the burglary, conspiracy to commit burglary², trafficking in stolen property, and conspiracy to commit trafficking in stolen property counts. 15RP 885-887; CP 246-255.

The court found defendant had been previously convicted of two strikes and sentenced defendant to life in prison without parole as a persistent offender on the burglary, trafficking and conspiracy counts. 15RP 895-901; CP 256-267. On the unlawful possession of a firearm and theft of a firearm counts, the court imposed the high end of the standard ranges. 15RP 901; CP 256-267.

Defendant filed a timely notice of appeal. CP 26-269.

² The State is anticipating filing a motion with the trial court under CrR 7.2(e) to correct the judgment and sentence in accordance with *State v Bobic*, 140 Wn.2d 250, 996 P.2d 610 (2000) (holding that a single agreement to commit a series of crimes under the same plan by the same conspirators constitutes a single act of conspiracy and without a jury determination that more than one plan existed, constitutes a single unit of prosecution). In its motion, the State is moving to merge the conspiracy to commit burglary in the first degree (Count IV) with the conspiracy to commit trafficking in stolen property in the first degree (Count VI) into a single count of conspiracy to commit burglary in the first degree and trafficking in stolen property in the first degree (corrected Count IV). This would also correct the judgment and sentence to include a single firearm enhancement on the amended Count IV. If granted, the State will then file a motion with the Court of Appeals in accordance with CrR 7.2(e) to seek permission for the trial court to formally enter a corrected Judgment and Sentence on the case.

2. Facts

On December 17, 2011, around 3:30 am, Fife Police Officer Thomas Vradenburg responded to the Sportco in Fife after multiple alarms inside the store went off. 11RP 124-126, 129. Upon arrival, Officer Vradenburg observed the northeast glass door to Sportco was shattered and inside there was damage to the gun display cases in the back of the store. 11RP 135-136, 141. An inventory of the guns after the burglary showed two long guns (shotguns or rifles) and 40 semi-automatic handguns were missing for a total of 42 guns that were stolen. 11RP 202-203.

As part of his investigation, Detective Jeff Nolta reviewed the video surveillance from the store. 11RP 238-244. It showed a white passenger vehicle drive by the Sportco and stop multiple times between 3:02 a.m. and 3:30 a.m. 11RP 238-244. At one point when it stopped, the video also showed very faint light colored shapes moving from the vehicle to the Sportco door that was broken. 11RP 242. Another surveillance camera inside also captured two individuals enter the Sportco around 3:26 a.m. and head towards the gun displays. 11RP 244-246. The video showed the suspects were wearing gloves so officers did not check for fingerprints anywhere. 11RP 217.

On the surveillance video, Detective Nolta could also see a Fife police officer, later determined to be Officer Ryan Micenko, drive by the white suspect vehicle. 11RP 221. A review of Officer Micenko's patrol car Coban video recording system showed that at 3:07 a.m., shortly before responding to the burglary, Officer Micenko ran the license plate of the white vehicle when it pulled up next to him across the street from the Sportco. 11RP 179, 183-184. The license plate of the vehicle, 889 TWF, was registered to Phalay Soeung at an address of 8438 Yakima Avenue in Tacoma. 11RP 184-185.

During his investigation, Detective Nolta was contacted by an officer from another agency who provided him with information that led Detective Nolta to believe an individual named David Bunta was involved in the burglary. 11RP 222-226. Detective Nolta and other officers began surveillance of Ms. Soeung's address and Mr. Bunta's address. 11RP 223-226; 12RP 357-360. On December 27, 2011, officers followed Mr. Bunta as he drove to Ms. Soeung's residence at 8438 Yakima Avenue. 12RP 358-359. Outside of the Yakima home, the white Honda with license plate of 889 TWF was parked. 12RP 358-359. Mr. Bunta was arrested by police on December 28³, 2011, and during the search incident to arrest,

³ The VRP states "December 20, 2011," however, a review of the preceding questions and the defense attorney's cross indicate the date they are discussing is December 28, 2011.

officers found a black ski mask with three holes in it in his coat pocket. 12RP 360-361. They also obtained a search warrant for his vehicle and found a 9mm pistol, a Santa Claus suit, a GPS unit, two rolls of duct tape, two black masks, and four pairs of gloves inside. 12RP 285-292, 299-300.

On December 28, 2011, police were watching the Yakima Avenue residence with the white Honda parked out front. 12RP 317-318. Around 5:30 p.m., they observed a male walk toward the white Honda carrying something the size of a laptop wrapped in a blanket. 12RP 368-371. The male looked around before opening the trunk and placing the item inside. 12RP 368-371. Officers then followed the male as he drove the Honda to a nearby gas station. 12RP 370, 372-373. When the male got out to pump gas, officers arrested him. 12RP 373. After the male initially gave two false names, officers were able to identify him as the defendant. 12RP 373-375.

Detective Nolta interviewed defendant after his arrest. 11RP 251. Defendant admitted he lived at the 8438 Yakima Avenue residence. 11RP 272-273. He also admitted that he had been to the Sportco with a man named David Garcia on a couple of occasions in the two weeks before his arrest. 14RP 699. Defendant also told police that he had initially given them a false name because he had an outstanding warrant for his arrest.

14RP 701. A search of defendant's cell phone revealed multiple texts regarding firearm transactions. 12RP 346-347.

Police obtained a search warrant and searched the white Honda driven by defendant. 11RP 252, 266-269. Officers discovered a 9mm handgun wrapped in a towel inside of a backpack located in the trunk. 11RP 268-269, 14RP 622. It was later identified as one of the missing firearms from Sportco. 14RP 623-624. Inside the vehicle, officers also found ammunition in the center console, gloves on the floorboard and various documents with defendant's name on them in the glove box and on the floor. 11RP 268-269, 14RP 625.

Police also obtained a search warrant for defendant's Yakima Avenue residence and recovered a 9mm pistol, one round of 9mm ammunition, one box of .22 caliber ammunition and a Santa hat. 11RP 253; 12RP 306-309. During the course of Detective Nolta's investigation, nine of the 42 firearms that were stolen were discovered in various nearby jurisdictions. 11RP 263-264. No fingerprints were found on the guns. 14RP 668-669. Detective Nolta interviewed several people he believed were connected to the crime including Wayland Witten, Alix Harris, and Andrew Stearman. 11RP 261-263.

During the trial, Andrew Stearman testified that he was an acquaintance of defendant's and had known him for a couple years. 12RP

395. He testified that he told detectives that on December 17, 2011, defendant and two younger Asian males came to his residence where he lives with his brother, Alix Harris, with 10-15 firearms in a duffel bag. 12RP 421-422. He said their intent was to sell the guns to Wayland Witten, another friend of his. 12RP 404-405. Later in his testimony, Mr. Stearman denied seeing any of that and said he had learned that all from his brother. 12RP 406-407.

Mr. Stearman also testified that he had loaned defendant some money and the defendant had given him a gun. 12RP 410-412. Later in his testimony however, he admitted that sometime after December 17, 2011, he bought a gun from defendant with the second amendment etched on it. 12RP 411-415. Mr. Stearman also admitted that on December 28, 2011, defendant had taken the gun back and Mr. Stearman sent defendant multiple text messages wanting it back saying things like he couldn't be "running around without a strap," meaning "without a gun." 12RP 409-414. After defendant stopped returning his texts, Mr. Stearman watched the surveillance video from the Sportco burglary online with his sister. 12RP 422-423. He admitted telling the detectives that the suspects looked familiar, but denied telling them that one looked like the defendant. 12RP 422-423.

He also identified a photograph defendant had sent him by text that showed two pistols on a bed. 12RP 402-404. A video of Mr. Stearman's interview with detectives was played for the jury where Mr. Stearman describes defendant coming to his home with multiple guns to sell to Wayland Witten, whom Mr. Stearman calls "Alec." 12RP 426-427; 13RP 466. The video also shows Mr. Stearman telling detectives that defendant was laughing and told him he had stolen all the guns. 12RP 418, 421-422.

On cross examination four days later after having met with his attorney and defense counsel, Mr. Stearman said that he had only seen defendant at his house once on December 27, 2011. 13RP 464, 471-473. He denied ever seeing defendant with multiple guns and said he had only seen defendant with the engraved gun. 13RP 465-466. He also stated that the picture defendant had sent him was of green guns and he now believed it was a different photograph than the one he identified in court. 13RP 470-471.

Phalay Soeung, the defendant's girlfriend with whom he has a child, testified during the trial that she and defendant lived with her parents at the Yakima address in December of 2011. 13RP 543-545. She testified that the white Honda with license plate 889 TWF is her vehicle. 13RP 546. She said she could not remember telling the detective that only

she and the defendant drive her vehicle and said it was a community car and able to be driven by anyone in the home. 13RP 549-351.

Phalay Soeung's brother, Phala Soeung, testified during the trial that he was incarcerated in the Pierce County jail with defendant sometime after December 2011. 13RP 493-497. He denied telling Detective Nolta that defendant had bragged about committing the Sportco burglary while in jail. 13RP 498.

Sovannarith "Eddie" Soeung, Phalay's other brother, also testified during the trial while he was serving a sentence after pleading guilty to one count of unlawful possession of a firearm. 13RP 504. That charge stemmed from the search of the Yakima house when police found a gun in his room. 13RP 504. He said he did not remember sending text messages to defendant about selling a gun and he did not remember telling the officers that the defendant gave him the gun. 13RP 513-517, 536. He testified he knew the gun he pleaded guilty to unlawfully having was stolen from Sportco because the officer told him that. 13RP 531. He did admit that the white Honda was his sister's vehicle that she and defendant drove together. 13RP 534.

Alix Harris, Andrew Stearman's brother, testified during the trial that he did not remember telling officers that the defendant came to his home with a bunch of guns on December 17, 2011, or that he sold them.

13RP 560. He also said he could not remember telling detectives that he saw defendant selling multiple guns to multiple people. 13RP 561. A video of those conversations between Mr. Harris and the officers was then played for the jury. 13RP 565-567.

Wayland Witten was transported to the courtroom to testify during the trial while serving a sentence for unlawful possession of a stolen firearm amongst other convictions. 13RP 580-581. He refused to answer the prosecutor's questions saying, "I plead the fifth." 13RP 580-584.

David Bunta was also brought in to testify during the trial while serving sentences for first degree burglary, trafficking in stolen property, conspiracy to commit burglary and conspiracy in trafficking in stolen property. 13RP 590. He admitted he burglarized the Sportco on December 17, 2011, but stated he did not recall who he was with or how many guns they stole. 13RP 590-591. He proceeded to say that he could not recall to the remainder of the questions that were asked of him and testified he was going to respond that way to every question. 13RP 591-593.

Detective Nolta testified that during his interviews with Alix Harris, Andrew Stearman, David Bunta, Wayland Witten, and Eddie Soeung, none of them expressed any significant issues regarding an inability to recall past events. 14RP 645-648. Detective Nolta also

testified about statements made by Eddie Soeung and Phala Soeung to him which were inconsistent with the testimony they gave on the stand. 14RP 648-649.

T.J. Wells, a retired police officer and gun salesman for Sportco, testified that the day before the burglary he spoke to law enforcement about suspicious individuals who had come into the store. 14RP 679. He remembered three dark skinned individuals, but not of African American descent, who came in wearing very dark clothing, with hoods above their heads and baseball caps tilted over their faces. 14RP 680. Mr. Wells said the men kept their hands in their pockets and made no eye contact while they looked at the guns in the same display case where the guns were stolen from the next day. 14RP 680-681.

Mr. Wells remembered one individual had a tattoo of writing or script on the right side of his neck. 14RP 682. During the trial, defendant showed the jury a tattoo of writing on the right side of his neck. 14RP 683. Mr. Wells also testified that all of the guns that were stolen were real guns capable of firing. 14RP 684-685. He also said that one of the guns that was stolen was a 9mm called the "Bill of Rights" gun with writing on the barrel of the gun. 14RP 688-689.

A stipulation was read to the jury that stated defendant had previously been convicted of a serious felony prior to December 17, 2011

and based upon that conviction, he was not permitted by law to possess a firearm. 10RP 118; 14RP 701; CP 83. The court also read a stipulation to the jury that defendant's phone records retrieved by Detective Nolta between December 2, 2011, and December 28, 2011, were true and accurate. 14RP 654-655; CP 84-85.

Detective Nolta testified that after reviewing defendant's cell phone records, he was able to determine that defendant's cell phone made twenty calls to David Bunta and five calls to Andrew Stearman on December 17, 2011. 14RP 698-699. Detective Nolta was also able to determine that at 3:02 a.m., David Bunta's cell phone pinged off a tower on Pacific Avenue near the Sportco. 14RP 663-664.

Defendant chose not to testify during the trial. 14RP 701.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS AS THE OFFICERS HAD A REASONABLE, ARTICULABLE SUSPICION TO STOP DEFENDANT.

A trial court's decision to deny a motion to suppress is reviewed for an abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Unlawful searches and seizures are per se unreasonable. The U.S. Constitution prohibits unlawful searches and seizures; the

Washington State constitution goes even further and requires authority of law before the State may disturb an individual's private affairs. U.S. Const. amend IV; Const. art I §7. There are however, certain "narrowly and jealously drawn" exceptions to the warrant requirement. *State v. Stroud*, 106 Wn.2d 144, 147, 720 P.2d 436 (1986). One such exception is a *Terry* stop. *State v. Glossberger*, 146 Wn.2d 670, 680, 49 P.3d 128 (2002).

Probable cause for a stop exists when there is a reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Specifically, an investigatory stop is lawful if the officer possesses "specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. A seizure is reasonable and lawful when it is based on an officer's objectively reasonable suspicion that an individual has engaged in criminal activity. *State v. Armenta* 134 Wn.2d 1, 10, 948 P.2d 1280 (2004). The police are authorized to detain suspects a brief time for questioning when there is an articulable suspicion, based on objective facts, that the suspect is involved in some type of criminal activity. *Brown v. Texas*, 443 U. S. 47, 99 S. Ct 2637, 61 L. Ed. 2d 357 (1979).

Furthermore, a police officer's decision to briefly detain an individual may be based on his or her own observations, other officers'

observations, tips from citizens and informants, or any combination of these. *State v. Thornton*, 41 Wn. App. 506, 705 P.2d 271 (1985); *State v. Harvey*, 41 Wn. App. 870, 707 P.2d 146 (1985). It is only necessary that the circumstances at the time of the stop be more consistent with criminal activity than innocent conduct. *State v. Mercer*, 45 Wn. App. 769, 727 P.2d 676 (1986).

Washington law gives officers the legal right to stop a suspected person, request the person produce identification and an explanation of his or her activities as long as the officer's "well-founded suspicion" meets the *Terry* rational. *State v. Little*, 116 Wn.2d 488, 495, 806 P.2d 749 (1991), quoting *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). An investigative *Terry* stop is among the specific exceptions to the warrant requirement and is based upon less evidence than is needed for probable cause to make an arrest. *State v. Dorey*, 145 Wn. App. 423, 429, 186 P.3d 363 (2008). A *Terry* stop is not an arrest.

In evaluating an investigatory stop, a court should take into consideration an officer's experience. An officer's suspicion of criminal activity, based on his or her experience in interpreting what would, to the ordinary citizen, appear to be innocent conduct, may appear incriminating to the officer in light of past experience. *U.S. v. Brigoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1974); *State v. Samsel*, 39 Wn.

App. 564, 570, 694 P.2d 670 (1985); *See also United States v. Cortez*, 449 U.S. 411, 629 S. Ct. 690, 66 L. Ed. 2d 21 (1981).

In the present case, the trial court did not abuse its discretion in denying the motion to suppress when it found the officers had a reasonable, articulable suspicion in order to conduct an investigatory *Terry* stop. The trial court's decision was based not only on the officer's observations of the defendant that night, but on numerous pieces of information known to the officers which connected the Yakima home and the Honda to the Sportco burglary on December 17, 2011.

Officers began to surveil the Yakima residence after a review of the Sportco surveillance camera's showed a white Honda pass by the store multiple times in the half hour before the burglary. CP 59-67, 68-74⁴. The officers learned the white Honda was registered to a woman who lived at the Yakima address. CP 59-67, 68-74. A confidential informant tip led police to also begin surveilling a man named David Bunta. CP 68-74. On December 20, 2011, officers observed Mr. Bunta drive to the Yakima home where the white Honda began following him. CP 68-74. At an intersection, a male got out of the Honda and spoke with someone in Mr. Bunta's passenger seat before the vehicles left separately. CP 68-74.

⁴ There was no evidentiary hearing held during the CrR 3.6 motion as the parties agreed the facts were not in dispute. As a result, the trial court relied on the statement of facts submitted by the parties in their briefing when making its ruling.

Later the same evening, officers observed Mr. Bunta's vehicle parked at the Yakima address. CP 68-74.

On December 26, 2011, the confidential informant told police that Mr. Bunta had come by his home and showed him one of the firearms stolen during the burglary. CP 68-74. Using the serial number documented by the confidential informant, officers confirmed the gun was stolen from Sportco. CP 68-74. The next day, officers saw Mr. Bunta's vehicle parked at Yakima residence along with the white Honda. CP 68-74. When questioned by police, Mr. Bunta admitted to participating in the burglary and during a search of his vehicle officers found guns and clothing matching the disguises the burglars wore during the burglary. CP 68-74. He admitted there were others involved, but refused to name anyone. CP 68-74.

During their surveillance of the Yakima residence on December 28, 2011, officers observed an individual, later identified as defendant, act suspiciously around the white Honda before driving it to a gas station. CP 68-74. Defendant left the rear of the Yakima residence and looked back and forth as he walked through an alley to the white Honda. CP 59-67, 68-74. When he got to the Honda, he placed a "small bundle" in the trunk of the car before getting in the driver's seat and leaving. CP 59-67, 68-74.

Officers stopped defendant in the white Honda and arrested him shortly thereafter. CP 68-74.

The combination of the white Honda's presence at the burglary scene, the information discovered while surveilling and interviewing Mr. Bunta, the Honda and Mr. Bunta's connections to the Yakima house and the suspicious behavior of defendant the night of December 28th all led the officers to have a reasonable, articulable suspicion that defendant was engaged in criminal activity specifically related to the Sportco burglary. The trial court recognized it was this totality of circumstances which led officers to stop defendant that night and properly denied defendant's motion to suppress. 2RP 80-81.

Defendant's comparisons to *State v. Doughty*, 170 Wn.2d. 57, 239 P.3d 573 (2010), and *State v. Martinez*, 135 Wn. App. 174, 143 P.3d 855 (2006), are misplaced. In *Doughty*, an officer conducted a *Terry* stop on Doughty after observing him approach and return in two minutes from a home where officers had previously had complaints from neighbors that the home may be involved in drug activity. *Doughty*, 170 Wn.2d at 60. The Washington Supreme Court held that the officer lacked a reasonable, articulable suspicion necessary to stop and seize Doughty. *Id.* at 65.

Similarly, in *Martinez*, the court found that an officer lacked a reasonable, articulable suspicion to stop an individual acting nervously in

a high crime area. *Martinez*, 135 Wn. App. at 177-178. The court stated "the problem is with the absence of a *particularized* suspicion.... That is, there must be some suspicion of a particular crime or a particular person, and some connection between the two." *Id.* at 181-182 (*State v. Duncan*, 146 Wn.2d 166, 179, 43 P.3d 513 (2002); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); *See Webster's Third New International Dictionary* 1647 (1993)) (emphasis in original).

In contrast, officers in the present case were acting with a particularized suspicion based not only upon their observations of the defendant at the time, but on evidence gathered from the crime scene and information from confidential informants and other suspects known to be involved in the crime. The officers in the present case were not merely patrolling a high crime area or basing their suspicions on sporadic neighbor complaints as in *Doughty* and *Martinez*. The officers in the present case had multiple independent reasons to believe the white Honda and the Yakima house were associated with the particularized crime they were investigating, the Sportco burglary. First, the vehicle seen at the crime scene was seen multiple times during the short period before the burglary. Second, Mr. Bunta, an admitted participant in the burglary who had a firearm stolen from the Sportco and clothing disguises in his vehicle, was seen interacting with individuals in the white Honda in the days after

the burglary. Third, Mr. Bunta's vehicle was seen parked in front of the Yakima home with the white Honda the day before defendant was contacted.

This, Mr. Bunta's admission that there were others involved, and defendant's suspicious behavior when he approached the white Honda and placed something in the trunk, all led officers to have a reasonable, articulable suspicion that defendant was involved in the burglary. Such suspicion was not based upon a "hunch" or unreliable information as in *Doughty* and *Martinez*. Rather, it was a particularized and well founded suspicion based upon the officer's observations and independently correlating pieces of evidence. The trial court did not abuse its discretion in denying defendant's motion to suppress as the officers had a reasonable, articulable suspicion to stop the defendant.

2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT WAS ARMED WITH A FIREARM DURING THE COMMISSION OF THE CRIMES OF BURGLARY IN THE FIRST DEGREE, CONSPIRACY TO COMMIT BURGLARY IN THE FIRST DEGREE AND TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE⁵, AND TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing*

⁵ See Footnote 2 detailing the State's motion to correct the judgment and sentence and merge the conspiracy to commit burglary in the first degree and conspiracy to commit trafficking in stolen property in the first degree counts into a single count. Given this motion, the State is responding to the sufficiency of the evidence argument in this section with the belief that these two counts will merge.

State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said, “[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when

the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. The State is not required to prove a nexus between the defendant, the firearm and the charged offense when the charged offense is burglary in the first degree and the evidence suggests there was an actual possession of the firearm.

To prove a defendant guilty of first degree burglary, the State had to prove, among other elements, that the defendant was armed with a deadly weapon. RCW 9A.52.020; CP 79-81. Under the statute, if one of the participants is armed, all the participants are armed, and all are guilty of burglary in the first degree. See *State v. Randle*, 47 Wn. App. 232, 734 P.2d 51 (1987). A burglar can transform an ordinary burglary into a first degree burglary by arming himself with a gun he finds in the building. See *State v. Faille*, 53 Wn. App. 111, 766 P.2d 478 (1988). The statutory definition for "deadly weapon" reads:

"Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, devise, instrument, article, or substance, including a "vehicle" as defined in this section, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6). The statute creates two categories of deadly weapons: deadly weapons per se and deadly weapons in fact. A firearm,

whether loaded or unloaded, is a deadly weapon per se. *State v. Hernandez*, 172 Wn. App. 537, 543, 290 P.3d 1052 (2012).

When first degree burglary involves deadly weapons per se, specifically firearms taken in the course of a burglary, "no analysis of willingness or present ability to use a firearm as a deadly weapon" is necessary. *Id.* (citing *In re Personal Restraint of Martinez*, 171 Wn.2d. 354, 367, 256 P.3d 277 (2011) quoting *State v. Hall*, 46 Wn. App. 689, 695, 732 P.2d 524 (1987)). For purposes of first degree burglary, defendants are armed with a deadly weapon if a firearm is easily accessible and readily available for use by the defendants for either offensive or defensive purposes. *Hernandez*, at 543 (citing *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007)). When the defendant or an accomplice has actual possession of a firearm, sufficient evidence supports a first degree burglary conviction despite the firearm being unloaded and no evidence showing that defendant intended to use it. *Hernandez*, at 534-544 (citing *State v. Faille*, 53 Wn. App. 111, 114-115, 766 P.2d 478 (1988) (sufficient evidence to sustain first degree burglary conviction where defendant was in possession of unloaded firearms but did not intend to use them); see also *State v. Speece*, 56 Wn. App. 412, 416 783 P.2d 1108 (1989) (no inquiry into willingness or present ability to use weapon is necessary for deadly weapon per se).

In the present case, defendant argues there was insufficient evidence presented that he or an accomplice was armed with a firearm because under *State v. Brown, supra*, the State was required to prove a nexus between the defendant, the firearm and the charged offenses. Brief of Appellant, 23, 30. However, this court has specifically addressed this issue in *State v. Hernandez, supra*, a case from 2011 with a similar fact pattern to the present case and applied an analysis distinguishing that case from *State v. Brown, supra*.

The 2007 *Brown* case involved Brown and another man who burglarized a home, but did not remove anything from the home and when the homeowner returned, he found a rifle on the bed rather than in the closet where it was normally kept. *Brown*, 162 Wn.2d at 426. Based on the firearm's location, the trial court convicted Brown of first degree burglary and applied a firearm sentence enhancement. *Id.*, at 427. The Supreme Court vacated the first degree burglary conviction and firearm enhancement holding that the circumstance under which the weapon was found did not support a conclusion that Brown was "armed" as intended by the legislature. It referenced a long line of case law which has held that the mere presence of a deadly weapon at the scene of a crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed. *Id.* at 431. *Brown* held

that "[s]imply constructively possessing a weapon on the premises sometime during the entire period of illegal activity is not enough to establish a nexus between the crime and the weapon" and determining whether to apply the nexus requires analyzing "the nature of the crime, the type of weapon, and the circumstances under which the weapon is found." *Id.* at 432-433 (citing *State v. Schelin*, 147 Wn.2d 562, 570, 55 P.3d 632 (2002)).

This court distinguished *Hernandez* from the facts of *Brown* relying primarily on the fact that a nexus is not required in cases involving actual, not constructive, possession. In both cases, defendants were convicted of first degree burglary and the court applied firearm sentencing enhancements. But, based on the lack of facts establishing any actual possession of the firearm in *Brown*, the court held there was insufficient evidence to find defendant was "armed" with a firearm as intended by the legislature for purposes of the firearm enhancement and the first degree burglary conviction. In contrast, in *Hernandez*, defendant and his accomplices burglarized a home, stole a 20 gauge shotgun and placed it in the back of their vehicle, thus there was evidence Hernandez and his accomplices had actual possession of the firearm. *Hernandez*, 172 Wn. App. at 544.

Relying on *State v. Easterlin*, the *Hernandez* court stated that the "nexus" requirement is not applicable to firearm enhancements where there is actual, not constructive, possession of a firearm. In *State v. Easterlin*, 159 Wn.2d 203, 206, 149 P.3d 366 (2006), the Supreme Court held that actual possession of a firearm is almost always sufficient to show a nexus and that Easterlin's statements that he possessed drugs and was armed was sufficient for a trier of fact to find that he was armed to protect his drugs. *Id.*, at 209. In actual possession cases, it is rarely necessary to go beyond the commonly used "readily accessible and easily available" instruction. Where the defendant actually, instead of constructively, possesses a firearm, the State need not show more than that the weapon was easily accessible and readily available unless some unique circumstance so requires. See *Easterlin*, 159 Wn.2d at 209 n. 3 (giving examples of such circumstances, including possession of a ceremonial weapon for religious purposes or a kitchen knife in a picnic basket). In *Hernandez*, this court stated, "a nexus requirement is inapplicable when the charge is first degree burglary and a firearm is stolen." 126 Wn. App. 170, 173, 107, P.3d 773 (2005), review granted & aff'd on other grounds by 159 Wn.2d 203, 149 P.3d 366 (2006); *Id.* at 545. Thus, in accordance with *Easterlin*, the *Hernandez* court held that the distinguishing factor to determine whether a nexus requirement is applicable is whether there is evidence supporting

actual or constructive possession of the firearm and the circumstances surrounding it.

Defendant attempts to argue that because *Brown* involved both a first degree burglary conviction and firearm enhancements, whereas *Hernandez* discussed a first degree burglary conviction only, the present case is unlike *Hernandez* and similar to *Brown*. See Brief of Appellant, at 30. However, based on the case law and the analysis described above, it was not what the charges were that made the difference, it was the fact pattern in the cases which altered what the analysis stood for. In fact, in its analysis, *Hernandez* held "[S]o even if we were considering a firearm enhancement, a "nexus" finding is not required because the possession was actual, not constructive." *Hernandez*, 172 Wn. App. at 544. As such, whether a nexus requirement is necessary is a determination to be made from the type of possession and facts of the case, not solely what the charges are.

- b. There was sufficient evidence presented for the jury to conclude defendant or an accomplice was armed with a firearm during the commission of the crime of burglary in the first degree and the related firearm enhancement.

In the present case, when the evidence is viewed in the light most favorable to the State, there is sufficient evidence for a jury to find

defendant or an accomplice had actual possession of a firearm and was "armed" during the commission of the crime of burglary in the first degree. The Sportco gun Salesman Mr. Wells testified that the day before the burglary, three men came to the store and acted suspiciously in the same area the guns were later stolen from. 14RP 679-682. He described one of the men as having a tattoo similar to the one on defendant's neck. 14RP 682-683. The next day, 42 guns were stolen from Sportco during which a white Honda registered to the defendant's girlfriend was seen near the store multiple times on the surveillance video. 11RP 171-179, 184, 202, 238-245.

Defendant was stopped while driving the white Honda after he was observed acting suspiciously and placing something in the trunk of the vehicle. 12RP 317-320, 368-372. Police found a 9mm handgun later identified as one of the Sportco guns in the trunk of the vehicle, ammunition in the center console, gloves on the floor, and papers with the defendant's name on them in the glove box. 11RP 267-269, 14RP 620-625. The day of the burglary, defendant's phone showed 20 calls between him and David Bunta, another man who admitted to and pleaded guilty to committing the Sportco burglary with other individuals, but refused to name them. 13RP 589-591, 14RP 603-606, 698. In Mr. Bunta's vehicle, police recovered a 9mm handgun later identified as one of the firearms

stolen from Sportco, a Santa Clause suit, two rolls of duck tape, two black masks and four gloves. 12RP 285-304.

Andrew Stearman testified that defendant and two other Asian men came to his residence on December 17, 2011, with several firearms intending to sell them to a man named Wayland Witten. 12RP 420-426; Plaintiff's Exhibit 41. Mr. Stearman said the defendant was laughing and told him that he stole the guns. 12RP 415-422; Plaintiff's Exhibit 41.

Several Sportco surveillance video's were shown to the jury which captured what occurred outside and inside of the store between 3 and 3:30 a.m. the night of the burglary. The video of the outside showed a white vehicle drive by the store multiple times and light figures going back and forth between the vehicle and the store at different points. Plaintiff's Exhibit 29. The video displaying the interior of the store shows two individuals enter the store wearing dark clothing and gloves and one individual wears a black ski mask with a furry hat and the other wears a Santa hat. Plaintiff's Exhibit 31. When they enter the store, neither individual has anything in their hands. Plaintiff's Exhibit 31. However, when they leave the store, each individual is carrying a large gun in their left hand and the Santa hat wearing individual has a long narrow black bag in his right hand and a large blue duffel bag slung over his shoulder. Plaintiff's Exhibit 31.

Ultimately, there was substantial evidence presented throughout the trial for a jury to conclude that defendant or an accomplice had actual possession of a firearm during the burglary and was therefore armed with a deadly weapon during the commission of the crime. In fact, at the conclusion of the State's case, defense counsel filed a motion to dismiss based on this very issue. 14RP 707. After hearing argument and researching much of the case law discussed in the above analysis, the trial court denied the motion. 14RP 707-724. As described above, this case is similar to *Hernandez* involving the actual possession of a firearm and unlike *Brown* which discussed situations involving constructive possession of a firearm. Thus, the nexus requirement is not necessary in the present case and there was sufficient evidence for the jury to find defendant was armed with a firearm during the commission of the burglary in the first degree.

- c. There was sufficient evidence presented for the jury to find in the special verdict form that defendant or an accomplice was armed with a firearm during the commission of the conspiracy to commit burglary in the first degree and trafficking in stolen property in the first degree.

Sufficient evidence existed for the jury to conclude that defendant or an accomplice was armed with a firearm during the conspiracy to

commit burglary in the first degree and trafficking in stolen property in the first degree. Again, the Sportco gun Salesman Mr. Wells testified that the day before the burglary, three men came to the store and acted suspiciously in the same area the guns were later stolen from. 14RP 679-682. He described one of the men as having a tattoo similar to the one on defendant's neck. 14RP 682-683. He testified they wore very dark clothing, had their hoods up over their heads, had baseball caps on, kept their hands in their pockets and did not make eye contact. 14RP 680. The next day, 42 guns were stolen from Sportco during which a white Honda registered to the defendant's girlfriend was seen near the store multiple times on the surveillance video. 11RP 171-179, 184, 202, 238-245.

On defendant's phone, police found text messages discussing the sale of firearms to different individuals. 12RP 353-355; Plaintiff's Exhibit 38. Andrew Stearman testified that defendant and two other Asian men came to his residence on December 17, 2011, with several firearms in duffle bags intending to sell them to a man named Wayland Witten. 12RP 420-426; Plaintiff's Exhibit 41. At one point he testified defendant had sent him a photograph of multiple guns laying on a bed. 12RP 402-403, 415; 13RP 474-476; Plaintiff's Exhibit 32.

While conspiring with his co-defendants to traffic the firearms, defendant is "armed" under the legislature's definition of armed when he

sends pictures of the guns on the bed and he and his co-defendant show up at Andrew Stearman's house with duffle bags full of the guns. As a result, sufficient evidence existed for the jury to conclude that during the commission of the conspiracy to commit burglary in first degree and trafficking in stolen property in the first degree, defendant or an accomplice was armed with a firearm.

- d. There was sufficient evidence presented for the jury to find in the special verdict form that defendant or an accomplice was armed with a firearm during the commission of the crime of trafficking in stolen property in the first degree.

Sufficient evidence also existed for the jury to conclude that defendant was armed with a firearm during the crime of trafficking in stolen property in the first degree. Andrew Stearman testified that defendant and two other Asian men came to his residence on December 17, 2011, with several firearms intending to sell them to a man named Wayland Witten. 12RP 420-426; Plaintiff's Exhibit 41. Mr. Witten later pleaded guilty to unlawful possession of a firearm and trafficking in stolen property stemming from incidents which occurred on December 17th, 2011. 13RP 580-582. Mr. Stearman testified that defendant gave him a gun with the second amendment etched on it in exchange for money. 12RP 400-402, 409-415; 13RP 476-478. There were text messages between defendant and Mr. Stearman discussing how Mr. Stearman paid

money for the gun. 12RP 409-415. All of this evidence, when viewed in the light most favorable to the State, is evidence that defendant was armed with a firearm when he sold guns to Wayland Witten and Andrew Stearman.

In conclusion, when the evidence is viewed in the light most favorable to the State, sufficient evidence existed for the jury to find defendant was armed with a firearm during the commission of the crimes above.

3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE NEXUS ISSUE CONCERNING DEFENDANT BEING ARMED WITH A FIREARM IN ACCORDANCE WITH THE RELEVANT CASE LAW.

A trial court's jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law,

permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

In the present case, defendant objected to the trial court's instructions to the jury with regard to the crime of burglary in the first degree. 15RP 761. The court instructed the jury that:

"Armed with a firearm", for the charge of Burglary in the First Degree only means that the defendant or an accomplice had a firearm in his possession or control and that the firearm, whether loaded or not, was readily available for offensive or defensive use.

CP 230, Instruction No. 25(a). Defendant requested the court also include in the burglary in the first degree definitions the so called "nexus" definition that it included in the instructions defining the special verdict form for deadly weapons. 15RP 761. That instruction read:

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive and defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider among other factors, the nature of the crime and the circumstances surrounding the commission of the crime.

CP 243, Instruction No. 37.

The court declined to include the "nexus" definition in the burglary in the first degree instructions stating:

Well I will acknowledge the defendant's exceptions for the reasons previously given. Concerning the *Speece* case and also the actual WPIC definition regarding burglary in the first degree, I think these instructions allow both sides to argue their respective theories of the case, are consistent with current case law.

15RP 761. On appeal, defendant argues it was error for the court to decline to include the "nexus" definition in the burglary in the first degree instructions. Brief of Appellant, 30-32. However, as discussed in the preceding analysis, the nexus requirement is unnecessary in cases involving burglary in the first degree when the facts of the case suggest actual possession of a firearm. In this case, the two individuals who burglarized the Sportco are seen entering the store with nothing in their hands and leaving carrying large firearms in their left hands. Plaintiff's Exhibit 31. The individual wearing the Santa hat is also carrying a large blue duffle bag presumably full of the approximately 40 handguns that were stolen. Plaintiff's Exhibit 31. Case law has specifically held such an instruction is not necessary when the firearm is taken and removed from the building during the commission of a burglary in the first degree. *See State v. Hernandez*, 172 Wn. App. 537, 543, 290 P.3d 1052 (2012). The trial court properly ruled in accordance with the relevant case law and declined to include the instruction in the burglary in the first degree definitions, but included it in the special verdict definitions. This allowed

defendant to argue his theory of the case and properly informed the trier of fact of the applicable case law.

In fact, defense counsel clarified at one point that he was allowed to argue the theory that defendant was not armed with a firearm during the commission of the crime. The court and the State responded that defendant was free to argue that theory as it was an issue the jury needed to make a factual determination about in the special verdict forms. 14RP 737-738. Defense counsel then did include that argument in his closing and the jury, based on their findings, chose to disagree with that theory of the case. 15RP 835-836. Given that defense counsel was able to argue his theory of the case and the court instructed the jury in accordance with the case law on the issue, the trial court did not err in its instructions to the jury on this issue.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO INSTRUCT THE JURY ON BURGLARY IN THE SECOND DEGREE AND CONSPIRACY TO COMMIT BURGLARY IN THE SECOND DEGREE WHEN THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT SUCH INSTRUCTIONS.

In general, the crimes charged in an information are the only crimes of which a defendant may be convicted and on which a jury may be instructed. *State v. McJimpson*, 79 Wn. App. 164, 171, 901 P.2d 354,

review denied, 129 Wn.2d 1013, 917 P.2d 576 (1996). Nevertheless, a defendant may be convicted of, and a jury instructed on, a crime that is a lesser offense necessarily included in the offense charged. ***State v. Berlin***, 133 Wn.2d 541, 544-545, 947 P.2d 700 (1997). The right to present a lesser included offense to the jury is a statutory right. RCW 10.61.006. Either the defense or the prosecution may request a lesser included offense instruction. ***State v. Tamalini***, 134 Wn.2d 725, 728, 953 P.2d 450 (1998).

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. ***State v. Walker***, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. ***State v. Lucky***, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by*, ***State v. Berlin***, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id.* The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). In other words, a criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

A defendant is entitled to an instruction on an inferior degree offense when: (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (citing *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). The first two requirements encompass the legal component of the test, while the third requirement encompasses the factual component of the test. *Id.*, at 454-455.

In determining whether there is sufficient evidence to support the instruction, the evidence is viewed in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448,

455, 6 P.3d 1150 (2000). The factual prong⁶ requires affirmative evidence that defendant committed the lesser and only the lesser crime. *State v. Brown*, 127 Wn.2d 749, 755, 903 P.2d 459 (1995). It is not enough that a jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes defendant's theory on the lesser included offense before an instruction will be given. *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). Specifically, a lesser included offense instruction should be given only "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *Fernandez-Medina*, 141 Wn.2d at 456, (*quoting State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

In the present case, defendant was charged with one count of burglary in the first degree and one count of conspiracy to commit burglary in the first degree. CP 79-81. Defendant requested that the jury be instructed on the lesser included offenses of burglary in the second degree and conspiracy to commit burglary in the second degree. 14RP

⁶ While many of these cases discuss the factual component *Workman* test for lesser included offense instructions, *State v. Fernandez-Medina* held that the third component of the inferior degree offense is the same as the factual component of the *Workman* test for lesser included instructions. *See State v. Fernandez-Medina*, 141 Wn.2d, 448, 455, 6 P.3d 1150 (2000).

734-737. The trial court declined to give the lesser included offense instructions and on appeal, defendant argues this was error. 14RP 734-737.

In reviewing the elements of the two offenses, it is apparent that the legal component of the test is satisfied as burglary is a single offense divided into three degrees and second degree burglary is an inferior degree of first degree burglary. *See State v. McDonald*, 123 Wn. App. 85, 90, 96 P.3d 468 (2004). As such, the question of whether to give the inferior degree offense instruction relies upon whether the factual component of the test is satisfied. In this case, meaning whether there was affirmative evidence that defendant committed only burglary in the second degree. A person commits the crime of burglary in the second degree when he or she enters or remains unlawfully in a building with the intent to commit a crime against a person or property therein. RCW 9A.52.030; WPIC 60.03. In contrast, burglary in the first degree contains the same language, but adds the additional element requiring that State to prove that "in entering or while in the building or in immediate flight therefrom, that person or an accomplice is armed with a deadly weapon or assaults any person." RCW 9A.52.020; WPIC 60.01.

In the present case, the facts alleged that in a period of approximately three minutes, two individuals entered the empty Sportco

building, stole 42 firearms by placing them in bags and ran out to a waiting vehicle where they fled the scene. 11RP 132-143, 201-203, 238-247; Plaintiff's Exhibit 29, 31. Nothing else was stolen from the store, no people were assaulted, and no other property was damaged in the process. In reviewing *State v. Speece*, 56 Wn. App. 412, 783 P.2d 1108 (1989), *affirmed*, 115 Wn.2d 360, 798 P.2d 294 (1990), and declining to give the burglary in the second degree instruction, the trial court described:

if there's some evidence that there was just entry in a building with intent to commit a crime but no weapons were taken, arguably you could get a second degree burglary instruction. I think when the only evidence that is here before the jury is there was an entry of the Sportco. The only thing that were taken were the guns and ammo. It was a very limited entry. They were in and out within a matter of less than three minutes according to the video. There wasn't anything else taken. There wasn't clothing taken or dry foods taken or beef jerky taken. They were guns that were taken, and I think I would need some additional authority to say that there should be a lesser here when there was no testimony as to any other intent involved other than to take weapons.

...

There is no affirmative evidence here that the defendant was not armed. If the jury believes he was the one that entered it, then there's no other evidence out there that could say he was not armed during the commission of the burglary, either himself directly or accomplices that entered the building and removed weapons.

14RP 735-736.

In essence, there were no facts presented which suggested that the crime occurred any differently than has been described above. There was

no evidence that there was any alternative intent in entering the store or that anything was else taken other than the firearms. Defendant's defense was that he was not involved. In such a situation, the jury has a choice to either believe the State in that two men entered the Sportco and stole 42 firearms or they could choose to believe it did not happen. There was no alternative theory of how the crime occurred and defendant has failed to articulate on appeal any facts which would support an alternative theory.

When this understanding is looked at in context with the analysis described in the preceding section discussing *Hernandez, supra*, and *Brown, supra*, and how "armed with a firearm" is defined in first degree burglary cases where deadly weapons per se are taken, it is apparent that in other words, the jury's decision is solely whether or not first degree burglary occurred. If the firearms were stolen, the burglars were armed and committed first degree burglary under *Hernandez*. If no firearms were stolen, there was no evidence to support any other crime and thus, no second degree burglary instruction is warranted. Understanding this, the trial court properly exercised its discretion when it declined to give the second degree burglary instruction on this basis.

Defendant attempts to argue that because the trial court relied upon *Speece* which predates *Brown*, it erred in declining to give the burglary in the second degree instruction. This argument is incorrect because, as

described above, the *Brown* case discussed a different and entirely unique set of facts wherein the burglars did not remove anything from the home, specifically any firearms. The court held that on those facts alone, there was not sufficient facts for the jury to find the defendants' were armed with a firearm for purposes of first degree burglary as intended by the legislature. 162 Wn.2d 422, 173 P.3d 245 (2007). In contrast, *Speece* discusses declining to give a second degree burglary instruction in a case with a similar fact pattern to the present case saying:

Speece's defense at trial was solely that he did not commit the burglary. The State established prima facie evidence that the burglar took two guns. Speece in no way disputed this evidence. Thus, there is no affirmative evidence in the record that would support an inference that Speece was not armed during the burglary, once the jury found that he was, indeed, the burglar. Therefore, Speece was not entitled to a lesser included offense instruction on second degree burglary.

State v. Speece, 115 Wn.2d 360, 363, 798 P.2d 294 (1990). The fact that *Speece* predates *Brown* is irrelevant when the court looks at how distinguishable the facts of the present case are from *Brown* and how closely analogous they are to *Speece*. *Brown* does not overturn the proposition that *Speece* stands for; it simply clarifies that such a proposition does not fit within the particular fact specific set of circumstances in *Brown* where no firearms are stolen.

When there are no facts supporting any theory other than defendant or his accomplices stole a firearm, there is no affirmative evidence which would entitle defendant to an instruction on the inferior degree offense of burglary in the second degree or conspiracy to commit burglary in the second degree. As such, the trial court did not abuse its discretion in declining to give such instructions.

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO GIVE A LIMITING INSTRUCTION ABOUT EVIDENCE WHICH WAS ADMITTED FOR MULTIPLE PURPOSES UNDER MULTIPLE EVIDENCE RULES.

A trial court's ruling on the propriety of a limiting instruction is reviewed for abuse of discretion. *State v. Ramirez*, 62 Wn. App. 301, 305, 814 P.2d 227 (1991). The court must give the instruction in situations where the evidence is admissible only for a limited purpose and an appropriate limiting instruction is requested. ER 105; *State v. Aaron*, 57 Wn. App. 277, 281, 787 P.2d 949 (1999).

In the present case, defendant argues the trial court erred when it chose not to give a limiting instruction regarding Andrew Stearman's testimony. During Andrew Stearman's testimony, when he was asked whether he saw the defendant in possession of firearms in mid to late December, he stated that he could not recall. 12RP 397. Because he

could not recall that incident, the prosecutor asked Mr. Stearman if he remembered the hour and a half audio video recorded conversation he had with law enforcement officers where he told the officers about that December 17, 2011, incident. 12RP 398. Mr. Stearman admitted he remembered speaking with the officers, but said he could not remember what he told them. 12RP 398.

The prosecutor continued to question Mr. Stearman about the events of the evening of December 17, 2011, and when confronted with prior statements he made to the detectives, Mr. Stearman repeatedly stated that he did not remember exactly what he said to the officers. 12RP 406-407, 416. Because Mr. Stearman could not remember what he told the detectives, the prosecutor asked to play the relevant portions of the video where Mr. Stearman tells the officers what happened on December 17, 2011, in order to refresh his recollection about the statements he made to the officers. 12RP 417-418. Portions of the video were played three more times during Mr. Stearman's testimony after he stated that he could not remember what he told the detectives. 12RP 421-422, 424-425.

About halfway through his testimony, Mr. Stearman began to change his answers. Rather than saying he did not remember what he told the detectives, he began denying statements he made to them or saying he told the detectives something different. In response to these answers and

three more times after, the prosecutor played portions of the video for impeachment purposes using prior inconsistent statements Mr. Stearman made to the detectives. 12RP 425-426; 13RP 484-488.

Basically, part of the purpose of playing the video was to refresh Mr. Stearman's recollection under ER 803(5)⁷ of what he told detectives when he said he did not remember and the other part of playing the video was for purposes of impeachment using prior inconsistent statements under ER 613⁸. Mr. Stearman's response to the question determined the prosecutor's purpose in playing portions of the video. Had Mr. Stearman remembered what he told the detectives and admitted he made different statements to them than what he was testifying to that day, it is likely the video would not have been played as there would not have been any need to refresh his recollection or any need to use prior inconsistent statements for impeachment purposes. It was the fact that while he remembered the interview, but he could not remember the statements he made to the detectives which allowed the State to introduce the video to refresh his

⁷ ER 803(5) reads, "Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

⁸ ER 613 allows parties to impeach witnesses using prior inconsistent statements, but the statement may not be used as substantive evidence.

recollection. Similarly, it was the fact that he denied making statements or claimed to have said something different which allowed the State to use the video to impeach him with his prior inconsistent statements.

As a result, the video was used for mixed purposes. Portions of it were played as substantive evidence under ER 803(5) and portions of it were played solely for the purposes of impeachment under ER 613. The rule regarding limiting instructions entitled "Limited Admissibility" reads:

[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

ER 105. Essentially, the rule requires a limiting instruction in situations where the evidence is admitted *only* for a limited purpose i.e. impeachment purposes. Here, where the evidence is admitted for multiple purposes, no limiting instruction is necessary as the jury is using the evidence for overlapping purposes. The trial court understood this when it ruled:

as to Mr. Stearman, I do think that his statements were made both for the -- or *the tapes were used for the purpose of refreshing his recollection and also to demonstrate his prior inconsistent statements*. In any event, he was also subject to further direct examination on those statements, some of which he admitted making, some of which he expressed some confusion. He was also subject to cross-examination regarding those statements, some of which he attempted to clarify in direct contravention to the taped

interview that was given. So I think as to Stearman, the issue of his credibility and the weight of his testimony is clearly one for the jury to deal with in its entirety, and *I don't think it's totally for purposes of impeachment...*

14RP 731-732. (Emphasis added). Because many of the statements in the video were used for overlapping purposes of both refreshing Mr. Stearman's recollection and impeaching him, the trial court properly exercised its discretion in declining to give a limiting instruction with regard to this evidence.

In part of his briefing on this issue, defendant argues that the State did not properly lay the foundation before playing portions of the video of Mr. Stearman's interview. Brief of Appellant 39-41. However, that is a separate issue regarding the admissibility of the evidence itself not having anything to do with the issue defendant has raised about whether a limiting instruction was required. Furthermore, during the trial, defense counsel never objected to the admission of any portion of Mr. Stearman's interview on foundational grounds. A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Id.* at 421. By failing to object, defense counsel deprived the State of the opportunity to remedy the situation and lay the proper foundation. "[A] litigant cannot remain silent

as to claimed error during trial and later, for the first time, urge objections thereto on appeal." *Bellevue Sch. Dist 405 V. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). As a result, the issue of foundation is not only waived on appeal, it is not within the scope of review of the issue the defendant has raised on appeal.

6. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT FOR NEGLECTING TO REVIEW AN EXHIBIT OR OBJECT TO A SINGLE MISSTATEMENT OF THE EVIDENCE DURING CLOSING WHEN THE ENTIRE RECORD OF HIS PERFORMANCE AND THE EVIDENCE AGAINST DEFENDANT IS REVIEWED.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered

suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule

forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177

(1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

In the present case, defendant claims that his counsel was ineffective when he failed to examine the documents that were found in the white Honda and failed to object to the State's representations in closing that the documents found in the Honda contained only defendant and Ms. Soeung's names on them. However, a review of the record shows not only why defense counsel's performance as a whole was not ineffective, but how defendant is unable to show there is a reasonable probability that but for this error, the outcome of the trial would have been different.

During Detective Nolta's testimony, when he was asked about whether items showing ownership were found in the white Honda, he responded "Other items were located. Various documents and that in some of them had Mr. Sun's name on them." 11RP 269. Detective Nolta's testimony was stopped in order to accommodate the scheduling of other witnesses and he was re-called to the stand several days later. 11RP 276-

278. When he was re-called, the prosecutor discussed the specific documents that had the defendant's name on them and where they were located. 14RP 624-625. When the State moved to admit those documents, there was a hearing outside the presence of the jury where defense counsel objected on the grounds the documents were more prejudicial than probative. 14RP 625, 638-640. The trial court overruled the objection and admitted the documents. 14RP 638-640.

During closing, while discussing the documents found in the Honda, the State told the jury "that paperwork is the defendant's name and Phalay's name only" and there was no objection from defense counsel. 15RP 802. After both parties had finished their closings and rebuttal, the State notified the court that there were in fact other documents found in the vehicle which contained other people's names on them. 15RP 869. He admitted he and defense counsel had failed to look through the documents until that point. 15RP 870. Defense counsel moved for a mistrial based on the improper testimony and the court denied the motion. 15RP 872. After some discussion, it was decided that the documents contained in Plaintiff's Exhibit 49 would be admitted to the jury.

First, defendant is unable to show his defense counsel's performance over the course of the trial was deficient on the basis of one alleged mistake. While defense counsel may have mistakenly failed to

inspect every document in the exhibit and relied upon the information provided to him during discovery, one such mistake does not render his entire performance deficient. Under *Strickland*, appellate courts review defense counsel's performance not just with regard to the alleged error, but with regard to their performance as a whole.

In the present case, the record shows defense counsel was an effective advocate for his client. At the beginning of the trial, defense counsel brought CrR 3.5 and CrR 3.6 motions to suppress and continually notified the court about his concerns with his ability to interview several uncooperative witnesses. 10RP 31-82; CP 59-67. During the trial, defense counsel cross examined the State's witnesses and made several objections and motions attempting to limit their testimony. Specifically, defense counsel brought several motions to limit the purposes for which the jury could consider several witnesses testimonies. 14RP 636-638, 725-734. At the conclusion of the case, defense brought a motion to dismiss based on the State not proving defendant was armed with a firearm. 14RP 708. He also requested lesser included instructions for burglary in the second degree and conspiracy to commit burglary in the second degree. 14RP 712-724, 734-738. As such, a review of the record overall shows defendant received effective assistance over the course of

the entire trial and one minor alleged mistake does not render his entire performance deficient.

Second, defendant is also unable to meet the second prong of *Strickland* and show that there is a reasonable probability that, but for defense counsel's error, the result of the trial would have been different. Defendant contends that because the State commented in closing that there were only documents with defendant and Ms. Soeung's names on them, it infers that only he and Ms. Soeung were the drivers of the white Honda, thereby leading the jury to conclude he participated in the burglary as the driver of the white Honda. However, not only did the jury hear and see information that other individuals drove the Honda, there was a substantial amount of other evidence connecting defendant with the Honda and the burglary.

During the trial, the jury heard information implying that other people drove the Honda. Detective Nolte first testified about the documents in the white Honda by saying "Other items were located. Various documents and that in some of them had Mr. Sun's name on them." 11RP 269. He actually initially suggested to the jury that defendant's name was not the only one found on the documents in the Honda by his comment. Ms. Soeung also testified that Honda was a

"community car" and anybody in the home she shared with multiple people could drive it. 13RP 549-550, 553.

Further, the documents that contained the other names went back to the jury to view during deliberations. The documents containing other people's names on them included earning sheets and payment receipts. Plaintiff's Exhibit 49; 15RP 872-877. In contrast, the documents specifically relating to the Honda had either defendant's name or Phalay Soeung's, his girlfriend and registered owner of the vehicle, name on them. Plaintiff's Exhibit 49; 15RP 872-877. Thus, while there are documents containing other people's names, none of them had any direct relation to the Honda itself in comparison to the documents with defendant's name on them. Regardless, all of those documents went back to the jury room for the jury to be able to view during deliberations. Thus, although it was not explicitly stated by defense counsel, the jury was able to see the evidence and make inferences there from. 15RP 879.

In addition, given the amount of evidence connecting defendant to the burglary and the white Honda, it is unlikely that defense counsel specifically pointing out there were documents found in the Honda with other people's names on them would have in any way changed the outcome of the trial. The vehicle was registered to defendant's girlfriend at the home where they lived together. 11RP 184, 272; 13RP 543-546.

Ms. Soeung's brother testified at trial that the white Honda was his sister's car that both she and defendant drove. 13RP 535. Defendant was actually stopped while driving the car after placing something in the trunk where officers later find one of the stolen Sportco guns. 12RP 369-372. Officers also found ammunition in the center console and gloves on the floor of the Honda. 11RP 267-269, 14RP 620-625.

Mr. Stearman testified, somewhat conflictingly, that defendant and two other individuals showed up at his residence with several guns and defendant specifically sold him a gun that was stolen during the burglary. 12RP 415-426; Plaintiff's Exhibit 41. The day of the burglary, defendant's phone showed 20 calls between he and David Bunta, another man who admitted to and pleaded guilty to committing the Sportco burglary with other individuals, but refused to name them. 13RP 589-591, 14RP 603-606, 698. The Sportco gun Salesman Mr. Wells testified that the day before the burglary, three men came to the store and acted suspiciously in the same area the guns were later stolen from. 14RP 679-682. He described one of the men as having a tattoo similar to the one on defendant's neck. 14RP 682-683. Ultimately, given the amount of evidence connecting defendant to the burglary and the white Honda, it is unlikely that counsel pointing out that documents in the vehicle had other people's names on them would have altered the outcome of trial.

Defendant is also unable to show that defense counsel's failure to object to the prosecutor's comment about this during closing rises to the level that there is a reasonable probability the outcome of the trial would have been different. While the comment was a misstatement to the jury about the evidence, the jury was instructed to disregard any statements by the attorneys which were not supported by the evidence. Not only was the following instruction written into the packet that the jury received, it was read aloud to the jury by the judge prior to the attorneys' closings:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 203, Instruction No. 1; 15RP 766-767. Furthermore, defense counsel addressed this type of situation at the very beginning of his closing when he stated:

As Mr. Greer I think said, as you were instructed by Judge Orlando, what I say and what I argue to you or Mr. Greer has argued to you is not evidence in this case, although I will assure you that both of us are doing our very best to be accurate as we can in relaying to you what our recollection is of the evidence.... So, again, while we have no intention, and I assure you neither of us will ever intentionally misstate any of the evidence, if we happen to say something that doesn't ring true to you, we expect you to call us on it

when you get back to the jury room and say that's not the way I remember.

15RP 814. Thus, while it may have been a misstatement, it is likely that had the jury noticed this, they would have relied upon their notes and the documents themselves as they are instructed to under the law. Further, it is unlikely that such a singular comment and defense counsel's failure to object to it would have changed the outcome given the substantial evidence described above.

As such, defendant not only fails to show defense counsel's performance was deficient, defendant also fails to show that he was prejudiced by any deficiency wherein there is a reasonable probability the outcome of the trial would have been different. Defendant is unable to satisfy either the first or second prong of *Strickland* and his claim of ineffective assistance of counsel should be denied.

7. THE LAW DOES NOT REQUIRE
DEFENDANT'S PREVIOUS STRIKE
OFFENSES BE PROVED TO A JURY BEYOND
A REASONABLE DOUBT.

The Persistent Offender Accountability Act (POAA) is part of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A. RCW which provides that the court, rather than the jury, determines the defendant's sentence. *See* RCW 9.94A.500(1). The POAA mandates that courts

sentence "persistent offenders" to life imprisonment without the possibility of parole. RCW 9.94A.570. A criminal defendant is a "persistent offender" when he is an "offender" who: 1) has been convicted in this state of any felony considered a most serious offense; and 2) has, before the commission of the current offense, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525 - provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted. RCW 9.94A.030(37).

The Washington Supreme Court has identified two questions of fact relevant to persistent offender sentencing: (1) whether certain kinds of prior convictions exist and (2) whether the defendant was the subject of those convictions. In determining those prior convictions, like ordinary sentencing determinations under the SRA, the trial judge conducts a sentencing hearing and decides those questions by a preponderance of the evidence. There is no right to a jury trial at sentencing under the persistent offenders statutes, and the State is not obliged to prove the constitutional validity of prior convictions. *State v. Thorne*, 129 Wn.2d 736, 781-784,

921 P.2d 514 (1996); *State v. Langstead*, 155 Wn. App. 448, 228 P.3d 799 (2010); *State v. Manussier*, 129 Wn.2d 652, 682, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997).

Defendant initially argues that due process requires that any fact that increases defendant's sentence must be found by a jury beyond a reasonable doubt. However, this is directly in contrast to the line of case law that is well settled on this issue. In *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the United States Supreme Court held that prior convictions are sentence enhancements rather than elements of a crime, and therefore need not be proved beyond a reasonable doubt to a jury. In *Apprendi v. New Jersey*, the Court stated that "[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (emphasis added).

The Washington Supreme Court recognizes the *Apprendi* exception and has confirmed that prior felony convictions used to support a persistent offender sentence do not need to be proved to a jury beyond a reasonable doubt. *State v. Wheeler*, 145 Wn.2d 116, 121, 34 P.3d 799 (2001). After the United States Supreme Court's decision in *Ring v.*

Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the issue of whether proof of prior convictions had to be submitted to the jury was again brought before the Washington Supreme Court and again, it held that prior convictions need not be proved to a jury. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003). Then, in *Blakely v. Washington*, the Court again enunciated the rule it expressed in *Apprendi* regarding the exception for prior convictions. 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Most recently, the Washington Supreme Court affirmed Division II's holding in *State v. Witherspoon*, -- Wn.2d --, -- P.3d -- (No. 88118-9)(2014 WL 3537948), which addressed this issue. In doing so, the court stated that Washington courts have long held that for the purposes of the POAA, a judge may find the fact of a prior conviction by the preponderance of the evidence. *Witherspoon, supra* at 7. Specifically, they stated "[W]e have repeatedly held that the right to jury determinations does not extend to the facts of prior convictions for sentencing purposes." *Id.* (See *State v. McKague*, 172 Wn.2d 802, 803 N. 1, 262 P.3d 1225 (2011) (collecting cases); see also *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) ("In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt."); *State v. Smith*, 150 Wn.2d 135,

139, 75 P.3d 934 (2003) (prior convictions do not need to be proved to a jury beyond a reasonable doubt for the purposes of sentencing under the POAA)).

Despite challenges in both the United States Supreme Court and the Washington Supreme Court discussing the analysis in *Almendarez-Torres v. United States*, neither court has departed from the principle in *Apprendi* that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. Specifically, the Supreme Court has cautioned against arguments such as defendant's which attempt to manipulate the holding in *Apprendi* by saying:

We [the United States Supreme Court] do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

State v. McKague, 159 Wn. App. 489, 515, 246 P.3d 558 (2011) (emphasis in original) (citing *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)); see also *State v. Witherspoon*, 171 Wn. App. 271, 318, 286 P.3d 996 (2012), *aff'd* -- Wn.2d --, -- P.3d -- (No. 88118-9)(2014 WL 3537948). Defendant's argument is without merit and attempts to re-litigate issues that have long since been decided. The courts

have made clear that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt.

8. DISTINGUISHING BETWEEN A PRIOR
CONVICTION AS A SENTENCING FACTOR
AND AN ELEMENT DOES NOT VIOLATE
EQUAL PROTECTION WHEN A RATIONAL
BASIS EXISTS IN THE PURPOSE FOR DOING
SO.

Under both the state and federal constitutions, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless that classification also affects a semisuspect class. *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996). Recidivist criminals are not a suspect class and thus, defendant's challenge is subject to rational basis review. *Mannussier*, 129 Wn.2d at 673.

A statute survives rational basis review if the statute is rationally related to achieve a legitimate state interest and the classification does not rest on grounds that are wholly irrelevant to achieving the state interest. *State v. McKague*, 159 Wn. App. 489, 518, 246 P.3d 558 (2011) (*citing Schoonover v. State*, 116 Wn. App. 171, 182, 64 P.3d 677 (2003)). The

burden is on the party challenging the classification to show that it is purely arbitrary. *Thorne*, 129 Wn.2d at 771.

In the present case, defendant argues that distinguishing between a prior conviction as a sentencing aggravator and a prior conviction as an element is arbitrary and lacks a rational basis because the government interest in either case is to punish repeat offenders more severely. Brief of Appellant, at 61. This argument is similar to the argument advanced in the recently affirmed case of *State v. Witherspoon*, 171 Wn. App. 271, 304, 286 P.3d 996 (2012), *aff'd* -- Wn.2d --, -- P.3d -- (No. 88118-9)(2014 WL 3537948) in which the rational basis by the legislature for such a distinction is explored and explained. In that case, the court held that "there is a rational basis for distinguishing between 'persistent offenders' and 'nonpersistent offenders' under the POAA." *Id.* at 305. The court described:

[t]he legislature did not include all recidivists under the POAA, but specifically targeted the most serious, dangerous offenders. *Thorne*, 129 Wn.2d at 764, 921 P.2d 514. Notably, the purpose of the POAA is to improve public safety by placing the most dangerous criminals in prison and reduce the number of serious, repeat offenders by tougher sentencing. RCW 9.94A.555. And it is within the legislature's discretion to define what facts constitute elements of the crime and the penalty for that crime, even where prior convictions as an element of the crime have the

singular effect of increasing punishment for recidivists.
Thorne, 129 Wn.2d at 767, 921 P.2d 514.

Id.

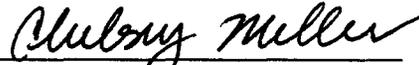
Specifically, the court cited two cases directly on point with defendant's argument in the present case. In *State v. Langstead*, 155 Wn. App. 448, 454-457, 228 P.3d 799, *review denied*, 170 Wn.2d 1009, 249 P.3d 624 (2010), and *State v. Williams*, 156 Wn. App. 482, 496-499, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011, 245 P.3d 773 (2010), Divisions One and Three of this court held that under the POAA there is a rational basis to distinguish between a recidivist charged with a serious felony and a person whose conduct is felonious only because of a prior conviction for a similar offense. As stated in *Langstead*, "[a] prior conviction when used as an aggravator merely 'elevates the maximum punishment' for a crime, while a prior conviction used as an element actually alters the crime that may be charged." *Langstead*, 155 Wn. App. at 455. As such, this court should find defendant's right to equal protection was not violated as the courts have already considered defendant's argument that there is no difference in the purpose behind using a prior conviction as a sentencing aggravator and a prior conviction as an element and found such an argument to be without merit.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: August 14, 2014.

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Pierce County
Prosecuting Attorney



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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. Mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/14/14 Johnson
Date Signature

PIERCE COUNTY PROSECUTOR

August 14, 2014 - 3:27 PM

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