IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DOUGLAS LEE MERINO, Appellant.	No. 37507-9-II UNPUBLISHED OPINION

Van Deren, C.J. — Douglas Lee Merino appeals his convictions for attempted first degree theft (count I) and conspiracy to commit first degree theft (count II). We hold that (1) the information was sufficient, (2) the State presented sufficient evidence to support Merino's conspiracy to commit first degree theft conviction, (3) the trial court properly admitted coconspirators' statements, (4) the trial court properly declined to give Merino's proffered withdrawal instruction regarding the conspiracy count, (5) the trial court properly denied Merino's motion for a new trial, and (6) the trial court properly determined that attempted theft and conspiracy charges did not amount to same criminal conduct for sentencing purposes. We affirm.

FACTS

In late November 2005, Jim Varner approached Eric Snelson, an acquaintance and

Farmer's Insurance agent, about taking out an insurance policy on an antique automobile. Jim Varner told Snelson where the car was located and Snelson went to inspect the vehicle. Snelson found the building where the car was purportedly stored, but the door was locked. After his unsuccessful trip to inspect the car, Snelson met with Jim Varner and Jim's son, Ken, on December 6, 2005. The Varners produced an appraisal and photographs of a 1949 Chevrolet Woody they said they wanted to insure. Snelson wrote a $60,000 policy on the vehicle. The listed insureds included Jim Varner, Ken Varner, Kendra Varner, and Janelle Varner.

On December 8, 2005, within days after the insurance policy was issued, Ken Varner reported to the Thurston County Sheriff's Office that the car had been stolen. He told police that he had been driving the car the previous evening when it broke down and that he left it parked alongside the road. He valued the car at approximately $50,000, and he said that he had recently purchased it.

Because the car had been recently insured for $60,000, and because the insured was "push[ing] to settle the claim quickly," Farmers' suspicions were aroused and it assigned Kamala Wedding, an insurance investigator, to the claim on December 14, 2005. Report of Proceedings (RP)[1] at 57-58, 80. Wedding met with Ken Varner, who provided, among other documents, a bill of sale for the vehicle, an appraisal, the police report of the theft, and some photographs of an antique vehicle. The appraisal, signed by Doug Merino, was on a form headed "Doug's Kustom Kar Appraisal," and stated, "The overall condition of this vehicle is excellent. Frame-up restoration on this vehicle was completed in November of 2004." RP at 205. On December 20, Wedding telephoned Merino and told him she was investigating the theft of Ken Varner's 1949

[1] All citations to the report of proceedings refer to the trial record from January 22 through January 28, 2008.

Woody wagon and asked to verify the documents Ken Varner had provided. Merino told her he had built the car from the ground up, described the vehicle as completed, and verified that he had sold it to Ken and Jim Varner. Merino said that the car was in excellent condition, that it was fully restored, and that Ken Varner had driven it away from his house. Merino also told Wedding that Ken and Jim Varner had paid $59,500 for the car, but he could not provide documentation because he did not report it on his income tax. He also told her about features of the car, such as disc brakes, interior wood paneling, and an alternator system, that were not mentioned in the appraisal.

Wedding left her number with Merino and asked him to call if he had additional information. She did not receive a call. She called Merino three or four times, leaving messages, before she was able to speak to him again. Merino verified to Wedding that he had given Ken one key on a key fob that unlocked the door. In one of her conversations with Merino, he told her that Ken Varner had been convicted of fraud, something she had already learned.

Snelson had told Wedding that, when he inspected the car, he had viewed the car through a window.[2] Merino told Wedding that it would have been impossible for Snelson to have looked through a window to see the car because the building where the car was stored did not have windows.

Merino also spoke to Wedding in general about restoring cars, and specifically about restoring the Woody that was the basis of the insurance claim. Wedding asked Merino if he had an opinion on whether the insurance claim was false and he replied that he didn't know Ken Varner very well and couldn't give an opinion.

[2] In fact, he later admitted that he had only seen a vague shape of a car, or perhaps just the fender of a car, through a crack in the door.

On February 2, 2006, Jim Varner was found dead of a gunshot wound in Lewis County.[3] During the death investigation, Bruce Kimsey, a detective with the Lewis County Sheriff's Office, interviewed Merino on more than one occasion. Over the course of those interviews, Merino told Kimsey that Jim Varner had approached him for the title to the Woody so that he could borrow money against it. Merino said that he had lied to Wedding because he did not want to get his best friend, Jim Varner, into trouble. Kimsey accompanied Merino to see the actual car which he had claimed was restored; it was a rusted hulk that Merino valued at $2,500. A detective with the Thurston County Sheriff's Office, Roland Weiss, also viewed the car, which was not in the building Snelson visited but at a rental property Merino owned, and verified that it looked nothing like the photographs the Varners provided to the insurance company. Merino admitted to signing both the appraisal and a bill of sale to Varner.

Kimsey later referred the fraud case to the Thurston County Sheriff's Office. As the investigation continued, Frank Alexander, who lived in Woodland, Washington, saw a story on television about the case, which included the photographs of the supposedly restored Woody. He recognized the car as one he owned and contacted the authorities. He identified the photographs that the Varners had provided to the insurance company as some taken of his car when he exhibited it at a car show in Portland, Oregon during the summer of 2004. He recalled three people admiring his car at that show and, after obtaining his permission, photographing it.

On May 25, 2007, the State charged Merino with one count of attempted first degree ltheft. Merino ultimately went to trial on a fourth amended information charging him with one count of attempted first degree theft and one count of conspiracy to commit first degree theft.

[3] Jim Varner's shooting is not an issue in this appeal.

Mike Varner, Jim's older brother and Ken's uncle, testified that, sometime between October and December 2005, he was at Jim Varner's house and he talked with Jim and Ken while standing outside, near Jim's garage. Merino was working on a car at Jim Varner's during Mike's conversation with Jim and Ken. Mike Varner said hello to Merino, who returned the greeting and resumed work on the car. Mike, Jim, and Ken Varner then talked about turning a car in for insurance, something about it being stolen, and Jim and Ken showed Mike a photograph of a hulk of a car parked underneath a lean-to. Merino was within 30 feet of the conversation, but he did not indicate that he heard it, nor did he participate in it.

Jim Varner's daughter, Janelle, testified that on December 1, 2005, her father gave her a ride from Olympia to her home in Bellingham. At his request, she printed, on equipment she had at her home, the four photographs provided to the insurance company by Jim and Ken Varner.

The jury returned a verdict of guilty on both charges. Merino unsuccessfully brought a motion for a new trial. The trial court sentenced Merino to 60 days on each count to run concurrently. Merino appeals.

ANALYSIS

I. The Information

Merino first contends that the fourth amended information was defective because it failed to include details such as identifying the victim of the crimes. We disagree.

"A charging document must describe the essential elements of a crime with reasonable certainty such that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense." *City of Seattle v. Termain*, 124 Wn. App. 798, 802, 103 P.3d 209 (2004). The essential elements rule requires that the information allege facts

supporting every element of the offense, in addition to adequately identifying the crime charged. *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989).

Where, as here, a defendant challenges an information for the first time on appeal, we construe it liberally.[4] *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). When a defendant challenges an information after entry of a verdict, we ask "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *Kjorsvik*, 117 Wn.2d at 105-06.

The fourth amended information reads:

> COUNT I: ATTEMPTED THEFT IN THE FIRST DEGREE, RCW 9A.28.020(1); RCW 9A.56.030(1)(a) - CLASS C FELONY:
> In that the defendant, Douglas Lee Merino, in the State of Washington, on or between December 8, 2005 and April 30, 2006, with intent to commit a specific crime did take a substantial step toward [t]he commission of that crime, by attempting to wrongfully obtain or exert unauthorized control over property or services of another exceeding one thousand five hundred dollars ($1,500) in value with the intent to deprive the owner of that property.
> Count II: CONSPIRACY TO COMMIT THEFT IN THE FIRST DEGREE, RCW 9A.56.030(1)(a), RCW 9A.28.040 - CLASS C FELONY:
> In that the defendant, DOUGLAS LEE MERINO, in the State of Washington, on or between November 1, 2005 and April 30, 2006, as a principal or as an accomplice, did conspire with another to wrongfully obtain or exert unauthorized control over property or services of another or the value thereof, with intent to deprive said person of such property or services, the value of which exceeds one thousand five hundred dollars ($1,500.00), and took a substantial step toward commission of this offense.

Clerk's Papers (CP) at 129 (some emphasis omitted).

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[4] Merino admits in his opening brief that the defense made "no objection to the charging document prior to this appeal." Br. of Appellant at 25. In his reply, he contends that he objected to the information "in two separate motions to dismiss. CP[ ] 14-19[,] CP[ ] 55-57." Reply Brief of Appellant at 3. But the pretrial motions that he cites are a *Knapstad* motion, *see State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), and a motion for change of venue, neither of which asserts a defective charging document.

The theft statute under which Merino was charged, former RCW 9A.56.030(1)(a) (2005), provided in relevant part, "A person is guilty of theft in the first degree if he or she commits theft of . . . [p]roperty or services which exceed(s) one thousand five hundred dollars in value." *See* Laws of 2005, ch. 212, § 2 (effective July 24, 2005). RCW 9A.28.020(1) defines "[c]riminal attempt," stating, "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." (Emphasis omitted.) "Criminal conspiracy" is defined in RCW 9A.28.040(1), which provides, "A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." (Emphasis omitted.)

Here, the charging document tracks the language of the statutes, or uses equivalent language, and thus contains all the required statutory elements. *See Kjorsvik*, 117 Wn.2d at 108 (precise language of statute is not necessary; test is whether elements appear "in any form"). Because none of the statutes under which Merino was charged require a specific victim, the victim's identity is not an essential element that must be included in the information. Rather, any confusion concerning the victim could have been clarified by requesting a bill of particulars. As our Supreme Court explained in *State v. Noltie*,

> Washington courts have repeatedly distinguished informations which are constitutionally deficient and those which are merely vague. If an information states each statutory element of a crime but is vague as to some other matter significant to the defense, a bill of particulars can correct the defect. In that event, a defendant is not entitled to challenge the information on appeal if he or she has failed to timely request a bill of particulars.

116 Wn.2d 831, 843-844, 809 P.2d 190 (1991) (footnotes omitted).

Because Merino could have ascertained other information if he had requested a bill of particulars, his failure to do so is dispositive of his assertion that the information fails to give sufficient additional details. *Noltie*, 116 Wn.2d 831, 843-844. *See also State v. Plano*, 67 Wn. App. 674, 679-80, 838 P.2d 1145 (1992).

Citing *State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997), Merino also contends that by including the term "accomplice" in count II, the State improperly charged complicity to conspiracy. Br. of Appellant at 25. But *Smith* does not assist Merino. *Smith* held that language in a to convict instruction on the charge of conspiracy to commit murder improperly described the crime as "conspiracy to commit conspiracy to commit murder." *Smith*, 131 Wn.2d at 262. That is not the case here. Merino has not shown actual prejudice and thus his late challenge to the information fails.

II. Sufficient Evidence Regarding Conspiracy

Merino also argues that the State's evidence was insufficient to convict him of conspiracy to commit theft. We disagree.

> The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citations omitted). "Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S.

Ct. 1354, 158 L. Ed.2d 177 (2004). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

A conspiracy is a plan to carry out a criminal scheme together with a substantial step toward carrying out the plan; the punishable criminal conduct is the plan. *See* RCW 9A.28.040(1); *State v. Williams*, 131 Wn. App. 488, 496, 128 P.3d 98, *review granted and cause remanded on different grounds*, 158 Wn.2d 1006 (2006); *see also State v. Bobic*, 140 Wn.2d 250, 262-65, 996 P.2d 610 (2000). The nature and extent of the conspiracy lies in the agreement, which embraces and defines its objects. *Williams*, 131 Wn. App. at 496. Conspiracy is an inchoate crime, not a completed crime; thus, any number of acts taken by coconspirators as steps to attain the ultimate object of the agreement can be a substantial step that completes the crime of conspiracy. *Williams*, 131 Wn. App. at 497.

Moreover,

> [t]o prove a conspiracy, it is not necessary to show a formal agreement. A conspiracy "may be proven by showing the declarations, acts, and conduct of the conspirators." *State v. McGonigle*, 144 Wash. 252, 260, 258 P. 16 (1927)). The agreement may be shown by a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *State v. Casarez-Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)

State v. Barnes, 85 Wn. App. 638, 664, 932 P.2d 669 (1997) (some internal quotation marks and citations omitted). Also, circumstantial evidence may provide proof of a conspiracy. *Barnes*, 85 Wn. App. at 664. "Once the conspiracy has been established, evidence of a defendant's slight connection to it, if proven beyond a reasonable doubt, is sufficient to convict him of participation in the conspiracy." *Barnes*, 85 Wn. App. at 664; *see also State v. Brown*, 45 Wn. App. 571, 579,

726 P.2d 60 (1986).

Merino's insufficiency contention focuses on Mike Varner's testimony about a conversation he had with Jim and Ken Varner, in which the latter two discussed a plan to make a fraudulent insurance claim. Mike testified that Merino was nearby working on his car while the conversation took place but that Merino did not participate in the Varners' discussion. Based on this, Merino contends there was no evidence that he was involved in any conspiracy.

But the record contains other evidence of Merino's participation in the conspiracy. Merino authored and signed an appraisal of a 1949 Chevrolet Woody, indicating that it was fully restored and worth $60,000, when in fact the Woody was a rusted hulk worth $2,500. Merino signed a bill of sale to one of the Varners and filled out a report of sale but did not file it. When questioned by the insurance investigator, he told her the car was fully restored and discussed details and features about the car that the Varners did not own. Merino also told the investigator that he had sold the car to the Varners for $59,500.

A rational trier of fact could infer from Merino's preparation of fictitious documents and misrepresentations to the insurance investigator that he was part of the Varners' plan to submit a fraudulent insurance claim. His actions furthered the conspiracy and were a substantial step toward the conspirators' objective. Taking the evidence and its inferences in the light most favorable to the State, there was sufficient evidence to convict Merino of conspiracy to commit first degree theft.

III. Admission of Coconspirators' Statements

Merino further contends that the trial court erred in admitting the hearsay statements made by Ken Varner and erred again in disallowing contradictory hearsay testimony from defense

witnesses. We disagree.

We review the trial court's interpretation of the rules of evidence de novo and that court's application of the rules to particular facts for abuse of discretion. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 642, 145 P.3d 406 (2006). Merino first contends that the trial court improperly admitted hearsay statements made by Ken and Jim Varner, including those statements described in Mike Varner's testimony. But statements made by a coconspirator in the course of and in furtherance of a conspiracy are not hearsay. *Sanchez-Guillen*, 135 Wn. App. at 642 (citing ER 801(d)(2)(v); *State v. St. Pierre*, 111 Wn.2d 105, 118-19, 759 P.2d 383 (1988)). Thus, Merino's underlying contention, that the trial court erred in determining that the statements were not hearsay, fails.

Before admitting coconspirator statements, the trial court must first determine whether the State has shown, with substantial independent evidence, a prima facie case of conspiracy and determine that the statements were made during the course and in furtherance of the conspiracy. *St. Pierre*, 111 Wn.2d at 118-19. Merino contends that these requirements from *St. Pierre* were not met, but we again disagree.

The State's offer of proof included other evidence of the conspiracy and Merino's connection to it, including: (1) Jim Varner's request to his daughter, Janelle, to print out photographs of a 1949 Chevrolet Woody; (2) Jim and Ken Varner's acquisition of insurance for a 1949 Woody using the photographs and a bill of sale and appraisal from Merino; (3) Ken's subsequent report to his insurer that the car had been stolen and his submission with that claim of the bill of sale from Merino; (4) Merino's statements to the insurance investigator that he had sold the fully restored Woody in good condition to Ken Varner for $59,500; and (5) the issuance of

the insurance policy on the Woody was based in part on the photographs and the appraisal from Merino. Furthermore, after Jim Varner was found dead, Merino admitted to police that the Woody in question was a hulk—not a working vehicle—and that the Varners' insurance claim was a fraud. Furthermore, the owner of the Woody depicted in the photographs recognized the car on a television newscast and contacted police, describing the car and the event at which the photographs were taken. We hold that the trial court did not abuse its discretion when it ruled that the State had met its burden to show independent evidence of a conspiracy and when it then admitted Ken and Jim Varner's statements to Mike Varner regarding the plan to make a false insurance claim.

Merino next argues that, as a criminal defendant, he has a right to confront witnesses against him, citing cases that generally so hold.[5] But none of the cases he cites address conspiracy. The applicable rule here is that "[s]tatements in furtherance of a conspiracy are not testimonial, and their admission does not, therefore, implicate the Sixth Amendment." *Sanchez-Guillen*, 135 Wn. App. at 644-45 (citing *Crawford v. Washington*, 541 U.S. at 56). As we discussed above, statements of coconspirators are not hearsay because they are admitted to prove the "'verbal acts'" that form the conspiracy. *State v. Miller*, 35 Wn. App. 567, 569, 668 P.2d 606 (1983); *see also* ER 801(d)(2)(v). Moreover, "[a] statement that falls within [ER 801(d)(2)(v)'s] 'firmly rooted' exception to the hearsay rule does not violate a defendant's right of confrontation." *State v. Rangel-Reyes*, 119 Wn. App. 494, 498, 81 P.3d 157 (2003) (internal

[5] Merino cites to *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Orndorff*, 122 Wn. App. 781, 95 P.3d 406 (2004); *State v. Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002); *State v. McDaniel*, 83 Wn. App. 179, 920 P.2d 1218 (1996); *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980).

quotation marks omitted) (quoting *Bourjaily v. United States*, 483 U.S. 171, 183, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)). Thus, Merino's confrontation clause claim fails.

Merino also argues that, having admitted the State's hearsay evidence, the trial court should have admitted the defense's hearsay evidence to impeach coconspirator Ken Varner's credibility. But we hold that the trial court did not admit hearsay, thus Merino's contention that he was entitled to the admission of hearsay fails. Thus, we address his claim that he alone was entitled to hearsay evidence. Merino contends that Ken Varner's statements to a loan officer, Craig Stevenson, and to detective Kimsey would have impeached Ken Varner's testimony. This claim also fails.

When defense counsel asked Stevenson and Kimsey at trial what Ken Varner had said to them, the State objected, asserting hearsay, which objection the trial court sustained. Merino provides no offer of proof regarding what the witnesses would have said and how it would have impeached Ken Varner.[6] Nor did the defense challenge the trial court's evidentiary ruling. *See* ER 103(a). A party may assign evidentiary error on appeal only on a specific ground made at trial, which gives a trial court the opportunity to prevent or cure error. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Under these circumstances, Merino waived any alleged error.

IV. Withdrawal from Conspiracy Jury Instruction

Merino next contends that, because he introduced evidence that he withdrew from the conspiracy, the trial court erred in declining his proposed withdrawal instruction. We disagree.[7]

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[6] Nor did the defense identify the statements as qualifying under ER 801(d)(2)(v)'s hearsay exemption as a statement by a coconspirator offered against a party, made during the course and in furtherance of the conspiracy.

[7] The trial court did give a withdrawal instruction regarding the attempted first degree theft charge.

Merino's proposed instruction reflects the language of RCW 9A.08.020(5)(b), which provides in part that "a person is not an accomplice in a crime committed by another person if[h]e terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime." As the State correctly notes, Merino cites no Washington case that applies this defense to conspiracy. This is not surprising. The statutory language itself appears to foreclose its application in this context.[8]

For the defense to apply, an accomplice must withdraw before the crime is committed. The crime of conspiracy is complete when there is an agreement and any of the conspirators takes a substantial step furthering the agreement. RCW 9A.28.040(1). *Williams*, 131 Wn. App. at 497; *see also State v. Handley*, 115 Wn.2d 275, 293, 796 P.2d 1266 (1990) (conspiracy is "'separate, distinct from, and unincluded in the crime which the conspirators have agreed to commit'" (quoting *State v. Gladstone*, 78 Wn.2d 306, 311, 474 P.2d 274 (1970))).

Here, every member of the conspiracy took substantial steps to further their goal of obtaining money from the insurance company through a false claim. Merino falsified a bill of sale and an appraisal. Jim Varner obtained photographs of another car that were given to the insurance agent as proof of the condition of Varner's car and he accompanied Ken Varner when they met with Snelson about obtaining insurance on a fully restored 1949 Woody that they did not own. Ken Varner obtained the insurance and reported the car stolen. All of these acts occurred before Merino provided any information to the insurance investigator or to law enforcement

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[8] *See State v. Handley*, 115 Wn.2d 275, 293, 796 P.2d 1266 (1990) ("While a 'withdrawal' defense to accomplice liability is expressly recognized by statute, RCW 9A.08.020(5)(b), it is unclear whether a similar defense to anticipatory offenses [such as conspiracy] is available.").

suggesting that the claim was fraudulent. Under these facts, we hold that the trial court did not err in declining to give a withdrawal instruction regarding the conspiracy charge.[9]

V. Motion for a New Trial

Merino further contends that the trial court abused its discretion when it denied his motion for a new trial, which was based on allegations of juror and prosecutorial misconduct. We disagree. We review for abuse of discretion the trial court's denial of a motion for a new trial, the court's investigation into juror misconduct, and the court's rulings on allegations of prosecutorial misconduct. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008); *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003); *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132, *review denied*, 164 Wn.2d 1027 (2008).

[9] Merino cites to Ninth Circuit model criminal jury instruction 8.19, addressing withdrawal from conspiracy, but that does not assist him. *See* Comm. on Model Criminal Jury Instructions, Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit 8.19 (2003) (Ninth Circuit Model Criminal Jury Instructions). Federal law similarly provides that a conspiracy is complete once agreement is reached and an overt act in furtherance of the agreement is committed by one of the conspirators; accomplishment of the conspiracy's goal is immaterial. *See United States v. Mincoff*, 574 F.3d 1186, 1198 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1108 (2010). The model instructions, which are not pattern instructions, reflect as much. *See* Ninth Circuit Model Criminal Jury Instructions 8.16 (addressing elements of conspiracy); *see also* Ninth Circuit Model Criminal Jury Instructions 8.18 (addressing conspiratorial associations and providing that it is no defense that a person's participation in a conspiracy was minor or for a short period of time). Also, model criminal jury instruction 8.19 indicates that a conspiracy member remains a member until he withdraws from the conspiracy, as indicated by some definitive, positive step. The instruction states that the government has the burden of proving that the defendant did not withdraw from the conspiracy before "the overt act" was committed by some member of the conspiracy. Ninth Circuit Model Criminal Jury Instructions 8.19. This indicates that withdrawal is effective only where it occurs before the conspiracy has been completed by a member's overt act in furtherance of the conspiracy.

A. Juror Misconduct

The party alleging juror misconduct has the burden to show that misconduct occurred. *Earl*, 142 Wn. App. at 774. A new trial is warranted only where juror misconduct has prejudiced the defendant. *Earl*, 142 Wn. App. at 774. That is not the case here.

At the hearing on his motion for a new trial, Merino alleged that jurors improperly consulted the Internet regarding the value of an antique Woody automobile. But he admitted to the trial court, and repeats the concession in his brief, that he lacked evidence to substantiate that assertion. The record verifies that, although one juror joked to another that he should look up the car's value on the Internet, there is no evidence that he did so or that any other juror improperly considered information outside the evidence presented at trial. Merino failed to show juror misconduct and the trial court did not abuse its discretion in refusing to order a new trial on this basis.

B. Prosecutorial Misconduct

Merino repeats his claims of prosecutorial misconduct, alleging that (1) the State failed to disclose exculpatory evidence, (2) the prosecutor improperly manipulated a witness's testimony, (3) the prosecutor made statements in closing argument that he knew were false, and (4) before trial, the State provided the defense only black and white copies of color photographs it subsequently used at trial. He argues that he was entitled to a new trial based on the prosecutor's conduct. We disagree.

To establish prosecutorial misconduct, Merino was required to prove that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). A new trial will be ordered only if there is a substantial likelihood the

misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578-79, 79 P .3d 432 (2003). If the defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is waived unless the misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719. Also, failure to request a curative instruction or to move for a mistrial "strongly suggests to a court that the argument or event in question did not appear [to be] critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Merino claimed that the prosecutor failed to disclose to the defense that Janelle Varner stated during a pretrial interview that she did not believe any of the people in the photograph of the Woody on display in Portland could be Merino. In response to Merino's motion for a new trial, the prosecutor submitted a declaration stating that he only asked Janelle if she could identify the photographer among the three distorted figures visible in the reflection in the car bumper in the photograph. She responded that she could not and the matter was not discussed further. The prosecutor averred that Janelle made no statement that the figures in the bumper were not her father or Merino. Faced with conflicting statements, the matter of whom to believe in ruling on Moreno's motion turned on a credibility determination within the trial court's purview, which determination we do not review. *See Thomas*, 150 Wn.2d at 874-75 (reviewing court must defer to the fact finder on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence).

At trial, the prosecutor asked Janelle if she recognized the photographs that were the State's exhibits 1, 2, 3, and 4. Janelle replied affirmatively, stating that the exhibits were larger

copies of the photographs that she had printed out for her father, Jim Varner. The defense did not object and did not cross-examine Janelle. Merino's assertion that the prosecutor improperly manipulated Janelle's testimony fails.

Merino also contends that, in closing rebuttal argument, the prosecutor improperly argued inferences from the evidence that he knew were false because they contradicted Janelle's pre-trial statement to the prosecutor that none of the people in the reflection in the bumper on the car in the photograph of the Woody were Merino. But the prosecutor averred that Janelle did not make this statement. Moreover, the prosecutor relied on the trial testimony of Woody's owner about the photographs (State's exhibits 1, 2, 3, and 4) and that owner's testimony and recollection of the three people who admired his car and took photographs of it at the 2004 summer event in Oregon. The prosecutor argued inferences from that testimony and other evidence to link Merino to the photographs, which the prosecutor argued suggested that the conspiracy started as early as summer 2004. The defense did not object.

A prosecutor is allowed wide latitude in making arguments to the jury and may draw reasonable inferences from the evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Reversal is not required where defense counsel failed to request a curative instruction regarding the prosecutor's comments. *Fisher*, 165 Wn.2d at 747. Moreover, the trial court instructed the jury that the attorneys' arguments were not evidence and to disregard any comment that did not comport with the evidence or the law the court had given. Under these circumstances, the trial court properly determined there was no prosecutorial misconduct.

Merino repeats his contention that the State improperly provided him with black and white copies of the color photographs that it used at trial. Merino relies on *State v. Boyd*, 160 Wn.2d

424, 158 P.3d 54 (2007), but that case does not assist him. *Boyd* held that criminal court rules (e.g., CrR 4.7) require the State to disclose evidence it intends to use at trial and provide copies of such evidence. *Boyd*, 160 Wn.2d at 432, 435, 441. Here, the State provided Merino copies of the photographs and he did not object when the color photographs were admitted at trial or identified by Janelle. And the defense did not cross-examine Janelle after she identified the color photographs as larger copies of the photographs that she printed out for her father. The trial court properly determined that Merino failed to establish prosecutorial misconduct and we hold that the trial court did not abuse its discretion in denying Merino's motion for a new trial.

F. Same Criminal Conduct

Finally, Merino argues that the trial court erred in declining to find that the charges of attempted theft and conspiracy to commit theft constituted the same criminal conduct for sentencing purposes. Again, we disagree.

Under RCW 9.94A.589(1)(a), "[s]ame criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." If any one of these three elements is missing, a trial court must count multiple offenses separately when calculating a defendant's offender score. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). We will not disturb a trial court's decision on whether two or more crimes are the same criminal conduct unless the trial court abused its discretion or misapplied the law. *State v. Burns*, 114 Wn.2d 314, 317, 788 P.2d 531 (1990).

Here, the two crimes did not occur at the same time. The conspiracy comprised the agreement among Merino and Jim and Ken Varner, plus a substantial step by any of them under that agreement. The evidence showed that the conspiracy began as early as the fall 2005

conversation among Jim, Ken, and Mike Varner, and possibly even as early as the summer of 2004, when the Woody was photographed in Oregon. Substantial steps included the printing of the photographs on December 1, 2005, and taking out an insurance policy using falsified documents on December 6, 2005. Thus, the conspiracy was complete when any of the substantial steps were taken, even if the theft had never been attempted. *Williams*, 131 Wn. App. at 497. *See also Handley*, 115 Wn.2d at 293 (conspiracy is "'separate, distinct from, and unincluded in the crime which the conspirators have agreed to commit'" (quoting *State v. Gladstone*, 78 Wn.2d 306, 311, 474 P.2d 274 (1970))). The conspiracy occurred at the place and time the preparations were made.

The attempted theft, on the other hand, occurred when Ken Varner took steps to collect on the insurance policy after reporting the car stolen on December 8, 2005. Merino assisted in that attempt by later verifying to the insurance investigator in a December 20, 2005, telephone conversation that he had restored, appraised, and sold the Woody to the Varners. Because the conspiracy occurred before the attempted theft, the two crimes occurred at different times and the trial court did not abuse its discretion by refusing to treat them as same criminal conduct for sentencing purposes.

VI. Statement of Additional Grounds for Review

In his statement of additional grounds for review (SAG),[10] Merino claims that the admission of Ken Varner's hearsay statements violated his confrontation rights. We addressed this issue already and we do not further discuss it. *See State v. Johnston*, 100 Wn. App. 126, 132, 996 P.2d 629 (2000) (reviewing court need not separately address pro se arguments that simply

[10] RAP 10.10.

repeat or paraphrase arguments presented in appellate counsel's brief).

He also claims prosecutorial misconduct based on the State's failure to provide the defense with color copies of the photographs that the State introduced at trial. We have discussed this claim already and only address Merino's additional assertion that the color photographs introduced at trial (without objection) showing the car's front bumper are exculpatory. But the images reflected in the bumper appearing in the exhibit photographs are distorted and Merino does not show how the color photographs are exculpatory.

Merino also complains that the defense had no idea the prosecutor was going to elicit testimony from Janelle Varner and the owner of the car about the reflected images appearing in the color photograph exhibits. But the record indicates that the State made no such inquiries of those witnesses and this claim fails.

Finally, Merino contends that the trial court erred in admitting as a business record the proof of loss statement that Ken Varner submitted to his insurer. Merino argues that the hearsay document was improperly offered during the testimony of the insurance investigator rather than through the testimony of a records custodian. But although the trial court ruled that the proof of loss form was a business record, it also ruled that the document was a statement by the person who wrote it, Ken Varner. Accordingly, the trial court additionally ruled that the document was a conspirator's statement in furtherance of the conspiracy and admissible over defense's objection on that basis. As we have held, such statements are not hearsay and are properly admissible. *See Sanchez-Guillen*, 135 Wn. App. at 642; *see also* ER 801(d)(2)(v). Accordingly, the trial court did not abuse its discretion in admitting the proof of loss statement. Merino's SAG

provides no basis for reversing his convictions.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Armstrong, J.

Penoyar, J.