Supreme Court No. 891633-0

(Court of Appeals No. 68495-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

PHILLIP SCHLOREDT,
Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Phillip Schloredt, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Schloredt appealed from his Snohomish County Superior Court conviction for second degree burglary. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. The right to counsel is guaranteed under the Sixth Amendment to the United States Constitution and article I, section 22. Counsel shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review. A lawyer initially appointed shall continue to represent the defendant through all stages of the proceedings unless a new appointment is made by the court following withdrawal of the original lawyer.

Where the trial court permitted defense counsel to withdraw, requiring Mr. Schloredt to pursue post-conviction relief pro se, was Mr. Schloredt's right to counsel violated, and was the Court of Appeals decision therefore in conflict with other decisions of the Court of Appeals and with decisions of this Court, requiring review? RAP 13.4(b)(1), (2)?

2. Mr. Schloredt also requests this Court review each and every issue raised in his Statement of Additional Grounds. RAP 13.4(b)(1), (2), (3).

D. STATEMENT OF THE CASE

Phillip Schloredt was arrested and charged with the burglary of a tire shop in Edmonds, which occurred on April 8, 2011. CP 171-72; RP 80-95.[1]

Before trial, Mr. Schloredt moved in limine to exclude a bag containing a syringe that had been found by officers when they searched his truck. RP 10; CP 157-58. The trial court granted this motion and instructed the State to "carefully instruct" its witnesses on the court's ruling excluding any reference to the needles. RP 10.

Despite this ruling, at trial, Officer Alan Hardwick testified that Mr. Schloredt told him about "needles" in his bag, and that Mr. Schloredt had seemed unstable on his feet. RP 183-91. The officer stated he had wondered if Mr. Schloredt was on heroin, both due to his behavior and his comment about the needles. RP 189. Counsel for Mr. Schloredt failed to object.

The jury convicted Mr. Schloredt of second degree burglary. CP 135; 2RP 31-34.

Following his conviction, Mr. Schloredt's trial counsel withdrew, stating that Mr. Schloredt wished to pursue ineffective assistance of counsel in a motion for a new trial. CP 180-83.

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[1] The verbatim report of proceedings from the trial consists of two non-consecutively paginated volumes. The first volume, from December 5 and 6, 2011, is referred to as "RP." The second volume, from the afternoon of December 6, 2011, is referred to as "2RP." Post-conviction proceedings are referred to by date, "1/13/12 RP."

On January 31, 2012, Mr. Schloredt appeared on a motion for a new trial with new assigned counsel from the Snohomish Public Defender's Office. 1/31/12 RP 2. Ms. Rivera, the new attorney, stated she "wouldn't be participating" in the motion for a new trial, and Mr. Schloredt argued the motion pro se, explaining that Ms. Rivera was not willing to assist him and therefore he "didn't have much choice in the matter." Id. at 2, 11 (emphasis added). The court agreed with Mr. Schloredt that the violation of the ruling excluding the syringe was a "problematic circumstance" and the strongest argument in the motion. Id. at 20-21.

The court denied the motion for a new trial and continued the case for Mr. Schloredt's motion to arrest judgment and sentencing. 1/31/12 RP 23.

On February 27, 2012, Mr. Schloredt appeared with Ms. Rivera for the motion to arrest judgment under CrR 7.4 and for sentencing. 2/27/12 RP 6. After the court stated its understanding that Mr. Schloredt was appearing pro se on the CrR 7.4 motion, Mr. Schloredt responded, "I never requested to proceed pro se on these issues and since I don't have any representation, that this is a violation of my constitutional rights to knowingly and willingly forfeit my right to representation by a lawyer." Id. (emphasis added).

After Mr. Schloredt put letters from his counsel into evidence, CP 15-16, Ms. Rivera explained her reasons for withdrawing from the representation. 2/27/12 RP 7-9. Ms. Rivera explained that after looking into "the merit of the

arguments, research[ing] the issues," and presenting the case to her supervisor, she was informed that the Rules of Professional Conduct (RPC's) prohibited her from representing Mr. Schloredt on his CrR 7.4 motion. 2/27/12 RP 9; CP 15-16.

Mr. Schloredt pleaded with the court for a lawyer to assist him, since Ms. Rivera refused, explaining that he did not believe he was qualified to represent himself, even with access to the law library. 2/27/12 RP 13. Mr. Schloredt ultimately "opted" to represent himself on the CrR 7.4 motion, with increased access to the law library at the jail. Id. at 21-23. The case was continued for Mr. Schloredt to prepare for the hearing.

On March 14, 2012, Mr. Schloredt argued the CrR 7.4 motion pro se. 3/14/12 RP 2. The court denied the motion, although it found the strongest argument was the violation of the court's ruling regarding the syringe. Id. at 32-34. Mr. Schloredt's motions for reconsideration on the CrR 7.4 and 7.5 were also denied. Id. at 34-35.

On September 30, 2013, the Court of Appeals affirmed Mr. Schloredt's conviction. Appendix A. Mr. Schloredt moved to reconsider the Court of Appeals decision, and on October 24, 2013, the Court of Appeals denied the motion for reconsideration. Appendix B.

Mr. Schloredt seeks review in this Court. RAP 13.4(b)(1), (2).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS IT MISAPPLIED THE LAW CONCERNING INEFFECTIVE ASSISTANCE OF COUNSEL AND THE WAIVER OF COUNSEL, REQUIRING REVIEW. RAP 13.4(b)(1), (2).

The Court of Appeals opinion erroneously attributes a great deal of importance to its finding that Mr. Schloredt's post-trial counsel did not withdraw, but rather made a professional judgment not to pursue the legal issues her client wished to pursue. Appendix A at 6. The Court reasons that if there is no withdrawal, then no waiver of counsel must be determined. Id. This finding is flawed and undermines the accuracy of the decision on several levels.

This Court has advised that while certain decisions relating to the conduct of a trial belong to the accused, others are ultimately for defense counsel. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 735, 16 P.3d 1 (2001); State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). In Stenson, this Court noted that decisions such as objecting to inadmissible evidence are reserved to counsel. 142 Wn.2d at 735 (citing 3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure, Sec. 11.6(a), at 603 (2d ed. 1999)).

Here, Mr. Schloredt's post-conviction motions were premised on the violation of the trial court's pre-trial rulings and trial counsel's failure to

object to inadmissible evidence – something inarguably in the province of counsel, not the defendant.

Once Ms. Rivera was appointed to represent Mr. Schloredt on his post-conviction motions, she immediately informed the trial court that she was unwilling to argue the motions she was expressly appointed to argue. 1/31/12 RP 2 (January 31, 2012 appearance). The trial court then asked Mr. Schloredt to proceed with argument pro se. 1/31/12 RP 2. Ms. Rivera's refusal to represent her client's position should be seen as a constructive withdrawal. At that point, the trial court was obligated to conduct a waiver colloquy with Mr. Schloredt, which it failed to do.

A waiver of counsel must be executed knowingly and intelligently at the time the court rules upon a waiver, as the critical question is the defendant's state of mind at the time he waives his right to counsel. The court must indulge in every presumption against the waiver of the right to counsel. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); State v. Hahn, 106 Wn.2d 885, 896, 726 P.2d 25 (1986); see Johnson v. Zerbst, 304 U.S. 456, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). See also United States v. Balough, 820 F.2d 1485, 1489 (9th Cir. 1987); United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994); United States v. Aponte, 591 F.2d 1247, 1250 (9th Cir. 1978).

The trial court made no inquiry into whether Mr. Schloredt was knowingly and intelligently waiving his right to counsel before proceeding pro se on his post-conviction motions. If anything, the record indicates that Mr. Schloredt repeatedly requested counsel, but was refused, pleading, "This court appointed counsel for this action but the attorney claims that her office would not allow her to participate..." 1/31/12 RP 3.[2]

In addition, the Court of Appeals found that even if a waiver was required, "the court conducted a thorough colloquy on the record prior to Schloredt's presentation of his motion for arrest of judgment." Appendix A at 7. The Court's assessment that a colloquy was held prior Mr. Schloredt's argument of the arrest of judgment motion is not supported by the record. 2/27/12 RP. Although the trial court discussed with Mr. Schloredt its understanding of the ethical canons, this was not a colloquy sufficient to satisfy the requirements of self-representation, which should have been required once Ms. Rivera effectively withdrew from representation. See, e.g., State v. Christensen, 40 Wn. App. 290, 293, 698 P.2d 1069 (1985).

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[2] Mr. Schloredt appears to attempt to cite Faretta in his oral argument, stating,

> As I understand it, you have to present a Ferrier [sic] motion, or something like that, to become pro se. To do that, you have to be able to understand 17 rules of self-representing, or something like that, and that's all I know about it. And I don't believe I'm qualified to represent myself even with access to the law library. I would actually like an attorney to represent me."

2/27/12 RP 13-14 (emphasis added).

The Court of Appeals opinion is premised upon the fact that no waiver of counsel was necessary, and therefore, that the trial court's failure to conduct any analysis of Mr. Schloredt's waiver of counsel was meaningless. As discussed above, because the Court of Appeals misapprehends the law on waiver, Mr. Schloredt respectfully requests this Court take review. Madsen, 168 Wn.2d at 504 (the court shall indulge in "every reasonable presumption" against a defendant's waiver of the right to counsel); State v. Silva, 108 Wn. App. 536, 539-40, 31 P.2d 729 (2001) (voluntary and intelligent waiver will not be found unless it is clear the defendant is making this decision "with eyes open" as to its risks and consequences).

Alternatively, because the record does not support the Court of Appeals determination that an appropriate colloquy was administered on the record, in light of the lack of waiver, review should be granted. State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991); Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984); Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); RAP 13.4(b)(1), (2).

For these reasons, Mr. Schloredt respectfully requests review. RAP 13.4(b)(1), (2).

MR. SCHLOREDT PRESERVES FURTHER REVIEW OF ALL OTHER ISSUES PREVIOUSLY RAISED IN BRIEFING AND IN HIS STATEMENT OF ADDITIONAL GROUNDS.

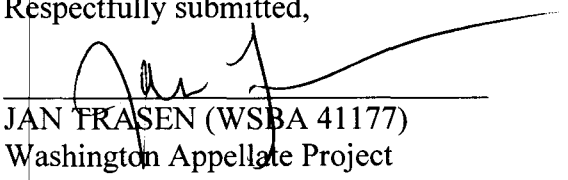
Mr. Schloredt's petition for review focuses on the issues discussed above. Mr. Schloredt does not, however, abandon the other arguments or assignments of error raised in his briefing, either by counsel or in Mr. Schloredt's Statement of Additional Grounds. Each of these arguments is expressly reserved for further review.

F. CONCLUSION

For the above reasons, the Court of Appeals decision requires review, as it is in conflict with other decisions of the Court of Appeals and with decisions of this Court. RAP 13.4(b)(1), (2).

DATED this 25th day of November, 2013.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PHILLIP LINCH SCHLOREDT, Appellant.	)	No. 68495-7-I DIVISION ONE UNPUBLISHED OPINION FILED: September 30, 2013

SCHINDLER, J. — When a court allows a defendant represented by counsel to file a motion pro se, no waiver of the right to counsel is necessary so long as the defendant does not assume core functions of counsel or has the assistance of experienced legal counsel. In this case, Phillip Linch Schloredt had the assistance of counsel and did not assume counsel's core functions when he filed his pro se motions for a new trial and arrest of judgment. In addition, Schloredt ultimately waived his right to counsel. We therefore reject his argument that he was denied the right to counsel. We also reject the other arguments Schloredt makes in his statement of additional grounds, and affirm.

FACTS

The State charged Phillip Linch Schloredt with second degree burglary of a tire shop in Edmonds on April 8, 2011. Prior to trial, Schloredt moved to exclude any reference to needles found in a bag in his truck. The court granted the motion and directed the State to "carefully instruct" its witnesses to not refer to the needles.

At trial, Jerral Sidles testified that on the morning of April 8, 2011, she saw a "silhouette" on the other side of a fence separating her apartment complex from the Factory Direct Tires store on Highway 99.

Beverly Ellingworth lived in the same apartment complex. Ellingworth testified that she saw Schloredt that morning throwing tires into a creek bed near the fence. When she confronted him, Schloredt said he was just getting tires out of the water. Ellingworth asked Schloredt if he worked for the tire store and he said, "No. I sell them tires."

Ellingworth noticed a black pickup truck nearby with the tailgate down and a number of tires in the bed. Ellingworth told Schloredt to stay put and started to walk back to her apartment to call police. When she heard the truck start, Ellingworth told Schloredt that he could not leave until he pulled all the tires out of the creek. Schloredt removed the tires from the creek. After filling the back of his truck with the tires and putting several on the hood, Schloredt left. Ellingworth then called the police.

Joseph Burch, the manager at Factory Direct Tires, testified that he saw Schloredt's truck that morning loaded with tires. When Burch called to him, Schloredt drove up and told Burch, "[T]he lady said I can have these." Burch told him that was not true. Schloredt responded, "It's not illegal, what I'm doing. Don't call the cops." Schloredt drove off and Burch called the police.

Burch testified that the tires in the store's fenced yard were stacked at closing time on April 7, 2011. On April 8, however, there were tires lying on the ground and the fence had sustained damage that was not present the day before. Burch did not give Schloredt permission to take the tires. Burch testified that he positively identified

Schloredt as the person he had seen driving away with the tires, and confirmed that the tires in the truck had come from his store.

Officer Stephen Morrison of the Edmonds Police Department testified that he responded to the report of a tire store burglary and stopped Schloredt's truck. When Officer Morrison told Schloredt why he stopped him, Schloredt said he found the tires in a creek bed next to a tire store in Edmonds. Schloredt denied going onto the property of the tire store. Schloredt said he would have taken more valuable tires if he had gone into the fenced area.

Officer Alan Hardwick of the Edmonds Police Department also responded to the burglary report. Officer Hardwick noticed that Schloredt's coat was wet and that he seemed "unstable." Officer Hardwick said he asked about the contents of a bag in the back of the truck and Schloredt said, " '[T]here might be some needles.' " On cross-examination, defense counsel asked Officer Hardwick if he had an opinion as to whether Schloredt was under the influence of drugs. When Officer Hardwick said he had an opinion, defense counsel asked what that opinion was. Officer Hardwick then explained that he wondered whether Schloredt was under the influence, especially "when he said something about needles in the bag." When asked if he was speculating, Officer Hardwick said,

> No. . . . It was based on some observations: The way that he spoke, the way that he walked, his nervousness. But all those things together and then the comment about the needles made me wonder maybe he's used heroin.

The jury convicted Schloredt as charged of second degree burglary. After trial, Schloredt's counsel withdrew, stating that Schloredt intended to move for a new trial in part on the grounds of ineffective assistance.

A new public defender was assigned to represent Schloredt. Shortly thereafter, Schloredt's new counsel informed him by letter that after researching his proposed motions for arrest of judgment and a new trial, and after discussing the motions with her supervisor, she had decided not to participate in briefing or arguing the motions. The attorney's decision was based in part on the ethical obligation to disclose contrary authority to the court. The attorney encouraged Schloredt to present the motions himself and offered to assist him in filing any pleadings.

On January 13, 2012, defense counsel told the court that she had met with her supervisor and decided that she would not participate in Schloredt's motion but would assist him with research and filing a reply. The attorney also requested a transcript of the fingerprint testimony at trial that Schloredt wanted to review. At the State's request, the court continued the hearing until January 31, 2012.

At the January 31 hearing, defense counsel reiterated that she would not be participating in Schloredt's pro se motion. Schloredt proceeded to present extensive argument on his motion for a new trial. The court denied the motion, noting that the evidence against Schloredt was overwhelming and that any violation of the court's ruling excluding references to the needles was harmless.

On February 27, 2012, Schloredt, with his counsel present, argued his motion for arrest of judgment. Schloredt showed the court the letters from defense counsel explaining why she decided to not participate in briefing or argue the motion for a new trail and the motion for arrest of judgment. Schloredt then told the court,

> I just want it on the record that I never requested to proceed pro se on these issues and since I don't have any representation, that this is a violation of my constitutional rights to knowingly and willingly forfeit my right to representation by a lawyer.

The court asked defense counsel to clarify the situation for the record. Counsel reiterated the reasons set forth in the letters to Schloredt. But counsel told the court that she had responded to Schloredt's request for copies of cases and would be representing him at sentencing.

Schloredt told the court, "I don't believe I'm qualified to represent myself" and asked for an attorney. The court explained to Schloredt that any lawyer would have the same problem. The court gave him the choice of presenting his motions pro se or through current counsel. If he chose the latter, it would be with the understanding that counsel would have a duty to divulge contrary authority to the court. Schloredt opted to proceed pro se. The court then conducted a colloquy concerning waiver of his right to counsel.

Following a continuance, Schloredt presented his motion for arrest of judgment. The court denied the motion.

At sentencing, defense counsel argued for an exceptional sentence below the standard range or, alternatively, a low-end standard-range sentence. After finding that Schloredt had an offender score of 24, the court imposed a mid-range sentence of 60 months.

Schloredt appeals.

ANALYSIS

Schloredt's principal contention on appeal is that the trial court erred in allowing his post-trial counsel to "withdraw" without first ensuring that he had knowingly, voluntarily, and intelligently waived his right to counsel. This contention fails for several reasons.

First, Schloredt's post-trial counsel did not withdraw. Rather, the attorney made a professional judgment not to pursue the issues Schloredt wished to pursue. Contrary to Schloredt's contentions, the attorney was under no obligation to pursue those issues. Defense attorneys in criminal cases retain "wide latitude to control strategy and tactics" and need not pursue any and all arguments the defendant wishes to pursue. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001); State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). The trial court recognized this point, stating, "I don't know that a lawyer, even if they represent somebody, has the obligation to bring an argument that they don't believe has merit." Schloredt fails to demonstrate any basis for concluding that counsel exceeded the wide latitude afforded her in deciding which arguments to pursue.

Second, no waiver of the right to counsel was necessary in these circumstances. Although Schloredt had no right to present his pro se arguments while represented by counsel, the court, in its discretion, allowed him to do so. State v. Barker, 35 Wn. App. 388, 394, 667 P.2d 108 (1983) (courts have discretion to allow a defendant represented by counsel to present argument). When a defendant represents himself while still represented by counsel—a situation referred to as "hybrid representation"—no waiver of the right to counsel is necessary if the defendant does not assume core functions of counsel or has the active assistance of experienced legal counsel. Barker, 35 Wn. App. at 394-95.

Here, Schloredt did not assume a core function of defense counsel. He did not, for example, make opening or closing statements or cross-examine witnesses—functions at the heart of the trial process which, if performed pro se, expose the

defendant to significant risks. Schloredt merely presented post-trial arguments that his counsel decided not to present. Further, Schloredt did not assume or take over counsel's role since counsel researched the issues, discussed them with her supervisor, and decided she could not pursue those arguments. In addition, counsel assisted Schloredt with his motion by providing copies of cases, notes to assist him in preparing his briefing, and information from an investigator regarding his argument that the State did not disclose exculpatory fingerprint evidence. In these circumstances, no waiver was necessary.

Finally, even if a waiver was required, the court conducted a thorough colloquy on the record prior to Schloredt's presentation of his motion for arrest of judgment. Because this motion repeated the arguments asserted in his earlier motion for a new trial, any error in failing to conduct the colloquy prior to the first motion was harmless. Cf. State v. Lackey, 153 Wn. App. 791, 803, 223 P.3d 1215 (2009) (waiver of speedy trial without counsel was harmless where defendant subsequently waived speedy trial with new counsel).

Schloredt also challenges the manner in which his counsel informed the court of her decision regarding his post-trial motions. Schloredt contends counsel "actually became an advocate against her client when she essentially informed the court that she believed his motions were frivolous." In support, Schloredt relies on State v. Chavez, 162 Wn. App. 431, 257 P.3d 1114 (2011).

In Chavez, defense counsel withdrew and the court appointed substitute counsel to represent Chavez on his motion to withdraw his guilty plea. Chavez, 162 Wn. App. at

435-36. At the motion hearing, defense counsel filed an Anders[1] brief, stating that he could not find a basis in law or fact to challenge Chavez's guilty plea. Chavez, 162 Wn. App. at 436. On appeal, Division Three held that while defense attorneys may decline to assert issues they consider frivolous, counsel's conduct in Chavez's case amounted to a complete denial of counsel at a critical stage. Chavez, 162 Wn. App. at 439. The court emphasized that Anders briefs are an appellate procedure designed for the withdrawal of counsel on appeal, that use of the procedure on a discrete issue in a trial court was completely inappropriate, and that use of "a procedure permitted on appeal but with no precedent or other authority for use in the trial court" raised "enough concern . . . to warrant a second look at the motion to withdraw." Chavez, 162 Wn. App. at 439-40.

Nothing remotely similar to counsel's conduct in Chavez occurred in this case. Schloredt's counsel followed proper procedures and was circumspect regarding her reasons for not pursuing Schloredt's motions. To the extent counsel's letters to Schloredt may have undermined Schloredt's motions, the State correctly points out that it was Schloredt, not his counsel, who submitted those letters to the court. Counsel acted at all times in a manner consistent with her ethical duty of candor to the court and her duties to her client. Schloredt's claim that he was denied his right to counsel is meritless.

Schloredt raises several additional claims in a pro se statement of additional grounds for review. Most of these claims were raised and rejected in Schloredt's post-trial motions. We review the court's decisions on those motions for abuse of discretion.

[1] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

State v. Smith, 159 Wn. App. 694, 699-700, 247 P.3d 775 (2011); State v. Meridieth, 144 Wn. App. 47, 53, 180 P.3d 867 (2008).

Schloredt contends he was denied due process because the prosecutor failed to disclose exculpatory fingerprint evidence prior to trial. In rejecting this argument, the trial court noted that there was no exculpatory evidence to disclose. The evidence simply showed that a smudge on a tire inside the fenced area did not present a usable fingerprint. See State v. Romero, 113 Wn. App. 779, 796-97, 54 P.3d 1255 (2002) (absence of fingerprints does not mean absence of the defendant). The trial court did not abuse its discretion in rejecting this claim.

Schloredt also argues, as he did below, that his counsel was ineffective for eliciting and failing to object to testimony violating a ruling prohibiting any mention of needles in his bag. To demonstrate ineffective assistance of counsel, a defendant must show both deficient performance and a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption of effective assistance, and Schloredt bears the burden of demonstrating the absence in the record of a strategic basis for the challenged conduct. McFarland, 127 Wn.2d at 335. Schloredt has not met his burden.

Because there is no reasonable probability that the evidence affected the verdict, Schloredt cannot establish ineffective assistance of counsel. In rejecting this claim below, the trial court stated that "the evidence in this case was extremely overwhelming."[2] The court also noted that there was no evidence regarding the nature

[2] (Emphasis added.)

of the needles or any evidence of illegal drugs or drug use. In these circumstances, there is no reasonable probability that the evidence affected the verdict.

Schloredt's challenge to a brief hearsay statement by witness Jerral Sidles is also unavailing. As the trial court correctly noted, the substance of the hearsay—i.e., that someone else told her Schloredt was wearing a leather jacket the morning of the offense—came in properly through the testimony of several other witnesses. Schloredt himself admitted that he was wearing a leather jacket. Accordingly, the court was within its discretion in concluding that any error was harmless.

Next, Schloredt contends there was insufficient evidence to support his conviction. Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn .2d 634, 638, 618 P.2d 99 (1980).

The State had the burden of proving that Schloredt entered or remained unlawfully in the fenced yard with intent to commit theft. In ruling on Schloredt's motions below, the trial court concluded there was "an abundance of circumstantial evidence that Mr. Schloredt committed a burglary in this case." We concur. The evidence included testimony that a person was seen inside the tire store's fence. A short time later, another witness saw Schloredt throwing tires into a creek bed near the fence. Schloredt's truck was partially loaded with tires. The fence was damaged, and

tires that had been stacked in the fenced yard the day before were missing or on the ground. Schloredt's statements and conduct, particularly his rapid flight from the scene, demonstrate consciousness of guilt. The defense conceded he was guilty of theft and argued only that the evidence was insufficient to prove burglary. Schloredt's conviction is supported by sufficient evidence.

Last, Schloredt contends the calculation of his offender score of 24 is incorrect. Schloredt asserts all or a portion of his criminal history "washes out" because more than five years elapsed between certain convictions. But prior convictions do not wash out simply because five years elapsed between convictions. Rather, if the prior conviction was a class C felony, the offender must have spent five crime-free years in the community. RCW 9.94A.525(2)(c). If the prior conviction was a class B felony, the offender must have spent ten crime-free years in the community. RCW 9.94A.525(2)(b). Schloredt does not mention either the class of his prior convictions or the period of time he spent in the community between convictions. Schloredt thus fails to demonstrate error in his offender score.

Affirmed.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PHILLIP LINCH SCHLOREDT, Appellant.	)	No. 68495-7-I DIVISION ONE UNPUBLISHED OPINION

The appellant, Phillip Linch Schloredt, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 14th day of October, 2013.

FOR THE COURT:

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68495-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Mary Kathleen Webber, DPA
Snohomish County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 25, 2013