IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63636-7-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
JONATHAN LEWIS HUGGINS,	)	
	)	
Appellant.	)	FILED: May 31, 2011
	)	

Leach, J. — Jonathan Lewis Huggins appeals seven convictions from two trials: two counts of first degree burglary and one count each of first degree robbery, first degree possessing stolen property, unlawful imprisonment, second degree unlawful possession of a firearm, and first degree criminal trespass. Huggins contends, and the State concedes, that the State erroneously charged him with possessing stolen property. He also claims the trial court violated his right to present a defense by excluding "other suspect" evidence and his right to confrontation by barring him from fully impeaching a witness. Huggins argues trial counsel provided ineffective assistance because he failed to move for a mistrial after a State's witness made a prejudicial comment. Finally, Huggins contends that the sentencing court exceeded its statutory authority by imposing

an alcohol-related community custody condition.

Accepting the State's concession, we reverse Huggins's conviction for possessing stolen property. Because the record contains no evidence that alcohol played a direct role in Huggins's crimes, the trial court lacked statutory authority to impose the alcohol-related community custody condition. We therefore remand to the trial court to dismiss the possession charge without prejudice, to strike the alcohol-related community custody conditions, and to resentence Huggins. Otherwise, we affirm Huggins's remaining convictions.

FACTS

The Seattle Incidents

On July 23, 2007, Laureen Bennett, a drug dealer, ran into Richard Heuring, a friend and fellow drug dealer. Heuring told Bennett that he wanted to buy methamphetamine. Bennett agreed to organize a deal through a third party and told Heuring that she would call him once she had the drugs.

Later that day, Bennett and Heuring arranged over the phone to meet at Bennett's apartment. Bennett went outside to wait for Heuring, where she encountered a man whom she later identified as Huggins.[1] Huggins pointed a silver gun with a red laser sight at Bennett and directed Bennett to take him to her apartment, holding the gun to her ribs. Huggins threatened to shoot if she screamed.

[1] Bennett testified that at the time of the encounter, she did not recognize Huggins. Nor had Bennett ever met Huggins.

When they arrived at Bennett's third-floor apartment, Gary Naugle, Bennett's friend, stood at the door. Huggins hit Naugle twice on the head and told Naugle not to look at him. Bennett unlocked the door, and they went inside. Huggins directed Naugle to get on the floor. He put a couch cushion cover over Naugle's head and bound his hands and feet together with electrical cords.

After binding Naugle, Huggins took Bennett into her bedroom, where she opened a safe containing Heuring's methamphetamine and other, personal, items. Bennett took everything out of the safe. Then, Huggins and Bennett returned to the living room, where he tied her up, blindfolded her, and gagged her. Bennett heard Huggins putting items into bags and eventually heard him leave the apartment.

Bennett freed herself and Naugle. She saw that her Social Security card, identification card, cameras, jewelry, cell phone, purse, credit cards, and Naugle's backpack had been taken. Bennett called a friend and, later, the police. Bennett did not tell the police that drugs were involved, but she identified Heuring as a possible suspect.

Detective Frank Clark took Heuring into custody on July 24. According to Heuring, after he met with Bennett on Capitol Hill, he went back to his apartment. While waiting for Bennett's call, a man holding a silver gun with a red laser pointer entered his apartment. Heuring later identified the man as Huggins.[2] Heuring said Huggins called him by name and told him to get down

[2] Heuring said he had never seen Huggins before the incident at his

on the floor. Heuring complied. A second man entered the apartment and restrained Heuring, sticking a gun to the back of his neck. Someone put a pillowcase over Heuring's head and duct-taped his hands together.

While Heuring lay on the floor, Huggins and another person searched his belongings. Huggins repeatedly called Heuring by his first name and asked him, "Where's the money? Where's the drugs?" Heuring responded that he did not have either. At some point during the intrusion, Bennett called. After multiple calls from Bennett and under the threat of physical injury and death, Heuring admitted that Bennett had his money.

The men took Heuring to a vehicle and demanded that he lead them to Bennett. Heuring tried to stall arrival at Bennett's by giving inaccurate directions, but after his assailants repeatedly struck him in the face, Heuring led them to the apartment. Heuring called Bennett and asked her to meet him outside.

Heuring said that after leaving Bennett's apartment, Huggins became worried that the police were looking for them and released him. Heuring went to the house of a friend, Jaime DeRosier, who helped Heuring remove the duct tape and pillowcase. Heuring then returned to his apartment and found that his laptop, bicycle, camera, stereo, money, and jewelry were gone. He did not call the police.

After speaking with Heuring and DeRosier, who produced the bloody

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apartment.

pillowcase and duct tape, the police eliminated Heuring as a suspect. Heuring told Detective Clark that he recognized the voice of one of the people involved in the incident. He identified the voice as "J.D.," the boyfriend of Ute Wysgoll, a woman whom Heuring briefly dated.[3] Later, Heuring identified Huggins in a police lineup.

The Bellevue Incidents

Arriving at their Bellevue home after a trip to Portland on the evening of July 28, 2007, John McConnell and his wife, Virginia Rhoads, noticed an unfamiliar white cargo van parked in their driveway. The garage door was open, and the house's lights were on. McConnell observed people moving around and left his car to investigate.

McConnell opened the van's passenger side door and saw a woman sitting in the driver's seat holding a small black dog.[4] At that point, a man "charged" McConnell, yelling, "Don't do that." The man grabbed McConnell, hit him on the left side of the face, and threw him to the ground. After punching McConnell, the man got into the passenger side of the van, and the van drove away. As it left McConnell's driveway, the van struck the rockery and hit McConnell's car.

McConnell went inside and called the police. The house was "complete

[3] A few weeks before the incident, J.D. made several harassing phone calls and sent abusive text messages to Heuring, in which he warned Heuring to stay away from Wysgoll. Huggins testified that he began using the alias J.D. when he "got into the street game."

[4] McConnell later identified the woman as Wysgoll.

chaos." McConnell noticed Rhoads's laptop had been taken, along with climbing equipment, a gym bag, and two bicycles. Police discovered Huggins's fingerprint in the house.

McConnell went to the emergency room, where he received nine stitches over his eye. At the hospital, McConnell provided the responding police officer with a partial license plate number and a description of the people involved. McConnell described the man who punched him as in his late 20s, five feet eight inches tall to five feet nine inches tall with short black hair and a dark complexion.

Six months after the burglary, when police showed McConnell photographs from a lineup, McConnell identified Huggins with 50 percent certainty. On seeing Huggins in court, McConnell said he was 80 percent certain that Huggins was the burglar.

Two days after the McConnell burglary, Kirkland Police Officer Adam Haas found McConnell's climbing gear behind a vacant house, when he investigated reports of squatters living in a group of abandoned houses. And in a Honda Ridgeline parked outside, police recovered jewelry belonging to Rhoads. Huggins and Wysgoll were among those squatting in the houses.

The next day, at a Kirkland condominium complex, police recovered a Dually pickup truck that had been stolen several days earlier from Ford of Kirkland. Police found McConnell's and Rhoads's bicycles and their wedding announcements in the Dually. Police discovered Huggins's fingerprints on the

truck's rearview mirror.

Wysgoll confessed to police that she and Huggins committed the Seattle and Bellevue incidents[5] and led the police to a black Honda in a Seattle towing lot. In the Honda, police found items taken from the McConnell-Rhoads house as well as property belonging to Wysgoll and Huggins, including Huggins's Arizona identification card.

After Wysgoll identified Huggins, the police attempted to arrest him at Wysgoll's mother's house in Seattle's University District. Huggins saw the police and fled. He ran across Interstate 5 and broke into the basement of a nearby house. Huggins surrendered to police after several hours of negotiation with special weapons and tactics and hostage negotiation teams. The police found a loaded silver .38 caliber revolver with a laser sight in the basement.

The State charged Huggins with three counts of first degree burglary, first degree possessing of stolen property, two counts of first degree robbery, unlawful imprisonment, second degree unlawful possession of a firearm, and residential burglary. The trial court granted Huggins's motion to sever the charges related to the Bellevue incidents, i.e., the first degree burglary charge involving McConnell and Rhoads and the first degree possession of stolen property charge.

In Huggins's first trial, involving the Bellevue incidents, the jury convicted

[5] Wysgoll pleaded guilty to attempted burglary for her role in the incident at McConnell's house and testified against Huggins at the first trial.

him as charged.

The trial on the Seattle incidents began immediately afterward. Huggins testified, disputing Bennett's and Heuring's versions of events. Huggins said that during the summer of 2007, he used and sold methamphetamine. For protection, he carried a .38 caliber revolver with laser sight. Huggins explained that he first met Heuring through Wysgoll, who arranged a meeting to discuss the possibility of future drug transactions. Heuring agreed to buy a quarter pound of methamphetamine from Huggins for $2,500. Heuring told Huggins that another person, Laureen Bennett, would be involved in the purchase. On July 4, Huggins, Wysgoll, Heuring, and Bennett met at Heuring's apartment. Heuring and Bennett purchased two ounces of methamphetamine and told Huggins they would call him when they needed more.

According to Huggins, things quickly soured between him and Heuring. Around July 10, Huggins refused to give Wysgoll methamphetamine. She told Huggins that when she went to Heuring to purchase drugs, Heuring accused her of stealing and made her strip to her underwear. As retribution, Wysgoll and Huggins decided to switch the quarter pound of high quality methamphetamine that Heuring and Bennett planned to buy with a quarter pound of very low quality drugs. Huggins explained how he accomplished the bait and switch. And he said that he took Bennett's and Heuring's property as collateral because they owed Huggins money for the methamphetamine. Huggins said when Heuring discovered the switch, he called Huggins and said "that they would handle it a

different way if I did not bring him back the product or, you know, bring back their cash and . . . their collateral."

The jury did not reach a unanimous verdict on the burglary and robbery charges for the incidents at Heuring's apartment. And for breaking into the basement during his flight from police, the jury found Huggins guilty of the lesser included crime of first degree criminal trespass. Otherwise, the jury found Huggins guilty as charged. In a consolidated sentencing, the trial court imposed standard range sentences and firearm sentencing enhancements totaling 254 months. Huggins appeals this judgment and sentence.

ANALYSIS

Possession of Stolen Property

The State's information alleged that Huggins committed first degree possessing stolen property when "on or about July 31, 2007, [he] did knowingly receive, retain, possess, conceal, and dispose of . . . a 2006 white Ford pickup, of a value in excess of $1,500, knowing that it had been stolen." Huggins claims, and the State appropriately concedes, that the State charged him under the wrong statute.

Effective July 22, 2007, the possessing stolen property statute, RCW 9A.56.150, no longer applied to possession of stolen motor vehicles.[6] Instead,

[6] In 2007, the legislature amended RCW 9A.56.150, adding the underlined portion, "A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds one thousand five hundred dollars in value." Laws of 2007, ch. 199, § 6.

our legislature created a new crime, also effective July 22, possession of a stolen vehicle, codified at RCW 9A.56.068.[7] The correct charge on July 31, therefore, would have been possession of a stolen vehicle.

The State and Huggins agree that Huggins's conviction for possessing stolen property should be reversed.[8] The State contends, however, that this remedy results from a finding that insufficient evidence supported Huggins's conviction.[9] We disagree. Here, the State proceeded under the wrong statute. The deficiency requiring reversal, therefore, is a defect in the State's information,[10] not a failure of the State's proof at trial.[11] In other words, the former possessing stolen property statute was legally, not factually, inapplicable to Huggins's conduct. A conviction obtained under a defective information must

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[7] RCW 9A.56.068(1) reads, "A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle."

[8] The State does not address in its briefing whether it would be permissible to charge Huggins under the possession of a stolen vehicle statute.

[9] Huggins claims that the mandatory joinder rule precludes the State from retrying him for possession of a stolen vehicle. We disagree that the mandatory joinder rule applies under the facts of this case. CrR 4.3.1(b) requires mandatory joinder where the crimes are "related offenses." Offenses are related where "they are within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1(b)(1). "'Same conduct' is conduct involving a single criminal incident or episode." State v. Watson, 146 Wn.2d 947, 957, 51 P.3d 66 (2002).

Here, there were three distinct criminal episodes: the McConnell burglary, the Heuring/Bennett burglary, and the possession of the stolen Dually. Huggins's offenses were separate incidents and therefore do not constitute the same criminal conduct. The mandatory joinder rule is inapplicable.

[10] See Montana v. Hall, 481 U.S. 400, 404, 107 S. Ct. 1825, 95 L. Ed. 2d 354 (1987) (characterizing Hall's prosecution under the wrong statute as a defect in the charging instrument).

[11] We note that the trial court would have been required to dismiss the charge if Huggins had properly raised the issue in a pretrial motion.

be reversed, and the charge dismissed.[12] The question arises whether the State may now charge Huggins under the correct statute. The United States Supreme Court considered a similar issue in Montana v. Hall.[13] There, a jury convicted Hall of incest.[14] On appeal to the Montana Supreme Court, the State discovered that the incest statute had not been in effect on the date of the charged criminal act.[15] The State brought the error to the attention of the court, which held that the double jeopardy clause barred Hall's second prosecution.[16] The Supreme Court reversed, holding, "[R]espondent's conduct apparently was criminal at the time he engaged in it. If that is so, the State simply relied on the wrong statute in its second information. It is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument."[17] Double jeopardy, therefore, does not bar the State from retrying Huggins for possession of a stolen vehicle.

"Other Suspect" Evidence

Huggins sought to present evidence that another man, Abraham Hartfield, committed the McConnell burglary. Huggins argued that the following evidence pointed to Hartfield as the guilty party: (1) Hartfield's appearance fit McConnell's general description of the male intruder, i.e., he was 30 years old, five feet seven

[12] State v. Kitchen, 61 Wn. App. 915, 918, 812 P.2d 888 (1991).
[13] 481 U.S. 400, 107 S. Ct. 1825, 95 L. Ed. 2d 354 (1987).
[14] Hall, 481 U.S. at 401.
[15] Hall, 481 U.S. at 401-02.
[16] Hall, 481 U.S. at 402.
[17] Hall, 481 U.S. at 404.

inches tall, had dark hair and a dark complexion; (2) Wysgoll knew Hartfield; (3) papers belonging to Hartfield's girlfriend were in the same abandoned houses where the police located some of the stolen property; (4) Hartfield lived one and one-half miles from where the police found the van; (5) at the time of the incidents, Hartfield was under the Kirkland Police Department's surveillance for automobile theft; (6) when Bellevue police arrested Wysgoll, they found notes in her purse implicating a third person.[18]

The trial court denied Huggins's motion to present this evidence, ruling,

> The circumstantial relationship between Hartfield's description, the association between he [sic] 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.

Huggins claims this ruling violated his right to present a defense under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution.

Both the federal and state constitutions guarantee criminal defendants "'a meaningful opportunity to present a complete defense.'"[19] This right extends to

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[18] The notes read, "Him (JD) and I need to communicate. We haven't even talked. His lawyer has not tried to contact me either. They are bombarding me. But remember this, Do not doubt what I say. Please. Love you. Burn this, destroy. But do not seek me out to annihilate me."

"Do not doubt me. Him and I need to communicate. We have not, and he or his lawyer has made no attempts to contact me, and I'm being bombarded by nosy lawfuckers."

[19] Holmes v. South Carolina., 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)); State v. Mezquia, 129 Wn. App. 118, 124, 118 P.3d 378 (2005).

relevant, admissible evidence.[20] Nonetheless, we review a trial court's ruling on the admissibility of evidence for an abuse of discretion.[21] "Abuse exists when the trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or reasons.'"[22]

The constitutional right to present a defense is not unfettered.[23] To be admissible in Washington, the proffered "other suspect" evidence must create a train of facts or circumstances that clearly point to someone other than the defendant as the guilty party, establishing a connection between the other suspect and the crime.[24] The defendant has the burden of demonstrating the admissibility of the "other suspect" evidence.[25] Where no other evidence links another person to the crime, evidence of motive, ability, or opportunity to commit the crime is insufficient to meet the defendant's burden.[26] Additionally, any error in excluding "other suspect" evidence is harmless if we conclude beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.[27]

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[20] State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

[21] State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

[22] Darden, 145 Wn.2d at 619 (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

[23] Rehak, 67 Wn. App. at 162.

[24] State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932); State v. Maupin, 128 Wn.2d 918, 927, 913 P.2d 808 (1996); Rehak, 67 Wn. App. at 162-63 (quoting Downs, 168 Wash. at 667); State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993).

[25] State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

[26] See Downs, 168 Wash. at 667; Rehak, 67 Wn. App. at 163.

[27] Maupin, 128 Wn.2d at 928-29 (quoting State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)).

Here, the evidence offered by Huggins did not clearly point to Hartfield as the perpetrator. While the identification evidence could have described Hartfield, the description matched any number of people. Wysgoll did not identify Hartfield as the suspect. No evidence directly linked Hartfield to the vacant houses, only his girlfriend. Finally, Wysgoll's notes do not indicate Hartfield's involvement. Huggins's speculation alone is insufficient to connect Hartfield to the crime. The trial court did not abuse its discretion in excluding the "other suspect" evidence.

We also note the court's decision to exclude the "other suspect" evidence did not contribute to the verdict obtained. Huggins argues that the evidence linking him to the Bellevue burglary was weak. We disagree. Aside from the substantial circumstantial evidence linking Huggins to the crime, police found Huggins's fingerprint in McConnell's house, Wysgoll testified that she and Huggins acted together in the burglary, and McConnell identified Huggins as the man involved. This evidence directly links Huggins to the burglary. Therefore, were we to conclude that the trial court erred in excluding the "other suspect" evidence, that error would have been harmless.

Alternatively, Huggins asks us to find Washington's "other suspect" rule unconstitutional under State v. Hudlow,[28] State v. Darden,[29] and Holmes v. South Carolina.[30] These cases do not support Huggins's position. Hudlow and Darden

[28] 99 Wn.2d 1, 659 P.2d 514 (1983).
[29] 145 Wn.2d 612, 41 P.3d 1189 (2002).
[30] 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

dealt with relevancy in the context of a defendant's right to confront adverse witnesses, not the right to present a defense using "other suspect" evidence. And Holmes did not alter the constitutionality of Washington's "other suspect" evidence rule.[31] That case addressed a South Carolina rule that allowed the exclusion of "other suspect" evidence in cases where there was strong evidence of the defendant's guilt.[32] The Court pointedly noted that rules such as Washington's, where evidence may be excluded if it does not sufficiently connect the other person to the crime, are "widely accepted" and were not challenged by Holmes or the amici curiae.[33] We reject Huggins's claim.

Impeachment Evidence

Huggins moved in limine to impeach Bennett through cross-examination. Huggins sought to introduce evidence of Bennett's 2002 Alford[34] plea for taking a motor vehicle without permission and Bennett's later statements to Huggins's counsel that she was guilty of the crime.[35] Huggins claimed that in the face of

[31] And while other states have rejected tests similar to Washington's, this court is not bound by those decisions.

[32] Holmes, 547 U.S. at 321, 324.

[33] Holmes, 547 U.S. at 327 & n.*.

[34] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Bennett's plea statement read, "I do not believe I am guilty of this crime. I plead guilty to take advantage of the State's offer."

[35] In the interview, Huggins's counsel asked her, "Why did you tell the court that you didn't believe you were guilty of the crime if you were guilty?" Bennett explained that she felt entitled to take the car:

> I had just lost my home to foreclosure, my marriage, and I had a card collection in the trunk of Michele A. Swan's car that Andy Skagg was going to buy the next day for $24,000. And it was the money that I was going to use for my daughter and I to have a place to live. She was a minor. And [the Swans] took [the card collection] and traded it for a [sic] eight ball of drugs.

this admission, Bennett's plea constituted an "outright lie to a judicial officer" and the evidence was therefore relevant to Bennett's credibility.

The court found Bennett's plea admissible, but not her interview answers. The court reasoned that while ER 608(b) permits introduction of specific instances of untruthfulness, the instances must be discrete and unrelated to the particular conviction being used for impeachment. And while ER 609(a) allows the introduction of a prior conviction, the rule prohibits going behind the facts directly related to the conviction. Therefore, in the trial court's opinion, the interview answers were not admissible under either ER 608(b) or ER 609.

Huggins argues that he should have been allowed to impeach Bennett with her interview answers under ER 608(b). We review a trial court's decision to limit the scope of cross-examination for an abuse of discretion.[36]

The federal and state constitutions guarantee a criminal defendant the right to confront and cross-examine adverse witnesses.[37] This right is not absolute.[38] A trial court may, within its discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative.[39] Thus, a defendant's right to cross-examine an adverse witness is limited to relevant evidence.[40]

We apply the evidence rules to determine whether a trial court violated a

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[36] Darden, 145 Wn.2d at 619.

[37] U.S. Const. amend. VI; Wash. Const. art. I, § 22; Washington v. Texas, 388 U.S. 14, 17-18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Hudlow, 99 Wn.2d at 14-15.

[38] Darden, 145 Wn.2d at 620.

[39] Darden, 145 Wn.2d at 620-21.

[40] Hudlow, 99 Wn.2d at 15.

defendant's confrontation rights.[41] ER 608(b) allows cross-examination of a witness regarding specific instances of misconduct to impeach a witness's credibility, particularly concerning the witness's character for truthfulness or untruthfulness. And ER 609 allows impeachment through the introduction of a prior conviction. Under ER 609, however, cross-examination is "'limited to the fact of the conviction, the type of crime, and the punishment.'"[42] ER 608 and ER 609 are not mutually exclusive, i.e., evidence inadmissible under ER 609 may be admissible under ER 608.[43]

Here, the trial judge ruled that he could not admit the impeachment evidence under ER 608(b) because it related to the prior conviction admitted under ER 609. This was error. The trial court had discretion to allow the cross-examination under ER 608(b). A failure to exercise discretion is an abuse of discretion.[44]

But the trial court's error was harmless. "Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment."[45] "Once impeached, there is less need for further impeachment

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[41] Darden, 145 Wn.2d at 624.

[42] State v. Clark, 143 Wn.2d 731, 767, 24 P.3d 1006 (2001) (quoting State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996)).

[43] See Clark, 143 Wn.2d at 767 (although facts underlying witness's convictions were inadmissible under ER 609, the judge could have admitted them under ER 608).

[44] See Brunson v. Pierce County, 149 Wn. App. 855, 861, 205 P.3d 963 (2009).

[45] Clark, 143 Wn.2d at 766.

on cross-examination."[46] While Bennett, as Huggins's victim, was a crucial State witness, her statement that she was guilty of taking a motor vehicle was not the only evidence that put her credibility at issue. The jury heard that Bennett (1) had a conviction for a "crime of dishonesty"; (2) used and sold methamphetamine during the time of the burglary; (3) called her friends after the burglary—rather than police—because of her drug involvement; and (4) withheld information that drugs were involved from the police.

Because the jury was presented with sufficient evidence to assess Bennett's credibility, the trial court's decision did not alter the outcome. The error was harmless, and we reject Huggins's confrontation clause claim.

Ineffective Assistance of Counsel

During direct examination, Heuring stated that he "had heard bad things about [Wysgoll] and JD doing robberies and stuff." Huggins's counsel immediately objected to Heuring's statement and moved to strike it from the record. The court sustained counsel's objection and ordered the jury to disregard the comment. Huggins claims that defense counsel's failure to move for a mistrial deprived him of his constitutional right to the effective assistance of counsel.

Claims of ineffective assistance involve mixed questions of fact and law that we review de novo.[47] To prevail on a claim of ineffective assistance,

[46] Clark, 143 Wn.2d at 766.
[47] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Strickland v. Washington[48] requires that a defendant satisfy a two-prong test. If a defendant fails to establish either prong, we need not inquire further.[49] First, he must show a deficiency in counsel's representation. Counsel's representation is deficient if it falls below an objective standard of reasonableness.[50] Second, he must show that the deficient performance resulted in prejudice.[51] Prejudice occurs when it is reasonably probable that but for counsel's errors, "'the result of the proceeding would have been different.'"[52] A strong presumption of effective assistance exists, and the defendant has the burden of demonstrating that there was no legitimate strategic or tactical reason for the challenged conduct.[53] We evaluate counsel's performance in the context of the entire record.[54]

Huggins argues that no legitimate tactical reason could have supported counsel's decision to continue with the same jury.[55] Assuming, without deciding,

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[48] 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[49] State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

[50] State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

[51] Stenson, 132 Wn.2d at 705-06.

[52] State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting Strickland, 466 U.S. at 694).

[53] State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

[54] Strickland, 466 U.S. at 695-96 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); McFarland, 127 Wn.2d at 335 ("Competency of counsel is determined based upon the entire record below.").

[55] As evidence of a lack of strategic basis, Huggins points to trial counsel's efforts to prevent the jury from learning about the Bellevue incidents. Counsel moved to sever the Bellevue charges from the Seattle charges. And after the jury convicted Huggins for the Bellevue charges, Huggins moved to

that counsel provided deficient representation, Huggins's claim fails because he cannot demonstrate prejudice.

After Heuring made the comment at issue here, counsel immediately moved to strike it. The court sustained the objection, struck the comment, and instructed the jury to disregard it. The court also instructed the jury before deliberations, "If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict." We presume that the jury followed these instructions.[56]

We agree with Huggins that some statements are too prejudicial to be cured by an instruction to the jury. Instructions to disregard "'cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress

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have the conviction generically referred to as a "felony crime involving dishonesty." Counsel prevailed on both motions. Huggins argues that "counsel therefore successfully protected Huggins from the prejudicial effect of the Bellevue incident. It would have been inexplicable for him to have nevertheless deliberately chosen to proceed with the same tainted jury." While this may show the lack of a strategic basis for failing to move for a mistrial, it also shows that, on the whole, defense counsel vigorously and diligently defended Huggins's interests. "[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Harrington v. Richter, __ U.S. __, 131 S. Ct. 770, 791, 178 L. Ed. 2d 624 (2011) (citation omitted) (quoting Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)).

[56] Strickland, 466 U.S. at 694-95 (a court should proceed on the assumption that the jury acted according to law and applied the law impartially); see also State v. Atkins, 156 Wn. App 799, 813, 236 P.3d 897 (2010).

itself upon the minds of the jurors.'"[57]

The record here, however, satisfies us that Heuring's statement was not too prejudicial to be cured. Indeed, the record suggests that the jury heeded the trial court's warnings and instructions. The jury did not reach a unanimous verdict on the charges involving Heuring. This indicates that it did not accept Heuring's testimony at face value. Heuring's statement does not appear to have affected the jury's ability to fairly evaluate the evidence.

Also, Huggins extensively testified to his deep involvement in criminal activities. Huggins told the jury that he had a recent conviction for a felony crime of dishonesty. He testified to other criminal activity, including using and selling methamphetamine. Huggins admitted to unlawful possession of a firearm, a crime for which he was charged, when he discussed carrying and displaying a .38 caliber revolver with laser sight. And Huggins's bait-and-switch story displayed a willingness to engage in deceitful behavior. It is unlikely that Heuring's statement about Huggins's involvement in "robberies and stuff" was any more damning than Huggins's own admissions. Considering the record below as a whole, Huggins fails to demonstrate that Heuring's statement altered the outcome of the trial. Because Huggins cannot satisfy the second Strickland prong, we reject his ineffective assistance claim.

[57] State v. Mack, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

Community Custody Condition

At sentencing, the trial court imposed community custody for 18 to 36 months, including the condition that "[t]he defendant shall participate in the following crime-related treatment or counseling services: drug and alcohol evaluation and follow recommended treatment." Huggins claims that the court exceeded its statutory sentencing authority by imposing an alcohol-related community custody condition. He argues that this condition is not directly crime related, in violation of former RCW 9.94A.700(5)(c) (2003) and State v. Jones.[58] This court reviews whether the trial court had statutory authority to impose community custody conditions de novo.[59] If the condition is statutorily authorized, the sentencing court's decision to impose it is reviewed for an abuse of discretion.[60]

Huggins did not object to the community custody condition below. But because he argues that the court lacked statutory authority to impose this condition of his sentence, this court can address this issue for the first time on appeal.[61]

The applicable statutes in effect between July 23 and July 31, 2007, the time period spanning Huggins's crimes, classified first degree burglary and robbery as class A felonies,[62] provided that all class A felonies were violent

[58] 118 Wn. App. 199, 76 P.3d 258 (2003).
[59] See State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).
[60] State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006).
[61] Jones, 118 Wn. App. at 204.
[62] RCW 9A.52.020(2); RCW 9A.56.200(2).

offenses,[63] and mandated community custody for violent offenders.[64] The court also had discretion to impose conditions listed in former RCW 9.94A.700(5), including "any crime-related treatment or counseling services."

In Jones, Division Two of our court construed the meaning of "crime related."[65] It held that a trial court may not order an offender to participate in alcohol counseling unless the evidence shows that alcohol use contributed to the crime.[66] The State does not contest Huggins's reliance on Jones; it argues that the condition directly related to Huggins's crimes. To support this contention, the State cites the testimony of Officer Haas, who stated that when he searched the Dually, "There were alcohol containers. They were empty, I believe." The State also cites Christopher Butterfield's statement that "his speech sounded a little bit slurred to me. Like he had been at bars." Also, Colin Carlos Tacardon testified that he smelled alcohol on Huggins's breath.[67] This testimony shows that there was some evidence that may have linked Huggins to alcohol (if the containers were empty and if the slurring was not the result of Huggins's admitted methamphetamine habit), but it does not link alcohol use directly to the commission of the crimes. Nor does evidence elsewhere in the record indicate alcohol involvement.

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[63] Former RCW 9.94A.030(50)(a)(i) (2006).
[64] Former RCW 9.94A.715 (2006).
[65] Jones, 118 Wn. App. at 207-08.
[66] Jones, 118 Wn. App. at 202, 207-08.
[67] Butterfield and Tacardon lived in the condominium complex where police found the Dually. Butterfield could not identify Huggins as the man whom he encountered in the complex.

Because no evidence in the record shows that alcohol contributed to Huggins's crimes, the trial court improperly imposed the alcohol-related community custody conditions. On remand, the trial court shall strike those conditions from Huggins's judgment and sentence to make the community custody conditions comply with statutory requirements.

CONCLUSION

We reverse Huggins's conviction for possession of stolen property and remand the case to the trial court to dismiss that charge without prejudice, to strike the alcohol-related community custody conditions, and to resentence him. In all other respects, we affirm the judgment and sentence.

Leach, J.

WE CONCUR:

Dwyer, C. J.

Becker, J.