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NO. 63636-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN HUGGINS,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Huggins was convicted of possessing stolen property in the first degree—a Dually pickup truck worth \$35,000. Huggins claims his conviction must be dismissed because he should have been charged with possession of a stolen vehicle instead. Is Huggins’s claim flawed because the rule requiring that a special statute be charged over a general statute only applies where the general statute will be violated in each instance where the special statute has been violated, and that is not the case here?

2. “Other suspect” evidence is admissible only if there is proof of circumstances that tend to clearly point out someone besides the one charged as the guilty party. Huggins sought to introduce evidence that another man burglarized the McConnell-Rhoads house and possessed the stolen pickup truck. But there was no evidence that linked the man to either crime. Did the trial court act within its discretion by excluding this purported “other suspect”?

3. Failing to allow cross-examination of a State’s witness is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment. Here, the court did not permit the defense to impeach a witness with the fact that she had entered an Alford plea to a crime that she may have later admitted committing. The trial court permitted other instances of the witness’s prior conduct as impeachment. Was it in the trial court’s broad discretion to limit impeachment evidence?

4. The trial court is in the best position to determine whether a trial irregularity can be cured with a jury instruction. In this case, a witness blurted out that Huggins and his girlfriend were known for doing “robberies and stuff.” The trial court sustained counsel’s objection, struck the remarks, and admonished the jury to disregard the comments. Was it within the trial court’s broad discretion to fashion a remedy short of declaring mistrial?

5. At sentencing, if a defendant is subject to community custody, the trial court can impose “crime-related” prohibitions. In this case, the defendant was convicted of possessing stolen property—the pickup truck. Inside the truck, police located empty alcohol containers. And, one person testified that Huggins was slurring his speech—he sounded like he had

just come from a bar. Did the sentencing court have the authority to impose a crime-related prohibition, such as requiring an alcohol test?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

There were nine charges, spread over two trials (the “Bellevue incidents” and the “Seattle incidents”), resulting in seven convictions.¹ CP 77-78, 169-73, 230-44. The trial court imposed a standard range sentence of 254 months, including three firearm enhancements. CP 326, 334.

2. SUBSTANTIVE FACTS

a. Bellevue Incidents.

On July 28, 2007, around 9:30 p.m., John McConnell, his wife, Virginia Rhoads, and their friend, Marybeth Anthony, returned home from Portland. 4RP 12, 14, 16-17, 91, 96.² McConnell saw a white cargo van parked in his driveway. 4RP 19, 93. The garage door was open and McConnell saw a man moving inside the house. 4RP 19, 26. He got out of his car to see what was happening. 4RP 28.

¹ The charges and verdicts are listed in Appendix A.

² The verbatim report of proceedings consists of 16 volumes, designated as follows: 1RP (May 5, 2008), 2RP (May 6 and 7), 3RP (May 8), 4RP (May 12), 5RP (May 13), 6RP (May 15), 7RP (May 19 and 20), 8RP (May 21, 22 and 27), 9RP (May 28), 10RP (May 29), 11RP (June 3), 12RP (June 4), 13RP (June 5), 14RP (June 9), 15RP (June 10, 2008), and 16RP (June 5, 2009).

McConnell saw a woman, later identified as Ute Wysgoll (Huggins's girlfriend), sitting in the driver's seat of the van. 4RP 28-29; 6RP 59-60, 63-66. Wysgoll had a small black dog in her lap. 4RP 29. A man (Huggins) charged McConnell, punched him and threw him to the ground. 4RP 32. Huggins then jumped into the van's passenger seat. 4RP 36.

McConnell got up and ran into the house to call 9-1-1. 4RP 37. As Wysgoll accelerated away, she crashed the van into some rockery, struck the car McConnell had first arrived in and then sped away. 4RP 39-40, 106.

The house was a shambles: items, including clothing, were scattered everywhere, drawers open, and a cigarette had been left smoldering on the carpet in a closet.³ 4RP 41, 78, 113-14; 5RP 51. A gym bag, climbing equipment, two bicycles, jewelry and other items had been stolen. 4RP 41-48, 114, 116; 7RP 55-56, 63-64.

Before McConnell went to the hospital to have a laceration over one eye stitched, he provided the responding police officers with a partial license plate and a description of the suspects. 4RP 53, 74, 147, 173.

³ Wysgoll had inadvertently left the smoldering cigarette. 7RP 123.

McConnell described the male suspect as in his late 20's, 5'8" to 5'10", short black hair, athletic build and, although the man did not speak with an accent, he appeared Italian or Mediterranean.⁴ 4RP 76-77.

Police discovered Huggins's fingerprint in the McConnell-Rhoads house. 5RP 75-78.

On two different occasions, the police showed McConnell montages with six photographs in each. After viewing the first montage, four days after the burglary (which did not contain Huggins's photograph), McConnell selected one photograph with 50% certainty. 7RP 50-53. On January 29, 2008, the police showed McConnell a second montage that contained photographs from a line-up that McConnell had not attended. McConnell selected Huggins's photograph with 50% certainty. 4RP 56, 65-67; 7RP 74-77. McConnell identified Huggins in court with 80% certainty as the man who had burglarized and assaulted him. 4RP 79. McConnell explained that viewing Huggins in court cleared up any

⁴ Rhoads's observation of the male suspect was limited; she described the man as Caucasian or Hispanic--not African-American--30 - 35 years old, 5'6", 135-140 pounds, with a medium build and short brown hair. 4RP 128. Officer David Quiggle testified that at the time of Huggins's arrest (August 1, 2007), he had a dark suntan. 6RP 156-57.

uncertainty that he may have had with regard to his montage picks.⁵

4RP 133.

Two days after the burglary, police investigated reports of people “squatting” in three vacant Kirkland homes. 5RP 173-75, 180. In the backyard of one of the homes, police located McConnell's climbing gear. 6RP 122-28, 158-59. In one of the garages, the police recovered a bicycle with a scratched off serial number.⁶ 5RP 181. Inside a Honda automobile that was parked in front of one of the homes, the police recovered pieces of jewelry that belonged to Rhoads. 5RP 205; 6RP 25-26. Huggins (“JD”) and Wysgoll, were among the individuals squatting in the homes. 6RP 30-33, 35-36, 60-62, 87-88.

The next day, Christopher Butterfield and Colin Tacardon, two residents of a Kirkland condominium complex located about two blocks

⁵ Police departments exchange information via email regarding unsolved crimes and suspect descriptions. Before Huggins had been identified and arrested, investigators in this case learned that there was another male/female team (Mr. Harrow and Ms. Schatz) of burglars who fit the general description that McConnell had provided. Harrow and Schatz were ultimately eliminated as suspects after a consensual search of their home failed to yield any property taken during the McConnell-Rhoads burglary and because neither of the Harrow/Schatz dogs matched the description of Wysgoll's little black dog. McConnell chose Harrow's picture from the first photo montage. 7RP 45-55. Harrow is not the “other suspect” identified in Huggins's proffer to the trial court and discussed in section C.2 of this brief, *infra*.

⁶ The parties entered into a stipulation regarding this bicycle. CP 66. On July 24, 2007, Richard Heuring reported to the Seattle Police Department that his bicycle had been stolen the previous day. On August 14, 2007, Mr. Heuring was present at a line-up where he identified Huggins as the person who had stolen his bicycle. Heuring's bicycle, brand name “Giant,” was recovered by the Kirkland police on July 30, 2007, from one of the abandoned houses. 7RP 33-34.

from the vacant homes, had separate contact with Huggins under suspicious circumstances.⁷ 5RP 112-16, 136-39, 145, 147, 184. The police investigated and discovered a pickup truck (a Dually), stolen several days earlier from Ford of Kirkland, parked in Tacardon's mother's parking stall. 5RP 158-59, 186; 6RP 41-43, 141. The police recovered McConnell's and Rhoads's bicycles and their wedding announcements from the Dually. 5RP 193; 6RP 152; 7RP 145-52. Huggins's fingerprints were found on the rearview mirror, which had been removed, put in a plastic bag, and placed on the driver's side floorboard. 5RP 75-80, 189-92; 6RP 30.

On the same day, police found the white panel van used in the burglary parked on a street near the vacant homes. 6RP 128-32, 142-43, 146; 7RP 57-59. The driver's side of the van had front-end damage consistent with an accident. 6RP 132; 7RP 45-47. Stuffed behind the driver's seat was a digital camera. 6RP 134. Wysgoll admitted that she took the photographs found in the digital camera. 6RP 73-78. The images downloaded from the camera and introduced into evidence included one of Huggins and some of Wysgoll's little black dog. 6RP 74-77, 148.

⁷ A few days after Butterfield and Tacardon saw Huggins at the condominium complex, the police showed each one a photo montage. Butterfield selected Huggins's photograph with 80% certainty. 5RP 125-30. Tacardon selected Huggins's photograph with 100% certainty. Tacardon also positively identified Huggins in court. 5RP 161-64.

About one week later, Wysgoll spoke to the police about a black Honda that had been towed from outside her mother's house to a storage lot.⁸ 6RP 68-69, 82-83; 7RP 60-61. The police recovered several items from the Honda: McConnell's and Rhoads's documents, Rhoads's figurines, and Huggins's Arizona identification card. 6RP 71, 89; 7RP 63-67.

Wysgoll admitted that she and Huggins had burglarized the McConnell-Rhoads house. 6RP 63-67, 83; 7RP 73. Wysgoll's memory of the burglary was hazy because she had taken Methamphetamine, Vicodin and Valium. 6RP 86. For her complicity in the crime, Wysgoll pleaded guilty to attempted burglary. 6RP 71-72.

b. Seattle Incidents.

Richard Heuring is in the business of selling—and sometimes using—methamphetamine. 10RP 67-68. On July 23, 2007, Heuring contacted one of his suppliers, Laureen Bennett. 10RP 133-34. He gave Bennett money and waited at his apartment for her to call. 10RP 134-35. Heuring's front door was slightly ajar. 10RP 138-39.

⁸ The Honda that had been parked in front of one of the vacant homes was not the same Honda that had been towed about five blocks from Wysgoll's mother's house. A police officer stated that the Honda at the vacant home was a Ridgeline model; Wysgoll stated that a Honda Accord (not owned by Wysgoll) had been towed from the area where her mother lived. 5RP 182 (Officer Haas); 6RP 68, 82 (Wysgoll); 7RP 126.

A man, later identified as Huggins, pushed the door open. He pointed a gun with a laser sight at Heuring, and ordered him to the floor. 10RP 140-41. Although the man had a bandana up to his eyes, Heuring could see most of his forehead—it looked tan. 10RP 141. Huggins kept calling Heuring by name; his voice was familiar to Heuring. 10RP 145.

Another man, who Heuring called “Bruce,” stood guard over Heuring while Huggins ransacked his apartment. Huggins and Bruce tied a pillowcase over his head with duct tape. They also duct taped Heuring's hands behind his back. 10RP 156-57. The men asked Heuring, “Where's the money, where's the drugs?” 10RP 146, 150. Heuring told them that he did not have any money because he had already given it to Bennett to purchase drugs. 10RP 152-56. Huggins and Bruce pistol-whipped Heuring, hit him with their fists and kicked him. 10RP 156, 170-71.

During the incident, Bennett called Heuring and told him to come to her house and pick up his drugs. 10RP 167-68. Huggins and Bruce forced Heuring into a car and ordered him to take them to Bennett's house. 10RP 160. There was a third person, later identified as Wysgoll, driving the car. 10RP 164-66; 12RP 131, 138-40; 14RP 57.

Heuring called Bennett back and arranged to meet her behind her apartment complex. 11RP 82-83; 12RP 22. As Bennett rounded a corner, she saw Huggins. He pointed a gun with a laser sight at her. 12RP 24-25.

Huggins took Bennett back to her apartment. 12RP 26. Bennett's friend, Gary Naugle, was outside smoking a cigarette, waiting for her to return. 9RP 57; 12RP 27-28.

Huggins smashed Naugle in the face with the gun and ordered Naugle not to look at him. He punched Naugle repeatedly. 9RP 60-62; 12RP 28-29. Huggins then ordered Naugle to lie on the floor. As Naugle begged for his life, Huggins kicked him, bound his hands with an electrical cord, and put a cushion cover over his head. 9RP 65-66, 68; 12RP 30-32.

Huggins commanded Bennett to show him where her money and drugs were. 12RP 33. Bennett took Huggins into her bedroom where she had a safe. Huggins ordered Bennett to put everything—methamphetamine, paperwork, credit cards, jewelry, collector bills and coins—into a bag. 12RP 33-34. Huggins then led Bennett back to where Naugle had been restrained. He put duct tape over Bennett's mouth, tied her to a chair, bound her hands and feet with a computer cord, and blindfolded her. 12RP 35-36. As Huggins looked around for more items to steal, he told Bennett that his friend, “Bruce,” would kill her if she

made any noise. 12RP 36. Before he left, Huggins took Naugle's backpack and credit cards.⁹ 12RP 45-47.

Bennett freed herself; then she freed Naugle. 9RP 80; 12RP 39. One of Naugle's eyes had started to swell shut, his mouth or nose was bleeding, and his hands were turning purple. 9RP 71, 82, 89, 109; 12RP 40. Bennett did not want to call the police because of the methamphetamine—she feared that she might go to jail. 12RP 41. About one hour later, Bennett called the police (after she first called a friend who went to Bennett's apartment and convinced her to call the authorities). 12RP 41. She told the police that Heuring might possibly have set her up to be robbed, but did not say why. 9RP 146; 12RP 49-50.

After leaving Bennett's apartment, Huggins, Bruce and Wysgoll dropped Heuring off a few block from his apartment. 11RP 97-100. Afraid that someone might be at his apartment, Heuring went to a friend's house. 11RP 18-28, 99-101. The friend helped Heuring remove the duct tape from his wrists and scalp. She then accompanied Heuring home—to a shambles. 11RP 24-31, 102-04. Among other items, Huggins had stolen a bicycle. 11RP 106-07.

⁹ During a search of the Honda that had been towed from near Wysgoll's mother's house, Naugle's and Bennett's credit cards were recovered. 10RP 107, 112-13.

The next day, the police arrived at Heuring's apartment. They wanted to talk to Heuring about the robbery the previous evening at Bennett's apartment. 9RP 146-50; 11RP 107. A police officer saw Heuring's swollen face, a cut on his head, and residue from duct tape on his wrists. 9RP 154-56.

After eliminating Heuring as a suspect, a police officer asked Heuring whether anyone had a grudge against him. It was then that Heuring knew the voice that he had recognized was Huggins's voice. 11RP 110-11, 144-52.

A few weeks earlier, Heuring's friend, Dave Winningham, introduced him to Wysgoll and they began to date. 10RP 70-80; 11RP 110-11; 12RP 126-28; 13RP 23-24. Wysgoll also bought drugs from Heuring. 10RP 76. Although they were never romantically involved, Heuring spent one night at Wysgoll's condominium. 10RP 77-80. The following day, Wysgoll got a telephone call from someone she addressed as JD. 10RP 80-83. Soon after Wysgoll dropped Heuring off at his apartment, Heuring received a call from JD, who wanted Heuring to know that Wysgoll was "his girl." 10RP 85. JD threatened Heuring then and in many subsequent telephone calls and text messages. 10RP 85-87. Heuring recognized JD's voice as that of his assailant. 11RP 110-11.

The police later identified JD as a suspect. 9RP 157. Immediately after the robberies, Wysgoll told her mother about drugs and men armed with guns. Frightened, Wysgoll's mother telephoned the police. 12RP 140. Wysgoll confessed that she and JD had committed the Bellevue and Seattle crimes. 12RP 140.

Approximately two weeks later, the police attempted to arrest JD at Wysgoll's mother's house. 9RP 166. JD saw the police and he fled. 9RP 170; 12RP 169. After running across Interstate 5, JD broke into the basement of a house.¹⁰ 9RP 172; 12RP 176-82. SWAT and hostage negotiation teams arrived and for several hours negotiated with Huggins to surrender. 9RP 172-80; 12RP 183. After the police arrested Huggins, a police officer found Huggins's loaded .38 caliber revolver with laser sight inside the chimney box. 9RP 181, 184.

Huggins testified. He stated that he was a drug dealer who carried a .38 revolver with laser sight because he often had large quantities of methamphetamine. 14RP 22-28. His girlfriend, Wysgoll, introduced Huggins to Heuring. 14RP 24, 31-32. Huggins and Heuring discussed possible future transactions involving large quantities of methamphetamine. 14RP 41-42. After a couple of meetings, Huggins

¹⁰ The house was owned by Mary Jane Erickson, who does not know Huggins. 11RP 49-50; 12RP 182.

agreed to sell Heuring a quarter of a pound of methamphetamine.

14RP 48, 58.

Huggins and Wysgoll went to Heuring's apartment to consummate the transaction with Heuring and a third party, who turned out to be Bennett. 14RP 48-49. Heuring and Bennett bought a couple of ounces and said that they would call Huggins when they needed more methamphetamine. 14RP 50.

About one week later, Huggins refused to give Wysgoll drugs, so she went to Heuring to buy methamphetamine. 14RP 51. Heuring accused Wysgoll of stealing money. He made her strip down to her bra and panties to prove that she had not stolen from Heuring. 14RP 51. When Huggins found this out, he and Wysgoll hatched a plot to do a "bait and switch." 14RP 52-53. The plan was to sell Heuring bunk during their next transaction. 14RP 52-54.

A couple of weeks later, Huggins, Bruce, Wysgoll and Heuring drove to Bennett's apartment. 14RP 54-57, 59-62, 149. Huggins and Heuring both had firearms. 14RP 62-64, 73. When they arrived, Naugle was outside Bennett's apartment; Huggins ushered Naugle inside. 14RP 67-69. Heuring and Bennett tested a sample of the methamphetamine. 14RP 66-71. Satisfied, Heuring and Bennett wanted to transact business, but they were \$400 short. They offered Huggins collateral: a bicycle,

Bennett's credit cards and Naugle's social security, Costco and Medicare cards. 14RP 74-77, 154-55.

When they all went back to Heuring's apartment to get the bicycle, Huggins switched fake drugs for the methamphetamine. 14RP 80-81. About an hour or so later, Heuring realized that Huggins had duped him. Heuring called Huggins and demanded that he bring the collateral back and give him the real methamphetamine or he was going to take care of it, although he did not specify how. 14RP 83-86.

About one week later, Huggins was at Wysgoll's mother's house to sell drugs. Huggins had heard through the grapevine that the police were looking for him—he assumed he must have sold drugs to a confidential informant. 14RP 87-89. When Huggins saw the police, he fled because he had a large amount of methamphetamine and a firearm. 14RP 91-92, 166-67. He tried to hide in the basement of a home. 14RP 98. Huggins did not want to get caught with evidence, so he snorted much of the methamphetamine, poured the remainder of it down the sink drain and hid his gun. 14RP 99-102, 162.

Huggins claimed that he never drove Wysgoll's Honda. 14RP 92. He said that he gave Wysgoll the credit cards and other items that he had taken as collateral for drugs. 14RP 93-94. He stored Heuring's bicycle,

also taken as collateral, at the vacant homes where he and Wysgoll had stayed. 14RP 38-39, 93, 113.

C. **ARGUMENT**

1. **POSSESSION OF A STOLEN VEHICLE IS NOT A SPECIAL CRIME THAT MUST BE CHARGED TO THE EXCLUSION OF POSSESSING STOLEN PROPERTY IN THE FIRST DEGREE.**

For the first time on appeal, Huggins contends that possession of a stolen vehicle and possessing stolen property in the first degree are concurrent offenses, i.e., that the statutes punish the exact same conduct, and that the legislature intended possession of a stolen vehicle to be a special statute that must be charged to the exclusion of the general statute of possessing stolen property in the first degree. Not only is Huggins barred from raising this issue for the first time on appeal, he is incorrect. Committing a violation of the possession of stolen vehicle statute does not always result in a violation of the possessing stolen property in the first degree statute, and therefore the rule requiring application of the special statute to the exclusion of the general statute does not apply.

As a rule of statutory construction, i.e., determining legislative intent, “where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute.” State v. Shriner, 101

Wn.2d 576, 580, 681 P.2d 237 (1984). This rule applies only where “the general statute will be violated in each instance where the special statute has been violated.” Shriner, 101 Wn.2d at 580. Worded another way, if it is “not possible to commit the special crime without also committing the general crime,” then the rule applies. Shriner, at 583. Such is not the case here.

RCW 9A.56.150, the Possessing Stolen Property in the First Degree--Other Than Firearm or Motor Vehicle, provides in pertinent part that:

A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property, other than . . . a motor vehicle, which exceeds fifteen hundred dollars in value.

RCW 9A.56.150(1).¹¹

RCW 9A.56.068, the Possession of Stolen Vehicle statute, provides that:

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

RCW 9A.56.068(1).

Contrary to Huggins's assertion, these statutes are not concurrent, one can commit a violation of RCW 9A.56.068 (Possession of Stolen

¹¹ In 2009, the Legislature increased the threshold dollar amount from \$1,500 to \$5,000. LAWS OF 2009, CH. 421, § 12 (effective for crimes committed on or after September 1, 2009). The date of Huggins's crime is July 31, 2007. CP 172.

Vehicle) without committing a violation of RCW 9A.56.150 (Possessing Stolen Property in the First Degree (“PSP 1”)). For example, a person who knowingly possesses a stolen vehicle valued at eight hundred dollars violates the possession of stolen vehicle statute, but not the possessing stolen property in the first degree statute. It is possible to violate the possession of stolen vehicle statute without violating the possessing stolen property statute if the motor vehicle is valued at \$1, 500 or less. Cf. State v. McCann, 74 Wn. App. 650, 653, 878 P.2d 1218 (1994) (statute prohibiting taking a motor vehicle without permission (“TMV”) not concurrent with PSP 1 because it is possible to violate TMV statute without violating PSP 1 statute if the motor vehicle is valued at \$1,500 or less).¹²

This alone, the single ability to commit an act that violates the possession of stolen vehicle statute without also violating the PSP 1, defeats Huggins's argument. It is irrelevant that a particular defendant's act may in fact violate both statutes in a particular case. The determinative factor is whether it is possible to commit the special crime without also committing the general crime; “*not* whether in a given instance both

¹² Although McCann was decided before the legislature enacted the possession of stolen vehicle statute, the analysis remains the same, i.e., the test for whether statutes are concurrent is whether a violation of the special statute necessarily violates the general statute. McCann, 74 Wn. App. at 652-53.

crimes are committed by the defendant's particular conduct.” State v. Crider, 72 Wn. App. 815, 818, 866 P.2d 75 (1994); State v. Chase, 134 Wn. App. 792, 802, 142 P.3d 630 (2006), rev. denied, 160 Wn.2d 1022 (2007).¹³

In short, Huggins's argument that the Possession of Stolen Vehicle statute and PSP 1 statute are concurrent, that they punish the same conduct, is incorrect. It is possible to commit what Huggins professes to be the special crime (Possession of Stolen Vehicle) without committing the general crime (PSP 1). Because this is true, Huggins's argument fails. Shriner, 101 Wn.2d at 582-83.

Finally, the issue has not been preserved for appeal. This non-constitutional issue has been waived.

An appellate court will not review an alleged error not raised at trial unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). “RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue

¹³ In Chase, this Court rejected the defendant's argument that under the facts of his case, it was impossible for him not to have violated a special and general statute. This Court stated, “[t]hat may be true [that the facts show he violated both statutes], but the question is whether all violations of the first degree theft of leased property statute are necessarily violations of the first degree theft statute.” Chase, 134 Wn. App. at 802-03.

not raised before the trial court.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Some earlier cases opined that the issue of allowing a person to be charged under a general statute over a special statute was an issue of constitutional magnitude because providing the prosecutor with unfettered discretion to charge under either statute violated the equal protection clause. These cases have since been overruled. See United States v. Batchelder, 442 U.S. 114, 125, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) (finding that a prosecutor choosing between concurrent statutes is no different than a prosecutor choosing to charge under similar but not concurrent statutes--this “does not give rise to a violation of the Equal Protection or Due Process Clause”); City of Kennewick, v. Fountain, 116 Wn.2d 189, 192-93, 802 P.2d 1371 (1991) (Washington Supreme Court recognizing overruling of equal protection concurrent statute arguments); see also State v. Carpenter, 52 Wn. App. 680, 683-84, 763 P.2d 455 (1988) (claimed error in jury instructions based on current statutes argument not preserved for review because no objection was raised below).

Here, Huggins did not raise the issue below. Counsel never objected to the State's motion to amend the information.¹⁴ See 1RP at 3-5. Counsel never brought a motion to dismiss the charge or objected to the trial court instructing the jury on PSP 1. See 7RP 107 (defense took exception only to the trial court's proposed “reasonable doubt” jury instruction). In fact, Huggins submitted a presentence memorandum in support of his request for an exceptional sentence in which he agreed to the charges and offender score. CP 249. See also CP 354 (defense memorandum regarding “other suspect” evidence for the Bellevue burglary and PSP 1 charges). Although Huggins does not acknowledge his failure to raise this issue below, his failure to do so constitutes waiver. This Court should hold that Huggins has waived this issue by failing to provide appropriate argument explaining why he can raise this issue under RAP 2.5(a). State v. Goodwin, 150 Wn.2d 774, 782, 83 P.3d 410 (2004).

2. THE TRIAL COURT PROPERLY EXCLUDED THE PURPORTED “OTHER SUSPECT” EVIDENCE.

Huggins sought to present “other suspect” evidence suggesting that Abraham Hartfield committed the Bellevue offenses--burglary and PSP 1.

¹⁴ Counsel did not object to the addition of the PSP 1 charge. Counsel's sole objection was to the joinder of the charge to the other charges. The trial court severed the PSP 1 charge and the Bellevue burglary charge from the remaining counts. 1RP 12-28, 90-95; CP 34-38.

However, Huggins failed to produce any evidence that connected Hartfield to either offense. The trial court properly excluded this evidence.

a. Facts.

Huggins sought to present evidence that Abraham Hartfield committed the Bellevue burglary and possessed the stolen Ford Dually pickup truck. The proffer concerning Hartfield was that (1) his appearance fit the general description of the male burglar, (2) he was seen coming and going from a residence where police had located papers of dominion and control that belonged to Hartfield's girlfriend, Ashli Purner, and where some of the stolen goods, including Heuring's stolen bicycle, were recovered, and (3) Ute Wysgoll and some of her acquaintances knew Hartfield. CP 354-56; 5RP 83. The defense further suggested that a handwritten note found in Wysgoll's purse upon her arrest established that some person, other than Huggins, was involved in criminal activity with Wysgoll. CP 356; 6RP 101-06, 115-17; 7RP 17-18. The defense argued that the note did not constitute inadmissible hearsay because it was being offered to show that a person—other than Huggins or Wysgoll—had a guilty state of mind about *Wysgoll's* criminal activities. 6RP 115. The defense conceded that the author of the note was unknown. 6RP 114-17.

The trial court ruled that the note, ostensibly written by some third party, was not admissible. The trial court stated, “[W]e don't really

have -- have any evidence as to who wrote the notes. No way to authenticate them.” 6RP 117.

The trial court also ruled that evidence concerning Hartfield as an “other suspect” was not admissible.

[L]ooking only at the defense proffer, I simply do not see sufficient evidence connecting Mr. Hartfield to the charged Burglary. . . . [T]he identification evidence . . . is general in many respects, and while aspects of it are similar to Mr. Hartfield, it does not specifically identify him.

Additionally, while Hartfield has some association with Ms. Wysgoll, who helped commit the burglary, she will not identify him as the suspect. . . . I think I can consider that she will offer no evidence that Mr. Hartfield committed the crime with her. She has never suggested as much.

Finally, Mr. Hartfield entered and left a residence in which some stolen goods were found and his girlfriend is also linked with the residence. There is no evidence actually linking him with these goods.

The circumstantial relationship between Hartfield's description, the association between he and Ms. Wysgoll and his association with the residence where the goods are found are likely to raise, at best, a conjectural inference as to the commission of the crime by Mr. Hartfield. I do not think it sufficiently connects him to the crime. I also think that it is insufficient under the PSP 1.

CP 353.

b. Argument.

“[A] criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.” State v. Hudlow,

99 Wn.2d 1, 15, 659 P.2d 514 (1983). This Court reviews a trial court's determination whether to admit "other suspect" evidence for abuse of discretion. State v. Thomas, 150 Wn.2d 821, 856-61, 83 P.3d 970 (2004). The trial court's decision will be reversed only if no reasonable person would have decided the matter as the court did. Thomas, 150 Wn.2d at 856.

The trial court properly excluded Huggins's proposed evidence concerning Abraham Hartfield as an "other suspect": the evidence failed to meet the well-established standard for "other suspect" evidence under Washington law. The test for determining if "other suspect evidence" is relevant is whether the evidence creates a "trail of facts or circumstances that clearly point to someone other than the defendant as the guilty party." State v. Mezquia, 129 Wn. App. 118, 124, 118 P.3d 378 (2005), review denied, 163 Wn.2d 1046 (2008). The defendant bears the burden of establishing the admissibility of the "other suspect" evidence. State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). Evidence suggesting only that the other party had the motive, ability, or opportunity to commit the crime is insufficient. State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). "Not only must there be a showing that the third party had the ability to place him or herself at the scene of the crime, there also must be

some step taken by the third party that indicates an intention to act on that ability.” Rehak, 67 Wn. App. at 163.

In Rehak, the defendant was charged with the murder of her husband. She sought to introduce evidence that her son had a troubled relationship with the victim, knew where the murder weapon was kept, would have benefited financially if the defendant was convicted, and was unaccounted for at the time of the murder. Rehak, 67 Wn. App. at 160-61. Though the Court of Appeals acknowledged there was evidence that the son had the ability to be at the scene and commit the crime, the Court of Appeals affirmed the exclusion of the “other suspect” evidence because “there also must be some step taken by the third party that indicates an intention to act on that ability.” Id. at 163. Without some indication of an intention to act on that ability, the unsupported accusation of the son was nothing more than speculation. Id.

Mere speculation about the possibility that someone else may have committed the crime, unless coupled with other evidence tending to connect such person with the actual commission of the crime charged, is a basis to exclude the proffered testimony. See In re Personal Restraint of Lord, 123 Wn.2d 296, 315-16, 868 P.2d 835, cert. denied, 513 U.S. 849 (1994). In Lord, the Washington Supreme Court affirmed the exclusion of certain evidence:

Lord claims the trial court erred in excluding evidence that (a) other individuals had refused to give hair samples or take polygraph examinations when the police asked them to do so, (b) one of Parker's neighbors owned a blue pickup truck which was not seen after Parker disappeared, (c) Parker's boyfriend wanted to have sex with her, (d) Parker had expressed concern about being followed by someone in a car, (e) several other persons had access to the U-Haul blanket and the residence in which Parker had last been seen alive. The trial court excluded this evidence under State v. Mak, 105 Wash.2d 692, 716-17, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986), which holds that evidence connecting another person with the crime charged is not admissible unless there is a train of facts or circumstances which tend clearly to point to someone other than the defendant as the guilty party. See also State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932); State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933). Lord does not explain how any of the above evidence tends to point clearly to anyone else as the guilty party.

In re Lord, at 315-16.

Here, as the trial court recognized, the fact that Hartfield met the general description of the burglar—approximately 30 years old, 5'7", 180 pounds, black hair, brown eyes, and a dark complexion—hardly justified the admission of “other suspect” evidence.¹⁵ CP 353, 355. The court stated, “[W]hile aspects of [the identification evidence] are similar to Mr. Hartfield, it does not specifically identify him.” CP 353.

¹⁵ In fact, defense counsel conceded that Hartfield's appearance, which met the general description of the suspect: 5'8", short black hair, closeness in age to the suspect and the fact that Hartfield had been living “very, very close to the location of the white van” was an inadequate foundation for admitting his “other suspect” evidence. 4RP 190-91.

Significantly, the suspect description was very general—it also fit Mr. Harrow, the male component of the male/female burglary duo who, although ultimately eliminated as a suspect in the McConnell-Rhoads burglary, was selected by McConnell in the first photo montage that he viewed. 7RP 45-55.

Evidence that Hartfield had access to a residence in which some stolen goods were found was similarly weak. As the trial court stated, “*There is no evidence actually linking him with these goods.*” CP 353 (emphasis added). Likewise, the recovery from the same residence of papers of dominion and control belonging to Hartfield's girlfriend hardly qualifies as a “train of facts or circumstances that clearly point to someone other than the defendant as the guilty party.”¹⁶ Mezquia, 129 Wn. App. at 124. Defense counsel had argued that the discovery of Hartfield's girlfriend's paperwork found in the same vacant house where Heuring's stolen bicycle was recovered supported the admission of the “other suspect” evidence. 5RP 83. Yet, Huggins stipulated that Heuring positively identified him from a line-up as the individual who had stolen his bicycle. 7RP 33-34. The trial court properly ruled that Huggins's

¹⁶ The defense contended in its proffer that Purner was Hartfield's girlfriend, and that the papers with her name provided a nexus between McConnell's and Rhoads's property that was recovered in the vacant homes and Hartfield. Yet, in the defense trial memorandum, Purner was identified as *Richard Heuring's* girlfriend. CP 23.

proffer failed to meet the standard under Washington Law: there were no facts or circumstances that clearly pointed to Hartfield as the person who committed the Bellevue burglary or possessed the stolen Ford Dually pickup truck.

Huggins claims that the trial court heard specific evidence linking Hartfield to the Bellevue burglary: namely, “Officer Quiggle described Hartfield as a ‘rather prolific car thief and residential burglar.’”¹⁷ Br. of Appellant at 33 (citing 2RP 122). However, “where there is no other evidence tending to connect such outsider with the crime . . . his bad character, . . . his means or opportunity to commit, or even his conviction of, the crime, is irrelevant to exculpate the accused[.]” Downs, 168 Wash. at 667.

Huggins discusses at some length the potential due process violation where “other suspect” evidence must meet a “heightened foundational requirement[.]” Br. of Appellant at 36-41. The case primarily relied upon by Huggins, Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), is easily distinguishable. At issue in Holmes, a death penalty case, was South Carolina’s “other

¹⁷ Huggins argues that because Hartfield was under police surveillance at the time of the burglary, the defense proffered specific evidence to link Hartfield to the McConnell-Rhoads burglary. Br. of Appellant at 33. Yet, Huggins does not explain how Hartfield could have committed the burglary while under police surveillance.

suspect” rule, which allowed for the *exclusion* of a defendant’s “other suspect” evidence, regardless of its strength, if the State’s case against the defendant was particularly strong. The Court concluded that the new rule was arbitrary and violated the defendant’s right to present a complete defense. 547 U.S. at 328-30. The opinion recognized that the typical rule—requiring exclusion of other suspect evidence when it does not sufficiently connect the third person with the crime—is constitutional. *Id.* at 327. Moreover, the Court specifically cited Washington’s “other suspect” rule among those that were constitutional and not challenged in that case. *Id.* at 327 n.* (citing *State v. Thomas*, 150 Wash.2d 821, 856-58, 83 P.3d 970 (2004)). Consequently, *Holmes* does not support Huggins’s argument.

This case is clearly distinguishable from *Holmes*. In *Holmes* there was powerful evidence of third-party guilt. In this case, there was no evidence of third-party guilt—just speculation. Moreover, in this case, unlike in *Holmes*, the trial court looked only at the defense proffer and ruled that there was insufficient evidence connecting Hartfield to the Bellevue burglary and the PSP 1. CP 353. The trial court properly concluded that,

The circumstantial relationship between Hartfield’s description, the association between he and Ms. Wysgoll and his association with the residence where the goods are

found are likely to raise, at best, a conjectural inference as to the commission of the crime by Mr. Hartfield. I do not think it sufficiently connects him to the crime. I also think it is insufficient under the PSP 1.

CP 353.

Moreover, even if the trial court erred in excluding evidence of Abraham Hartfield as an “other suspect,” Huggins fails to show how he was prejudiced. The jury heard that McConnell initially identified someone other than Huggins as the man who had burglarized and assaulted him. 7RP 43-53. The jury was aware that Wysgoll was biased against Huggins because she blamed him for (1) the lost opportunity to go to school paid for by her Godmother, (2) stealing a \$3,000 settlement that she had received, and (3) losing her apartment, thereby forcing her to live in the abandoned houses. 6RP 91-92, 97. And, the defense, in closing, stressed Wysgoll's lack of credibility and argued that there is “direct and clear evidence that the person who committed [the burglary] was *someone other than Mr. Huggins. . . .*” 7RP 148. So, although Huggins was precluded from naming an “other suspect,” he was able to argue his theory of the case. Accordingly, if there was error, it was harmless.

3. THE TRIAL COURT EXERCISED PROPER DISCRETION WHEN IT DENIED CROSS-EXAMINATION ON CONDUCT UNDERLYING A CONVICTION.

Huggins contends that the trial court erred in denying him the opportunity to impeach Bennett under ER 608(b) with specific instances of conduct underlying her conviction for taking a motor vehicle (“TMV”). Huggins argues that Bennett's entry of an Alford¹⁸ plea, when later, during a defense interview she admitted to having taken the motor vehicle, was probative of Bennett's truthfulness and would have assisted the jury in assessing her credibility. Br. of Appellant at 41-53.

This Court should reject Huggins's claim for three reasons. First, it is not at all clear from the record that Bennett's Alford plea contradicts her responses during the defense interview, in which case there is no specific instance of conduct that bore on Bennett's character for truthfulness. Second, even if Bennett's Alford plea constituted a false statement to the plea court, the statement is not germane to the issues in this case. Finally, even if relevant, the specific instance of conduct was not the only available impeachment. Consequently, this Court should hold that the trial court's exclusion of the circumstances surrounding Bennett's plea was a proper exercise of the court's broad discretion.

¹⁸ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

a. Facts.

At trial, the defense sought to impeach Bennett with her responses in a defense interview that contradicted her Alford plea.¹⁹ CP 368-70, 489, 491-94; 8RP 35-43. Bennett's statement of what she did that makes her guilty of the crime began by identifying her plea as pursuant to North Carolina v. Alford. CP 489. The statement continued: "I do not believe that I am guilty of this crime. I plead guilty to take advantage of the State's offer. . . ." CP 489.

Five and one half years after Bennett pled guilty to TMV, a crime that involved many other people—but none related to the instant case—Huggins's counsel interviewed Bennett. CP 491-94. After confirming that Bennett had pled guilty, counsel asked, "You entered a plea by way of Alford. Do you recall that?" Bennett responded, "*I don't know what that means, but if it says I did, I did.*" CP 493.

Counsel asked Bennett why she told the plea court that she did not believe she was guilty of the crime if she was guilty. CP 493. Bennett explained that she had a card collection worth \$24,000 in the trunk of the car at issue. The woman who owned the car, Michele Swan, traded the card collection for an "eight-ball" of drugs. CP 493. Bennett stated that

¹⁹ On July 22, 2002, Bennett pled guilty to TMV, a crime that had occurred in 2000. CP 491-93.

was why she took the car. CP 494. Counsel asked, "And so you made that statement to the court because you just essentially felt that you were entitled to take the car because of what she did to you?" CP 494. Bennett responded, "Yes. I don't have a long criminal history. *I wasn't all that familiar with the law and whatnot*, but. That's the gist of it right there." CP 494.

The trial court ruled that under ER 609(a), the evidence rules contemplate the use of a conviction, but by the plain language of the rule, prohibits going behind the conviction, absent additional foundation.²⁰ 9RP 8. The court further ruled that under ER 608(b), if there was other specific conduct unrelated to a particular conviction that is already being offered as impeachment, then the court might admit that discrete incident. 9RP 8.

The defense contends now, as it did at trial, that Bennett's responses in the interview contradict an Alford plea. The issue is whether the trial court erred by refusing to admit the allegedly false Alford plea.

²⁰ The trial court appears to have inadvertently referred to ER 608(a), when, in fact, the court meant to cite ER 609(a). This mistake is evident by the context of the ruling--at no time did anyone seek to offer "reputation evidence," the subject of ER 608(a). Rather, the trial court was attempting to synthesize ER 608(b) with ER 609(a). See 9RP 7-8; see also 8RP 35-43 (general discussion among the court and parties regarding ER 608(b) and ER 609(a)).

b. Argument.

A criminal defendant has the constitutional right to cross-examine and confront witnesses against him. Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). That right, however, is subject to the limitation that the evidence sought must be relevant. See State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Under ER 401 and 402, evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” is generally admissible.

Specific instances of conduct, if probative of the witness's truthfulness and would have assisted the jury in assessing her credibility are admissible as follows:

Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, *in the discretion of the court*, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness. . . .

ER 608(b) (italics supplied).

Allowing such evidence is within the discretion of the trial court, and this Court reviews the trial court's exclusion of evidence for an abuse

of discretion. State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001); see also ER 611(a), ER 403, ER 608(b). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). In addition, failing to allow cross-examination of a State's witness is an abuse of discretion if the *witness is crucial* and the alleged misconduct constitutes the *only* available impeachment. Clark, 143 Wn.2d at 766.

For example, in State v. McDaniel, a prosecution for assault, the defendant should have been permitted to impeach the victim's credibility by showing that she had committed perjury in a related civil proceeding when she lied about her drug use. 83 Wn. App. at 186. The evidence was germane because her drug use may have impeded her ability to perceive who it was that kicked her, and a fact of consequence was the assailant's identity. Id. at 186. In addition, the victim was motivated to minimize her drug use because she was on probation, a condition of which was that she refrain from drug use. Id. In reversing McDaniel's conviction, this Court stated that “[t]he fact of the lie and the motivation for the lie are highly relevant.” Id. Because the victim had lied under oath for her own purposes in the related civil proceeding, it was a question for the jury whether she would lie under oath for her own purposes in the criminal

proceeding. Id.; see also State v. McSorley, 128 Wn. App. 598, 613, 116 P.3d 431 (2005) (finding that in a child luring prosecution, the defendant should have been allowed to cross-examine the child about two prior incidents when, as a “prank,” the child pretended to be injured or in need of help; the incidents were highly probative of his credibility at trial, both because they demonstrated a willingness to mislead strangers and because they “constitute[d] the only available impeachment”); State v. York, 28 Wn. App. 33, 36-37, 621 P.2d 784 (1980) (reversing a conviction where the State had successfully moved in limine to preclude specific instances of misconduct by the paid informant; the Court of Appeals said, “[T]he defense should have been allowed to bring out the only negative characteristics of the one most important witness.”).

Washington cases have allowed cross-examination under ER 608(b) where the specific instance of conduct is germane to the trial issues. See, e.g., State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991). “Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue.” Id. (quoting York, 28 Wn. App. at 36). In Wilson, the trial court permitted the State to cross-examine the defendant's witness (his wife) regarding a prior false statement that she had made under oath, on a Department of Social and Health Services financial assistance form. Wilson, at 893. On appeal, the Court of

Appeals held the prior statement came within ER 608(b). Id. The court found that the prior false statement was not only relevant to the witness's veracity but also germane to the issue of sexual abuse.²¹ Id.

If the evidence at issue is merely collateral to the questions presented, the trial court acts well within its discretion by excluding the evidence. York, at 35; see also State v. Griswold, 98 Wn. App. 817, 830-31, 991 P.2d 657 (2000) (the witness's prior false statement was “clearly collateral” and “not germane to the guilt issues here.”).

Also relevant to the analysis in this case is ER 609(a), which governs the use of prior convictions for impeachment. ER 609(a) provides:

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness. . . .

ER 609(a). Under this rule, “cross-examination regarding prior convictions is limited to the fact of the conviction, the type of crime, and the punishment.” Clark, 143 Wn.2d 767 (quoting State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996)). Any other details leading up to

²¹ On the DSHS financial assistance form the witness denied that Wilson lived at her residence. Yet, at trial, the witness claimed that because she and Wilson lived together, Wilson could not have committed the sexual abuse without her knowledge. Wilson, 60 Wn. App. at 893.

the conviction are not admissible under ER 609, but may, in the discretion of the trial court be admitted under ER 608(b).

- i. Huggins has failed to establish any false statement.

Here, contrary to McDaniel, McSorley, York, and Wilson, there is no specific instance of conduct; i.e., no false statement with which to impeach Bennett. In response to counsel's questions during the interview, Bennett stated that she was not "all that familiar with the law," and that she did not know what it meant to plead guilty under North Carolina v. Alford. CP 493-94. Thus, as a threshold matter, Huggins fails to establish any impeachment by contradiction.

Besides, Bennett may have had a legitimate good-faith defense to TMV. See RCW 9A.56.020(2)(a).²² Bennett said that she had taken the car because the car's owner had sold Bennett's \$24,000 card collection for drugs. CP 493-94. Perhaps Bennett's claim of title was untenable. Nevertheless, she may have believed herself not guilty of a crime. If so, Bennett's statements during the interview, vis-à-vis her Alford plea, were not false.

²² "In any prosecution for theft, it shall be a sufficient defense that: (a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable."

Finally, given the Supreme Court's language in Alford, it would be unfair to penalize Bennett for such a plea:

An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence *even if he is unwilling or unable to admit his participation in the acts constituting the crime . . .* when . . . a defendant intelligently concludes that his . . . interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

North Carolina v. Alford, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (emphasis added). Thus, a defendant who is “unwilling or unable” to admit guilt may enter an Alford plea.

It is impossible to know whether Bennett's Alford plea was under advice of counsel or to avoid being convicted on a more serious crime or if for some other reason Bennett was “unwilling or unable” to admit guilt. In any event, Bennett's ambiguous statements regarding the circumstances of her guilty plea are a far cry from the false statements made *under oath* in Wilson and McDaniel.

ii. Bennett's Alford plea was not germane.

As stated above, the specific instance of conduct must be germane to the issues presented at trial. York, 28 Wn. App. at 34-35; Griswold, 98 Wn. App. at 830-31; McDaniel, 83 Wn. App. at 186; Wilson, 60 Wn. App. at 893. Here, even assuming that Bennett's Alford plea contradicts her responses during the interview, the “false” statements were collateral and

not relevant to the guilt issues in this case. See Griswold, 98 Wn. App. at 830-31.

Huggins primarily relies on McDaniel, a case that is distinguishable. As stated above, evidence that the victim in McDaniel had lied under oath about her drug use in a related proceeding was germane to the issues at trial. Yet, in this case, the defense interview was not a deposition and Bennett's responses were not made under oath or affirmation. Likewise, Bennett's allegedly false Alford plea was not made under oath or affirmation. A false statement—but not made under oath—is distinguishable.²³ See State v. O'Connor, 155 Wn.2d 335, 352, 119 P.3d 806 (2005) (“While the retention of the \$300 (a remittance by an insurance company) may reflect an instance of dishonesty, it did not involve a lie under oath.”); but see State v. Kunze, 97 Wn. App. 832, 859-60, 988 P.2d 977 (1999) (“Specific instances of lying may be admitted whether sworn or unsworn, but their admission is *highly discretionary* under ER 608(b)) (emphasis supplied), review denied, 140 Wn.2d 1022 (2000).

Further, unlike the false statement in McDaniel, Bennett's Alford plea was to a crime *wholly unrelated* to the instant case. And, Bennett had no motive to lie about her Alford plea. By contrast, the jury learned that

²³ As the comments to ER 603 (which requires that a witness testify under oath or affirmation) make clear, “The purpose of the rule is stated in the rule itself—to ‘awaken the witness's conscience’ and to impress upon the witness the duty to tell the truth.”

Bennett *had* lied—to the police and defense counsel during an interview—about whether the burglary involved drugs, a specific instance of conduct germane to the issues at trial. 12RP 68-69.

Finally, consistent with the trial court's ruling, the jury learned about the fact of the conviction (that she had been convicted of a “crime of dishonesty”), pursuant to ER 609(a).²⁴ 12RP 13. Once the witness has been impeached, there is less need for further impeachment on cross-examination. See Clark, 143 Wn.2d at 766.

iii. There was other impeachment evidence.

Huggins contends that Bennett was a crucial State's witness because she was the only eyewitness to the crimes that had occurred in her apartment. Br. of Appellant at 43. However, the defense theory in the “Seattle incidents” case did not rest on the perpetrator's identity; rather, the defense theorized that this case arose from a conflict among drug dealers. Specifically, the defense contended that Bennett and Heuring fabricated the charges in retaliation for Huggins having sold them bunk in

²⁴ The trial court instructed the jurors that they are the “sole judges of the credibility of each witness,” and “[e]vidence that any other witness [besides the defendant] has been convicted of a crime may be considered by you in deciding what weight or credibility should be given to the testimony of the witness and for no other purpose.” CP 181, 188. The jury is presumed to follow the court's instructions. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997).

lieu of \$2,500 of methamphetamine. See generally 9RP 26-33 (defense opening statement); 15RP 56-91 (closing argument).

Bennett's testimony, while certainly important, was not crucial in light of other testimony, including that of Huggins. Huggins admitted that—armed with his .38 caliber revolver with laser sight—he along with Heuring and Bruce had gone to Bennett's apartment. 14RP 28, 56, 59, 62, 66-69, 73. The jury did not have to decide, “Who did it”; rather, the issue was whether the incident was a dispute among drug dealers or an armed burglary, robbery and unlawful imprisonment.

Even if Bennett was a crucial witness, her Alford plea was not the only available impeachment evidence. See Clark, 143 Wn.2d at 766 (failing to allow cross-examination of a State's witness is an abuse of discretion if the *witness is crucial* and the alleged misconduct constitutes the *only* available impeachment.) As Huggins concedes, the jury learned that Bennett had: (1) a conviction for a crime of dishonesty, (2) used and sold methamphetamine during the time of the incidents, (3) called friends, rather than the police, immediately after the burglary because illicit drugs were involved, and (4) withheld information from the police. Br. of Appellant at 44-45. Consequently, the jury had sufficient information to assess Bennett's credibility. See United States v. Beardslee, 197 F.3d 378, 383 (9th Cir. 1999) (one consideration in determining whether a

defendant's Confrontation Clause right to cross-examination was violated is whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness).

Moreover, Huggins does not dispute that there was additional impeachment evidence. Instead, he protests that, “On cross examination, *defense counsel had little to add.*” Br. of Appellant at 45 (emphasis supplied). However, “[t]he Confrontation Clause guarantees an opportunity for effective cross examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). Huggins fails to cite any law that prohibits the State from impeaching its own witness. Indeed, the law is contrary. See ER 607 (“The credibility of a witness may be attacked by any party, including the party calling the witness”); see also State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997) (“[I]t was reasonable for the State to anticipate the attack and 'pull the sting' of the defense's cross-examination.”). This Court should reject Huggins's claim.

- iv. Any error was harmless beyond a reasonable doubt.

Huggins has failed to show any constitutional violation. However, even if this Court finds that the trial court abused its discretion, any error was harmless.

Confrontation Clause violations are subject to harmless error analysis. State v. Watt, 160 Wn.2d 626, 634-35, 160 P.3d 640 (2007). A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Whether an error is harmless is a question of law that this Court reviews de novo. State v. Bird, 136 Wn. App. 127, 133, 148 P.3d 1058 (2006).

Given the other available impeachment evidence and the overall strength of the State's case, any error was harmless beyond a reasonable doubt. Van Arsdall, 475 U.S. at 684 (list of non-exclusive factors to consider when determining whether a Confrontation Clause error is harmless). Huggins admitted that he went to Bennett's house armed with a

gun.²⁵ The physical evidence—Bennett's and Heuring's apartments in shambles, cut electrical cords that had been used to bind Bennett and Naugle, injuries to Heuring and Naugle, duct tape remnants on Bennett's and Naugle's wrists and on a pillow case used to blindfold Heuring, Bennett's and Naugle's stolen identification cards located in a car associated with Huggins and his girlfriend—corroborated the State's theory. 9RP 39-43, 82, 89, 107-09, 132-37, 154-56; 10RP 17, 107, 112-13, 156-57; 11RP 19-22, 27, 29-32; 12RP 28-36, 39-40, 45-48.

Finally, Huggins fully argued his theory of the case. See generally 15RP 53-91. He put Bennett's credibility front and center when he reminded the jury that Bennett had lied to the police. 15RP 62. Any error in excluding Bennett's Alford plea was harmless beyond a reasonable doubt.

²⁵ Huggins argues that Heuring's identification of his assailant should be viewed dubiously because he had “only a few seconds to observe his attacker.” Br. of Appellant at 48. Putting Huggins's admission that he was present at the crime scene aside for the moment, Heuring stated that he was certain of his identification because he recognized Huggins's voice. 11RP 97, 110-11. Similarly Huggins's claim that Heuring could not identify the gun is unpersuasive because Huggins admitted that during the incident he was armed with a gun with a laser sight—just as Heuring had described. 10RP 140-41; 11RP 125; 14RP 28, 62, 73.

4. TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE.

Huggins claims that his trial counsel was ineffective for failing to move for a mistrial after Heuring uttered an unsolicited remark concerning Huggins's reputation, characterized on appeal as a “prejudicial trial irregularity.” Br. of Appellant at 48-53. The Court should reject this claim. Defense counsel immediately objected and the trial court struck the remark and instructed the jury to disregard the testimony. There is no likelihood that the trial court would have granted a mistrial given the de minimis nature of the “trial irregularity” and the remedial measures taken. As such, Huggins fails to establish either deficient performance or prejudice.

To prevail on a claim of ineffective assistance of counsel, Huggins must show both that his counsel's performance was deficient and that he was prejudiced. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show deficient performance, Huggins has the “heavy burden of showing that his attorney ‘made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. . . .’” State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland, 466 U.S. at 687). If a

defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Huggins bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001).

Huggins must also show that his attorney's deficient performance resulted in prejudice such that “there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.” State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). This Court employs a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If a defendant fails to satisfy either prong of the ineffective assistance of counsel test, this Court need not address the other prong. Hendrickson, 129 Wn.2d at 78.

In deciding whether a trial irregularity should result in a mistrial, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether an instruction could cure the irregularity. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). A mistrial is only appropriate where nothing the trial court could have said or done

would have remedied the harm done to the defendant, and the trial court has broad discretion to cure any trial irregularities. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992).

The trial irregularity at issue here is an isolated remark. During direct examination, Heuring testified that he had heard “bad things” about Wysgoll and JD “doing robberies and stuff.” 10RP 84. Counsel objected, succeeded in having the remark stricken from the record, and the trial court admonished the jury to disregard it. 10RP 84. Huggins now contends that this was insufficient and that his attorney should have demanded a mistrial. But Huggins fails to demonstrate that this choice was not based on a legitimate trial strategy. See State v. Dickerson, 69 Wn. App. 744, 748, 850 P.2d 1366 (1993). Counsel may well have thought that Heuring's testimony was not believable but that it could improve in a retrial.

Huggins also fails to establish that he was prejudiced by his counsel's failure to seek a mistrial. Contrary to Huggins's contention, it is not clear that the trial court “would likely have granted a mistrial motion.” Br. of Appellant at 50. “A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant receives a fair trial.” State v. Jungers, 125 Wn. App. 895, 901-02, 106 P.3d 827 (2005). Here, the trial court remedied the

de minimis trial irregularity by striking the isolated remark and instructing the jury to disregard the testimony. Moreover, at the close of evidence, the trial court instructed the jury that, “If evidence was not admitted *or was stricken from the record*, then you are not to consider it in reaching your verdict.” CP 180 (italics added). The jury is presumed to follow the court's instructions. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997). There is nothing in this case to forestall that presumption.

5. THE TRIAL COURT HAD THE AUTHORITY TO ORDER AN ALCOHOL EVALUATION AND TREATMENT.

Huggins asserts that the trial court exceeded its sentencing authority by ordering him to comply with an alcohol-related community custody condition. Br. of Appellant at 53-57. He is incorrect. A court has the authority to order crime-related prohibitions. There was evidence that, in addition to methamphetamine, Huggins consumed alcohol during his week-long crime spree. As such, the sentencing court had the authority to order an alcohol evaluation and treatment, if recommended.

A sentencing court may order a defendant to participate in crime-related treatment. Former RCW 9.94A.700(5)(c).²⁶ A condition is

²⁶ Recodified as § 9.94B.050 by LAWS OF 2008, CH. 231, § 56 (effective August 1, 2009). At Huggins's sentencing, and based on the incident dates, RCW 9.94A.700(5)(c) applied to specified crimes, including burglary in the first degree. See former RCW 9.94A.715 (authorized a court to impose community custody for “violent offenses”); see also RCW 9.94A.030(50)(a)(i) (burglary in the first degree is a violent offenses).

crime-related if it directly relates to the circumstances of the crime. RCW 9.94A.030(10). This Court reviews sentencing conditions for an abuse of discretion. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

At sentencing, the trial court imposed community custody for 18 to 36 months, a condition of which was that, “The defendant shall participate in the following crime-related treatment or counseling services: drug and alcohol evaluation and follow recommended treatment.” CP 327, 333.

The alcohol evaluation and possible need for treatment directly relates to Huggins's crimes. On July 31, 2007, Officer Haas responded to “suspicious circumstances” at a Kirkland condominium complex. 5RP 167-68, 184. Huggins had falsely identified himself as a law enforcement officer to a resident (Mr. Butterfield). 5RP 117-22, 185-86. Butterfield said that Huggins's speech sounded slurred, “[l]ike he had been at bars.” 5RP 122.

Later that same day, and at the same condominium complex, Officer Haas located the stolen Ford Dually pickup truck. 5RP 186. In addition to recovering items from the cab and the bed of the truck that Huggins had stolen in the McConnell-Rhoads burglary, Officer Haas said that there were alcohol containers, empty he believed, inside the cab of the truck. 5RP 188-89, 193; 6RP 152; 7RP 145-52.

Given Butterfield's description of Huggins's slurred speech and the empty alcohol containers in the stolen Dually that a jury convicted Huggins of "possessing," the trial court had the authority to impose alcohol-related terms of community custody. This Court should affirm Huggins's sentence.

D. CONCLUSION

For the reasons stated above, the State respectfully asks this Court to affirm Huggins's judgment and sentence.

DATED this 30 day of September, 2010.

Respectfully submitted,

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Trial 1: Bellevue Incidents

Burglary In The First Degree	victim - McConnell	Guilty
Possessing Stolen Property In The First Degree	victim -Kirkland Ford	Guilty

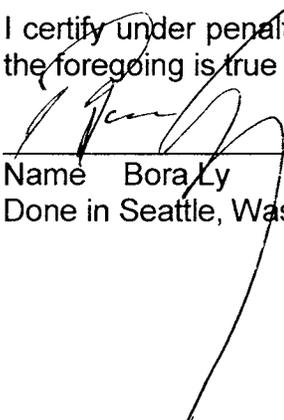
Trial 2: Seattle Incidents

Burglary In The First Degree	victim - Heuring	Not guilty
Robbery In The First Degree	victim - Heuring	Not guilty
Burglary In The First Degree	victim - Bennett	Guilty + firearm enhancement
Robbery In The First Degree	victim - Naugle	Guilty + firearm enhancement
Unlawful Imprisonment	victim - Naugle	Guilty + firearm enhancement
Unlawful Possession of a Firearm In The Second Degree		Guilty
Residential Burglary	victim - Erickson	Guilty of lesser included offense - criminal trespass in the first degree

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JONATHAN HUGGINS, Cause No. 63636-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly
Done in Seattle, Washington

09-30-10

Date