No. 32873-2-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CECILY MCFARLAND

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable Judge John Knodell

APPELLANT'S OPENING BRIEF

KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorney for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Supreme Court

Washington State Court of Appeals

Federal Authorities

Washington Constitution, Statutes & Court Rules

Secondary Authorities

A. SUMMARY OF ARGUMENT

Cecily McFarland was convicted of first-degree burglary, 10 counts of theft of a firearm and three counts of unlawful possession of a firearm. She received consecutive sentences totaling nearly 20 years for these counts, which stemmed from her removal of property from her ex-boyfriend's parents' home (the Legaults). Ms. McFarland requests that this Court remand so that the trial court may consider a mitigated or exceptional sentence downward and recalculate her offender score with one less point.

As to her convictions themselves, Ms. McFarland should be retried because the court erred in overruling certain objections made by the defendant. First, the court erred by denying the defendant's motion in limine to preclude the prosecutor and the State's witnesses from referring to the Legault(s) as the victim(s) in this case.

Also, the court erred by admitting Exhibit P44 (a redacted video taken by an officer's body camera during Ms. McFarland's arrest, in which Ms. McFarland denied leaving home during the alleged burglary). The court erred because (a) the video was only relevant as an impermissible character attack for making a false statement to an officer; (b) it did not constitute proper impeachment evidence since the defendant never testified and it did not contradict any defense theory of the case

(defense counsel acknowledged before the jury that Ms. McFarland had been at the Legault home the previous evening); (c) an officer could be heard on the video indicating that a burglary had occurred and describing the burglary elements, which invaded the province of the jury; and (d) the video was unduly prejudicial since it showed the defendant in handcuffs, cursing and arguing with an officer, and in an impaired state, and the officer suggested during Ms. McFarland's arrest that she was a flight risk and that direct fingerprint or video evidence had linked Ms. McFarland with the burglary when this was never proven at trial.

Based on the foregoing, Ms. McFarland respectfully requests that this Court reverse and that she be retried or, at a minimum, resentenced.

B. ASSIGNMENTS OF ERROR

1. The court erred by failing to consider an exceptional downward sentence, and defense counsel was ineffective for failing to request such a sentence and failing to present the court with supporting legal and factual bases for the request.

2. The court erred in calculating Ms. McFarland's offender score.

3. The court erred by denying the defendant's motion in limine to preclude the prosecutor and its witnesses from referring to the Legault(s) as the victim(s) in the case.

4. The court erred by admitting Exhibit P44.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Ms. McFarland should be resentenced because (a) the court erroneously believed it did not have discretion to order and failed to consider an exceptional downward sentence, or (b) defense

counsel was ineffective for failing to request an exceptional sentence downward and alert the court to those facts and law that would have supported a sentence below the standard range.

Issue 2: Whether the defendant's offender score was miscalculated by one point, because the burglary and unlawful firearm possession counts constituted the same criminal conduct.

Issue 3: Whether the trial court erred by denying the defendant's motion in limine and allowing the prosecutor and a law enforcement witness to refer to the complaining witness as the "victim."

Issue 4: Whether the court erred by admitting the video exhibit that was filmed during Ms. McFarland's arrest.

(a) The video exhibit was irrelevant except for the improper purpose of suggesting that Ms. McFarland had a propensity for lying.

(b) Ms. McFarland's prior false statements to the deputy, if considered impeachment evidence, were improperly admitted since Ms. McFarland never testified or otherwise disputed that she was at the Legault residence on the night of the burglary.

(c) It invaded the province of the jury when an officer opined as to the elements of burglary on the video and explained that a burglary had, in fact, occurred.

(d) Admitting and publishing the video to the jury was unduly prejudicial, because it showed Ms. McFarland in handcuffs, cursing, arguing with an officer and in an impaired state, and it included the officer intimating that the defendant was a flight risk and referring to unproven "facts" not in evidence.

D. STATEMENT OF THE CASE

In June 2014, Cecily McFarland moved in with her boyfriend, Chad Faircloth, to his parents' home on Alderwood Drive in Moses Lake (Jeffrey Faircloth's and Bobbie Palma's home). (1RP 109-10, 129) Ms.

McFarland had formerly lived at Fred and Loretta Legaults' home on Fairway Drive in Moses Lake with their son, Ms. McFarland's ex-boyfriend Derik Sterling. (1RP 119, 132, 222, 286, 287)

During the night of June 21-22, 2015, Ms. McFarland and Chad Faircloth went to collect Ms. McFarland's property from the Legaults' residence. (1RP 75-75, 110, 120, 221, 288) Mr. Legault and his wife were asleep when various items were taken that night, and they had not given anyone permission to come in their home. (1RP 222-23, 236, 240) Mr. Sterling testified that Ms. McFarland sent him a text message about 11:00 p.m. on June 21st that she was in his mom's house. (1RP 287)

According to Jeffrey Faircloth and Ms. Palma, Ms. McFarland and their son Chad Faircloth brought various items back to their home that night, items which Ms. McFarland said belonged to her. (1RP 119, 122, 124, 132-33) Ms. Palma saw Ms. McFarland carry boxes of personal items and about 10 guns, which Ms. Palma placed in a locked carport for safekeeping. (1RP 121, 125-26, 131) At his son's request, Jeffrey Faircloth then went to the Legault home and helped transport additional items at about 6:00a.m. on June 22nd. (1RP 112, 118)

When he woke up on June 22nd, Mr. Legault contacted law enforcement after noticing many things missing from his home, including a big-screen television, various electronics, tools, checkbooks, guns,

ammunition, alcohol and other household items. (1RP 217, 222-35, 241-43) A search warrant was executed that afternoon at the Alderwood residence and pictures were taken of items that Mr. Legault had reported missing. (1RP 80, 97-99, 178-81, 185, 217, 238-43, 247; Exhibits 1-15, 22-26, 28) Several of the missing items were located in a bedroom shared by Chad Faircloth and Ms. McFarland. (1RP 89, 92-94, 102, 104-05, 181, 248; Exhibits 11-15, 29) Also, Mr. Legault identified 10 guns as his that were seized from the locked carport. (1RP 100, 101, 103, 158-66, 232-35; Exhibits 1-2, 4, 31-42) The court would later permit the State and its witnesses, over objection, to refer to the Legaults as the "victim[s]" during the ensuing trial. (2RP 60-62; 1RP 76-77, 93; CP 35-36)

While the warrant was executed, Ms. McFarland was taken into custody. (1RP 180) During this time, she was filmed by a sheriff deputy's body camera. (RP 7-8, 185; Exhibit 44) On video, she denied having left home that night, which the State argued went to her culpability. (1RP 187-88, 191-93, 213, Exhibit 44) The video showed Ms. McFarland in handcuffs and, as the trial court found, under the influence of something. (*Id*.; 1RP 192) The video was admitted over defense counsel's numerous objections (1RP 214), including that it was irrelevant (1RP187-88), lacked probative value (1RP 191-92, 213), was unduly prejudicial (1RP 191, 194, 200, 213), invaded the province of the jury

when an officer discussed the elements of burglary (1RP 191-93, 201), and constituted an improper use of Ms. McFarland's statements since Ms. McFarland had not taken the witness stand or disavowed those statements (1RP 195). (Exhibit 44)

At trial, Ms. McFarland stipulated that she had a prior felony, which made it unlawful for her to possess a firearm. (1RP 205-06, 214-15; Exhibit P31) Testimony and exhibits were admitted consistent with the above facts, after which the jury convicted Ms. McFarland as charged of first-degree burglary, ten counts of theft of a firearm, and three counts of unlawful possession of a firearm.[1] (1RP 351; CP 173-86)

At sentencing, Ms. McFarland's offender score was calculated as "three" for each of the burglary and unlawful possession of a firearm counts (she had two prior nonviolent felonies and these current offenses added an additional point against each other). (2RP 22; CP 193). Ms. McFarland's offender score was calculated as "two" for each of the theft of a firearm counts. (CP 214-15)

The court and parties noted that the firearm counts were required by the legislature to run consecutively, so Ms. McFarland's standard sentencing range was calculated at 237 to 306 months. (2RP 23, 26) The State filed a sentencing memorandum with the trial court, explaining that

[1] A charge of trafficking in stolen property was dismissed by the court for insufficient evidence. (CP 211)

concurrent sentences for the firearm charges must run consecutively. (CP 190) At sentencing, defense counsel expressed concern with the standard range, noting that there was a "certain degree of --lack of proportionality in the ---in the punishment based on the consecutive sentences that are required by the legislature." (RP 24) Defense counsel did not request any exceptional downward sentence on Ms. McFarland's behalf and instead requested the low end of the standard range at the sentencing hearing.[2] (2RP 24)

Ms. McFarland did not have any history of violent offenses, she was 25-years-old, she apologized to the court for taking its and the State's time, she apologized to the victims and community, she said that she had sincerely learned her lesson, she said she did not intend to hurt or harm anybody with her actions, and she looked forward to making positive and rehabilitative changes in her life. (2RP 24-25)[3]

The court expressed concern that Ms. McFarland's standard range was typical of that faced by someone who was convicted of murder, and the court commented following Ms. McFarland's statement to the court:

[2] There does not appear to be any sentencing memorandum filed on behalf of the defendant in this case. (*See* CP 1-254; and see court docket for No. 14-1-00413-6)

[3] Chad Faircloth happened to enter a plea agreement with the State for his involvement in these same events and received a three-year prison-based DOSA sentence. (2RP 23)

> I don't have --apparently don't have much discretion, here. Given the fact that these charges are going to be stacked one on top of another, I don't think -- I don't think high end is called for, here.

(2RP 24-25)

The court then accepted defense counsel's recommendation and sentenced Ms. McFarland to the low end of the standard range for all 13 of the firearm counts, which equaled nearly 20 years in prison. (2RP 26)

This appeal timely followed. (CP 232)

E. ARGUMENT

Issue 1: Whether Ms. McFarland should be resentenced because (a) the court erroneously believed it did not have discretion to order and failed to consider an exceptional downward sentence, or (b) defense counsel was ineffective for failing to request an exceptional sentence downward and alert the court to those facts and law that would have supported a sentence below the standard range.

The court expressed concern with the standard range sentence that resulted from Ms. McFarland's multiple, consecutive sentences for her 13 firearm convictions. But the court commented it did not have much discretion and, thus, sentenced her to the low end of the standard range, which was still nearly 20 years. The court erred by failing to consider an exceptional sentence downward in this case and by misinterpreting the law to the extent that it believed it had no discretion to order a sentence below the standard range. Additionally, defense counsel was ineffective for failing to invite the trial court to exercise its discretion and failing to present any factual or legal bases that would have supported a mitigated or

exceptional sentence downward. Ms. McFarland should be resentenced so that the trial court may exercise its discretion and consider whether an exceptional sentence downward is appropriate in this case.

"Under the SRA, a sentencing court generally must impose a sentence within the standard sentencing range." *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014) (citing RCW 9.94A.505(2)(a)(i)). For an offender convicted of unlawful possession of a firearm and/or theft of a firearm, a standard range sentence means consecutive sentences for each of these convictions and for each firearm unlawfully possessed. RCW 9.94A.589(1)(c) and RCW 9.41.040(6). *See also State v. Murphy*, 98 Wn. App. 42, 48-49, 988 P.2d 1018 (1999); *State v. McReynolds*, 117 Wn. App. 309, 343, 71 P.3d 663 (2003) (holding that the law "clearly and unambiguously prohibits concurrent sentences for the listed firearms crimes").

However, the exceptional sentence statue, RCW 9.94A.535, authorizes a departure from the standard sentencing range and provides:

> The court may impose a sentence outside the standard range for an offense if it finds, considering the purposes of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence… A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585(2) through (6).

RCW 9.94A.535; *Graham*, 181 Wn.2d at 882.

An exceptional sentence downward may be imposed pursuant to the above statute even where consecutive sentences have been mandated by the legislature. *In re Personal Restraint of Mulholland*, 161 Wn.2d 322, 326, 329-30, 166 P.3d 677 (2007) (citing RCW 9.94A.589(1)(b) (exceptional sentence downward permitted even for mandatory consecutive sentences for serious violent offenses). In *Mulholland*, the Court pointed out that the exceptional sentence statute, RCW 9.94A.535, applies to RCW 9.94A.589(1) as a whole and does not limit its application among the multiple subsections of that statute. *Id*. at 328-30. The Court held, RCW 9.94A.535 "leads inescapably to a conclusion that exceptional sentences may be imposed under either subsection of RCW 9.94A.589(1)." *Id*. at 329-30.

In other words, even where the Legislature sets forth that sentences shall run consecutively, as in RCW 9.94A.589(1)(b) (for serious violent offenses) or subsection (c) (for firearm offenses), a trial court has discretion to impose an exceptional sentence. *See Mulholland*, 161 Wn.2d at 331; *State v. Stevens*, 137 Wn. App. 460, 469-70, 153 P.3d 903 (2007), *review denied*, 162 Wn.2d 1012 (2008) (exceptional sentence downward for four counts of first-degree unlawful possession of a firearm affirmed). RCW 9.94A.535 does not differentiate between the subsections of RCW 9.94A.589(1) and thus has equal application to allow exceptional

sentences for those that would otherwise be required to run consecutively as serious violent offenses (RCW 9.94A.589(1)(b)) or as firearm offenses (RCW 9.94A.589(1)(c)). *See Mulholland*, 161 Wn.2d at 331; *Stevens*, 137 Wn. App. at 469-70; *Graham*, 181 Wn.2d at 883-85.

"The court may impose an exceptional sentence below the standard range if it finds…mitigating circumstances are established by a preponderance of the evidence…," such as, but not limited to, those reasons set forth in RCW 9.94A.535(1)(a)-(j). For example, an exceptional sentence downward may be appropriate based on the particular defendant's mitigated culpability for the crime, that the defendant had no predisposition to break the law, or that the defendant did not conceal the possession of firearms. *See, e.g.*, *Stevens*, 137 Wn. App. at 470.

Additionally, a mitigated sentence may be appropriate where "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010."[4] RCW 9.94A.535(1)(g); *Graham*, 181 Wn.2d at 883. "[C]oncurrent sentences are sometimes

[4] Policy goals of the SRA include: (1) ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; (2) promoting respect for the law by providing punishment which is just; (3) being commensurate with the punishment imposed on others committing similar offenses, (4) protecting the public, (5) offering the offender an opportunity to improve himself or herself, (6) making frugal use of the state's and local government's resources, and (7) reducing the risk of reoffending by the offenders in the community. *Graham*, 181 Wn.2d at 887 (citing RCW 9.94A.010).

necessary to remedy injustices caused by the mechanical application of grids and ranges…" *Graham*, 181 Wn.2d at 886.

Although a sentence within the standard range is generally not appealable (*State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003)), a standard range sentence is reviewable in "circumstances where the court refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. McGill*, 112 Wn. App. 95, 99, 47 P.3d 173 (2002). For example, a sentencing court errs when it operates under the "mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible." *Mulholland*, 161 Wn.2d at 333. In *McGill*, the trial court's "comments indicate[d] it would have considered an exceptional sentence had it known it could." 112 Wn. App. at 100. The Court of Appeals remanded for resentencing so that the trial court could exercise its discretion, explaining, "We…cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option." *Id*. at 101.

Accordingly, a defendant should be resentenced where the sentencing court failed to recognize that it had the authority to impose an exceptional sentence. *McGill*, 112 Wn. App. at 97, 99-101 (citing *State v. Hale*, 65 Wn. App. 752, 757-58, 829 P.2d 802 (1992); *State v. Bonisisio*,

92 Wn. App. 783, 797, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999) (remanded where it was "likely the trial court would have imposed a sentence within the standard range had it correctly interpreted the statute to allow concurrent [firearm] enhancements]").

State v. Muholland is instructive here. Even if certain sentences are mandated to run consecutively under RCW 9.94A.589(1), these same sentences may run concurrently[5] as an exceptional sentence downward "if [the sentencing court] finds there are mitigating factors justifying such a sentence." *Mulholland*, 161 Wn.2d at 327-28; RCW 9.94A.535(1). In *Mulholland*, the trial court said it did not believe it had discretion to run multiple serious offense sentences at the same time. *Id*. at 334. The Supreme Court remanded for resentencing, explaining:

> The record does not show that it was a certainty that the trial court would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option. Nonetheless, the trial court's remarks indicate that it was a possibility. In our view, this is sufficient to conclude that a different sentence might have been imposed had the trial court applied the law correctly. Where the appellate court "cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option," remand is proper. "[W]hile no defendant is entitled to an exceptional sentence ..., every defendant is entitled

[5] The sentencing court may order a downward departure from the standard sentencing range instead of, or in addition to, ordering concurrent sentences. *Graham*, 181 Wn.2d at 885, 887. RCW 9.94A.535(1)(g) "empowers a sentencing judge to reduce a 'clearly excessive' sentence by lessening sentences for the offenses and/or by imposing concurrent sentences." *Id*. at 886. "[D]ownward departures from the standard range can[] accomplish the same goal [as ordering consecutive sentences to run concurrently]." Id.

> to ask the trial court to consider such a sentence and to have the alternative actually considered."

Mulholland, 161 Wn.2d at 334 (emphases added) (quoting *McGill*, 112 Wn. App. at 100–01; *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005)).

Furthermore, defense counsel's failure to cite precedent to the trial court that would support an exceptional sentence below the standard range, such as the multiple offense policy in RCW 9.94A.535(1)(g), may constitute ineffective assistance of counsel. *McGill*, 112 Wn.2d at 97, 101 (citing *State v. Sanchez*, 69 Wn. App. 255, 261, 848 P.2d 208, *review denied*, 122 Wn.2d 1007 (1993); *State v. Hortman*, 76 Wn. App. 454, 886 P.2d 234 (1994), *review denied*, 126 Wn.2d 1025 (1995)).

A criminal defendant has the constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is ineffective where (1) the representation was deficient, i.e., fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) counsel's deficient representation prejudiced the defendant, i.e., there is reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

The Court in *McGill* explained the importance of defense counsel citing appropriate authority in support of a downward departure request, stating: "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." *McGill*, 112 Wn.2d at 102.

Here, Ms. McFarland received a nearly 20-year sentence after she took boxes of personal property and additional property that belonged to her ex-boyfriend's parents from a home where she used to live. Ms. McFarland's new boyfriend, Chad Faircloth, participated in the events with her and thereafter received a three-year prison-based DOSA sentence. The trial court expressed concern after learning of Ms. McFarland's standard range that resulted in this case, commenting that her standard range sentence was equivalent to that imposed on persons convicted of murder.

Ms. McFarland was not a career criminal and did not have any history of violent crime. When she was given the opportunity to address the court, she apologized to the court, the State, the Legaults and the community for her actions. She expressed remorse and hope to one day go to college, rehabilitate and experience a brighter future. In response,

the court questioned its own discretion to sentence Ms. McFarland to anything but the mandatory consecutive sentences.

There were arguable bases for requesting the trial court to depart from the standard range with an exceptional sentence downward, none of which were presented by defense counsel. For instance, Ms. McFarland seemed to lack a predisposition to commit violent crime, she had no violent criminal history, there appeared to be mitigated culpability given the nature of the events and relationships of those involved, she did not conceal the weapons when she brought them to the Faircloths' home, and the multiple offense policy would have supported a request below the standard range because the resulting standard range sentence was arguably "clearly excessive" in light of the purposes of the SRA. Like in *McGill*, defense counsel's failure to alert the trial court to its ability to sentence below the standard range or to present those legal and factual bases for a downward departure constituted ineffective assistance of counsel in this case. *McGill*, 112 Wn.2d at 97, 101.

Finally, it is not necessary that Ms. McFarland prove with absolute certainty that the trial court would have granted an exceptional downward sentence. But, the record suggests here that such a sentence was a possibility, had the trial court been properly informed of its ability to and the bases for it to exercise its discretion. Therefore, like in *Mulholland*,

remand is the proper remedy so that Ms. McFarland may ask the trial court to consider imposing an exceptional sentence downward. 161 Wn.2d at 334.

The court indicated that it believed it had no discretion to impose anything other than consecutive sentences for the 10 theft of a firearm and the three unlawful possession of a firearm counts. The court's failure to consider an exceptional sentence in this case was reversible error. *Grayson*, 154 Wn.2d at 342. Moreover, defense counsel neglected to present any argument as to why a mitigated sentence would be appropriate in this case, even though both defense counsel and the court expressed concern with the "proportionality" (2RP 24) of the punishment and the resulting standard range sentence. *See Graham*, 181 Wn.2d at 887 (citing RCW 9.94A.010) (discussing multiple offense policy as basis for mitigated sentence where resulting standard range lacks proportionality to standard range that results from consecutive sentences). Thus, reversal is also appropriate based on ineffective assistance of defense counsel. *McGill*, 112 Wn.2d at 97, 101.

Ms. McFarland did not have the right to an exceptional downward sentence, but she did have the right to have the trial court *consider* such a sentence. She was prejudiced by her attorney's failure to invite the court to consider a mitigated exceptional sentence in this case.

Issue 2: Whether the defendant's offender score was miscalculated by one point, because the burglary and unlawful firearm possession counts constituted the same criminal conduct.

Ms. McFarland further requests that she be resentenced so that the trial court may recalculate her standard sentencing range for the burglary and unlawful possession of a firearm counts. Her offender score for these counts was calculated as "3" since she had two prior felonies and the offenses counted against each other to add an additional point. But, pursuant to a "same criminal conduct" analysis, Ms. McFarland's offender score was one point too high.

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.530(1); RCW 9.94A.525. The sentencing court calculates an offender score by adding current offenses and prior convictions. RCW 9.94A.589(1)(a). "A defendant's current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses 'encompass the same criminal conduct.'" *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998); *see also* RCW 9.94A.589(1)(a). If the sentencing court finds "that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a).

"Same 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." RCW 9.94A.589(1)(a). The absence of any of these elements precludes a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). "Under this standard, when the record supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result." *Id*. at 537-38. The defendant bears the burden of proving the crimes constitute the same criminal conduct. *Id*. at 539.

In a markedly similar case, Division II of this Court concluded that burglary, theft of a firearm and unlawful possession of a firearm all constituted the same criminal conduct, so the defendant's offender score of "zero" was affirmed. *State v. Murphy*, 98 Wn. App. 44-51, 988 P.2d 1018, *review denied*, 140 Wn.2d 1018 (1999). There, the defendant broke into a home with a few accomplices and removed electronics, clothing, guns and ammunition. *Id*. at 44-45. Like here, the jury convicted Mr. Murphy of one count of first-degree burglary, five counts of theft of a

firearm, and five counts of second-degree unlawful possession of a firearm. *Id*. at 45. The trial court found that the offenses all encompassed the same criminal conduct and entered an offender score of zero for each count. *Id*. at 45-46.

The State argued on appeal that Mr. Murphy's convictions of burglary, theft of a firearm and unlawful possession of a firearm were not the same criminal conduct and that the trial court erred by calculating Mr. Murphy's offender score as zero. *Murphy*, 98 Wn. App. at 51. But the Court of Appeals affirmed, stating that the "trial court did not err in using the SRA's 'same criminal conduct' provision… to calculate Murphy's offender score [at zero.]" *Id*

Here, Ms. McFarland respectfully requests that this Court remand for resentencing pursuant to Issue One above and to correct her offender score calculation by reducing it one point on the burglary and unlawful firearm possession counts. Ms. McFarland's case is very similar to *Murphy, supra*. In both cases, the defendant (with accomplice(s)), entered someone's home without permission, removed a myriad of items including multiple firearms, and was ultimately convicted of first-degree burglary, multiple counts of theft of a firearm and multiple counts of unlawful possession of a firearm. Like Mr. Murphy, Ms. McFarland's convictions all stemmed from the exact same events, the unlawful entering into a

home and taking of guns by a person without lawful authority to possess guns. *See Murphy*, 98 Wn. App. at 44-45, 51.

The offenses herein involved the same intent (to remove the guns from their owner), were committed at the same time and place (the evening of June 21st to 22nd at the Legault home), and were committed against the same victim (the Legaults). Like the offender score of zero that was affirmed in *Murphy*, 98 Wn. App. at 51, Ms. McFarland requests that her offender score be reduced one point so that only her two prior felonies are included in her offender score.

The offender score recalculation would reduce Ms. McFarland's standard range on the burglary count from 31-41 months down to 26-34 months, and reduce the standard range on each of the three unlawful firearm possession counts from 9-12 months down to 4-8 months. RCW 9.94A.525. The sentencing correction, before calculating any possible downward departure or concurrent exceptional sentence, would effectively reduce Ms. McFarland's total period of confinement by at least 15 months if the court maintained a sentence at the low end of the standard range.

Issue 3: Whether the trial court erred by denying the defendant's motion in limine and allowing the prosecutor and a law enforcement witness to refer to the complaining witness as the "victim."

The trial court erred by denying the defendant's motion in limine and allowing the prosecutor and its witnesses to refer to the Legaults, the

complaining witness(es), as the "victim[s]" in this case. (1RP 36, 60-62; CP 35-36) One deputy witness and the prosecutor repeatedly referred to Mr. Legault as the "victim." (1RP 76-77, 93) This improper opinion testimony invaded the province of the jury as to an ultimate fact in issue: whether Mr. Legault was in fact a "victim," which was key in this case where Mr. Faircloth and Ms. Palma testified that the defendant said she had merely retrieved her own property from her prior residence. The jury was required to make the ultimate determination of whether Mr. Legault was a "victim;" but, its province to do so was improperly invaded by the prosecutor's and Deputy Fisher's conclusory reference to Mr. Legault as the "victim."

First, a trial court's decision on a motion in limine is reviewed for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion occurs when the court's exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *State v. Quaale*, 182 Wn.2d 191, 197, 340 P.3d 213, *review granted*, 179 Wn. App. 1022 (2014).

"Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant because it invad[es] the exclusive province of the [jury]." *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642

(2009) (internal quotation marks omitted). In addition, a prosecutor may not improperly comment on the evidence by expressing his personal belief of the defendant's guilt or by interjecting his own beliefs about the nature of the crime. *State v. Henderson*, 100 Wn. App. 794, 804, 998 P.2d 907 (2000) (reversible error for prosecutor to interrupt defense counsel's witness examination and state: "This was not an altercation. It was a robbery.") "Opinion on the guilt of the defendant may be reversible error because it violates the defendant's 'constitutional right to a jury trial, which includes the independent determination of the facts by the jury.'" *State v. George*, 150 Wn. App. 110, 117n.2, 206 P.3d 697, *review denied*, 166 Wn.2d 1037 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007)).

Testimony or argument that is not a direct comment on the defendant's guilt or the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. *See e.g. City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). But, witnesses may not offer improper opinions on the defendant's guilt, either directly or by inference. *King*, 167 Wn.2d at 331. "Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an 'ultimate issue' will generally depend on the specific circumstances of

each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." *Heatley*, 70 Wn. App. at 579.

To illustrate, in *State v. Carlin*, the defendant was charged with second-degree burglary after a tracking dog followed his scent. *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds by Heatley*, 70 Wn. App. 573. On appeal, the defendant argued that it was improper for the dog handler officer to offer an impermissible opinion on guilt by testifying that the dog had followed a "fresh guilt scent." *Carlin*, 40 Wn. App. at 703. The Court of Appeals agreed, noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *Id.*

Other states have found the use of the term "victim" improper when it invaded the province of the jury on an ultimate guilt determination. *See e.g., Jackson v. State*, 600 A.2d 21 (Del. 1991). In *Jackson, supra*, the court held that it was improper for the prosecutor to refer to the complaining witness in a rape case as the "victim" when the defendant had admitted to sexual intercourse but claimed that the intercourse was consensual. *Id.* at 24. The court explained:

> The term "victim" is used appropriately during trial when there is no doubt that a crime was committed and simply the identity of the

> perpetrator is in issue. We agree with defendant that the word "victim" should not be used in a case where the commission of a crime is in dispute…

Jackson, 600 A.2d at 24. *Accord Veteto v. State*, 8 S.W.3d 805, 816-17 (Tex. App. 2000), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (2008) (trial court's reference to complaining witness as "victim" rather than "alleged victim" constituted an improper comment on the weight of the evidence, because the sole issue in the defendant's case was whether he committed the various assaults.)

Finally, constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *Quaale*, 182 Wn.2d at 201-02; *see also State v. Alger*, 31 Wn. App. 244, 640 P.2d 44 (1982) (trial court's single reference to complaining witness in rape case as "victim," while "neither encouraged nor recommended…," did not prejudice the defendant's right to a fair trial.)

Here, Deputy Fisher testified that he "contact[ed] a victim…in this case…[named] Fred…Legault…" (1RP 76) Deputy Fisher and the prosecutor referred to this complaining witness as the "victim" four times during this portion of the testimony. (1RP 76-77) And, Deputy Fisher later testified that a checkbook cover case was found in the defendant's bedroom with "the victim's name engraved on it." (1RP 93)

The trial court abused its discretion by denying the defendant's motion in limine to preclude the State and its witnesses from referring to the complaining witnesses, the Legaults, as the victim(s). (1RP 36, 60-61; CP 35-36) The parties and court suggested that the issue may need addressed on appeal, because some trial judges in Grant County allow the term "victim" to be used regarding the complaining witness(es), and some judges do not. (RP 60-61)

Deputy Fisher's testimony and the prosecutor's references to Mr. Legault as the "victim" constituted improper comments on the evidence that invaded the fact-finding province of the jury. Ms. McFarland did not testify in this case. Instead, testimony was provided by Mr. Faircloth and Ms. Palma that Ms. McFarland informed them she had merely retrieved her own property from the Legaults' residence where she had resided. (1RP 119, 122, 124, 132) Under these circumstances, it was for the jury to decide whether Ms. McFarland had entered unlawfully or taken items that did not belong to her. Referring to the Legaults as the "victim(s)" under these circumstances invaded the province of the jury to determine whether a crime had occurred and whether the Legaults were, in fact, victims of any crime.

The improper comment on Mr. Legault's veracity as the complaining witness was prejudicial in this case. First, an officer's

opinion on guilt or veracity of a witness, such as by referring to that witness as a "victim," has a particularly prejudicial impact on a jury. A law enforcement officer carries a special aura of reliability that creates a higher risk of prejudice before the jury. *King*, 167 Wn.2d at 331. Deputy Fisher's testimony as an authority figure that Fred Legault was a "victim" answered the very question the jury was asked to determine.

Finally, the error was not harmless in this case, because the State cannot establish beyond a reasonable doubt that, without the improper opinion testimony by the witness and improper comment by the prosecutor that any reasonable jury would have reached the same conclusion absent the error. Ms. McFarland used to live with the Legaults and had apparently not removed or had been unable to remove some of her property after she left that home. She did not try to hide the fact that she was picking up property from the Legault home since she sent a text message to her ex-boyfriend that she was at his mom's house, and the text was sent before several trips were made to pick up property. A reasonable jury could have had doubt as to whether certain items of personal property that Mr. Legault reported missing instead belonged to Ms. McFarland.

Ultimately, it was for the jury to decide whether Mr. Legault was a "victim" of a crime. The improper comments by Deputy Fisher and the prosecutor that Fred Legault was a "victim" invaded the province of the

jury and were not harmless. Accordingly, reversal and retrial is appropriate. *King*, 167 Wn.2d at 329-30, 337 (setting forth this remedy).

Issue 4: Whether the court erred by admitting the video exhibit that was filmed during Ms. McFarland's arrest.

The court erred by admitting the officer's body camera video that was filmed during Ms. McFarland's arrest wherein Ms. McFarland denied leaving her home on the night of the burglary (Exhibit P44). Specifically, (a) the evidence was irrelevant except for the improper purpose of suggesting Ms. McFarland had a propensity for lying; (b) Ms. McFarland's statements, if intended as impeachment evidence, were erroneously admitted when she never testified and when she conceded that she was at the Legault home on the night of the burglary; (c) a deputy could be heard on the video describing the elements of burglary, thereby invading the province of the jury; and/or (d) the video was unduly prejudicial because it showed Ms. McFarland in handcuffs, cussing, arguing, and in an apparently impaired state, and the deputy intimated that Ms. McFarland was a flight-risk and also suggested that a nonexistent video or fingerprint evidence had linked Ms. McFarland with the burglary.

(a) The video exhibit was irrelevant except for the improper purpose of suggesting that Ms. McFarland had a propensity for lying.

The video and audio recording (Exhibit P44), in which Ms. McFarland repeatedly told an officer that she never left the Faircloth home

on the night of the alleged burglary at the Legault residence, was inadmissible under ERs 401, 402 and 404. Ms. McFarland's statement of denial did not prove that she committed any of the charged crimes. At most, Ms. McFarland's false statement to the officer was only relevant for an improper purpose: to suggest that Ms. McFarland had the propensity to commit dishonest acts (i.e., lie), which made the statement inadmissible pursuant to ER 404. The court erred by admitting the video.

As a threshold matter, a trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). "'A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.'" *Id.* (quoting *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009)). In close cases, the balance must be tipped in favor of the defendant. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

"Relevant evidence" is that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401; *State v. Mee*, 168 Wn. App. 144, 275 P.3d 1192,

review denied, 175 Wn.2d 1011 (2012). Irrelevant evidence is inadmissible. ER 402.

As to evidence of a criminal defendant's prior bad acts, such evidence is not necessarily objectionable because it has no probative value, but because it presents a danger that the defendant will be found guilty based on the jury's overreliance on past acts as evidence of the defendant's character. *Slocum*, 183 Wn. App. at 442. Thus, pursuant to ER 404, character evidence should generally be excluded unless it is relevant for a permissible purpose. ER 404 states:

> (a)… Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> > (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;…
>
> (b)… Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404.

"Before a trial court admits evidence under ER 404(b), it must '(1) find by a preponderance of the evidence this misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4)

weigh the probative value against the prejudicial effect of the evidence.'" *State v. Fuller*, 169 Wn. App. 797, 828-29, 282 P.3d126 (2012), *review denied*, 176 Wn.2d 1006 (2013) (quoting *State. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009)). A defendant's past bad acts are presumptively inadmissible and any doubts on whether to admit the evidence are resolved in the defendant's favor. *Fuller*, 169 Wn. App. at 828-29 (internal citation omitted).

Here, the court erred by admitting the video of Ms. McFarland's statements where she repeatedly told an officer she had not left the house or participated in any burglary the night before. (Exhibit P44, 3:12-3:18, 3:36-3:43, 3:45, 5:36) Ms. McFarland's statements, which defense counsel acknowledged were false (1RP 336-37), did not make it more or less probable that the defendant had committed the elements of burglary, theft of a firearm, or unlawful possession of a firearm. The court failed to determine or identify how Ms. McFarland's statements helped prove an element of any of the charged crimes. *See Fuller*, 169 Wn. App. at 828-29.

The State did not offer Ms. McFarland's statements for any purpose relevant to proving the elements of its case. In addition, the statements were not relevant to disprove the charges, because defense counsel acknowledged to the jury that Ms. McFarland had previously lied

to the deputy about her whereabouts and was present at the Legault home on the night of the burglary. The video did not tend to prove or disprove any of the charged elements in this case.

If Ms. McFarland's statements were relevant (as perhaps suggested by defense counsel, 1RP 188), they were relevant only for the improper purpose of attacking the defendant's character by suggesting she was a liar. The statements did not show motive, opportunity, knowledge or any other permissible purpose for admitting negative character evidence under ER 404(b). The purpose of admitting Ms. McFarland's statements was to suggest to the jury that she had a flawed character because she was willing to make a false statement to an officer. This type of propensity evidence was inadmissible.

(b) Ms. McFarland's prior false statements to the deputy, if considered impeachment evidence, were improperly admitted since Ms. McFarland never testified or otherwise disputed that she was at the Legault residence on the night of the burglary.

As addressed above, ER 404(b) applies where prior misconduct is offered as substantive evidence, such as to prove motive, intent, opportunity, plan, etc. On the other hand, ER 608(b) and ER 613(b) address the use of prior misconduct for impeachment purposes, such as where a prior false statement is used to impeach a witness's credibility or the defendant's theory of the case, or to show bias of a witness. *State v.*

Wilson, 60 Wn. App. 887, 891-92, 808 P.2d 754, *review denied*, 117 Wn.2d 1010 (1991); *see Fuller*, 169 Wn. App. at 814, 818. To the extent Ms. McFarland's statements were intended as impeachment evidence, they were improperly admitted.

Generally, the credibility or character of a witness, including the accused who testifies, may be impeached pursuant to ER 608 and 613. For example, where a witness previously made a statement that is inconsistent with his or her trial testimony, the witness may be impeached with the prior inconsistent statement under ER 613(a), (b). Also, the credibility or bias of a witness may be attacked with specific instances of conduct going to the witness's truthfulness or untruthfulness. ER 608(b).

Whether a prior statement is used for purposes of impeachment (ER 613) or for the purpose of showing bias and attacking the credibility of the witness (ER 608), the witness should be given the opportunity to explain or deny the statement. *See, e.g., State v. Spencer*, 111 Wn. App. 401, 409-10, 45 P.3d 209 (2002) (internal citations omitted). *See also State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005) (quoting ER 608(b)) ("specific instances of a witness's conduct, introduced for the purpose of attacking his or her credibility, may *not* be proved by extrinsic evidence, but may '*in the discretion of the court, if probative of truthfulness or untruthfulness*, be inquired into on cross examination of the

witness ... concerning the witness' character for truthfulness or untruthfulness.'")

For example, the State is entitled to cross-examine a testifying defendant on a prior inconsistent statement to police, such as in *State v. Heller* where the defendant initially told a detective she did not know what they were talking about when they asked her about a stabbing. *State v. Heller*, 58 Wn. App. 414, 418, 793 P.2d 461 (1990).

However, important for purposes of this case, "the *character* of a defendant in a criminal case is not open to inquiry unless he [or she] puts it in issue…" *State v. Ternan*, 32 Wn.2d 584, 591, 203 P.2d 342 (1949) (emphasis in original). In other words, impeachment evidence is used to show that a witness is not truthful, but it may not be used to argue that a witness is guilty or that the facts contained in the prior statement are substantively true. *State v. Burke*, 163 Wn.2d 204, 219, 181 P.3d 1 (2008) (emphasis added). "[A] person may be impeached if his or her credibility is a fact of consequence to the action, but not otherwise." *State v. Allen S.*, 98 Wn. App. 452, 464, 989 P.2d 1222 (1999). "[A] person's credibility is *not* a fact of consequence when he or she fails to say anything pertinent to the case, regardless of whether he or she takes the witness stand." *Id.* (emphasis in original).

To illustrate, in *State v. Fuller*, a defendant was questioned by law enforcement and initially claimed he was home the night of a murder. 169 Wn. App. at 805. When confronted during the investigation with evidence that he was seen at the location of the crime, the defendant did not admit or deny the murder, other than his initial claim that he was home that night. *Id*. The State sought to use Mr. Fuller's "partial silence" as impeachment evidence. *Id*. at 818. However, the Court of Appeals rejected the State's argument, refusing to allow the State to "impeach" a nontestifying defendant about his or her postarrest "partial silence." *Id*. at 819 (emphasis added). The Court noted that Fuller's statements did not show knowledge of the crime, and the State failed to otherwise identify any defense theory that it "impeached" with the evidence. *Id*. at 814, 818. The defendant's conviction was reversed and remanded for retrial. *Id*. at 832.

In this case, Ms. McFarland repeatedly told the law enforcement officer that she never left home during the incident. (Exhibit P44, 3:12-3:18, 3:36-3:43, 3:45, 5:36) Ms. McFarland's statement did not show knowledge of the crime. *See Fuller*, 169 Wn. App. at 819. Instead, the statement was purportedly used to attack Ms. McFarland's credibility, because Ms. McFarland had lied to the deputy about her whereabouts (1RP 336-37). But Ms. McFarland never testified so as to put her

credibility as a witness in question. And, her credibility was not a substantive fact of consequence in this trial. Therefore, the "impeachment" evidence was not admissible pursuant to ER 608 or 613.

Had Ms. McFarland testified, she would have been entitled to "the opportunity either to admit the inconsistency and explain it (in which case the testimony of the prior statement is not admissible as evidence) or to deny it (in which case [extrinsic] evidence of the prior inconsistent statement is admissible)." *Spencer*, 111 Wn. App. at 409-10n.8. Not only did Ms. McFarland not place her credibility in issue by testifying, but she was never given the opportunity to admit and explain the prior false statement, or to deny it (or to disavow it, as noted in her objection, 1RP 195). Therefore, it was improper to admit the video as extrinsic evidence of this non-testifying defendant's prior false statement to an officer.

Finally, Ms. McFarland's prior false statement was not admissible to impeach any defense theory of the case. *See Fuller*, 169 Wn. App. at 814, 818. The defendant did not present any evidence or argument that she had remained home during the night of the Legaults' burglary. Instead, she acknowledged that she was present at the Legault home. Therefore, it was improper to admit Ms. McFarland's post-arrest false statements to supposedly impeach any defense theory of the case.

In sum, Ms. McFarland did not testify or present any defense theory denying her presence at the Legault residence during the burglary. In fact, she acknowledged that she had been at the Legault residence on the night of the burglary (1RP 336-37). Thus, it was improper to admit, apparently as impeachment evidence, the extrinsic evidence video of Ms. McFarland's prior false statements to the deputy in which she denied leaving the Faircloth home during the time of the burglary. The State's attack on Ms. McFarland's credibility when she had not placed her character in question constituted a misuse of impeachment evidence under ER 608 and 613. The court erred by admitting this evidence when Ms. McFarland had not taken the witness stand, had not been asked to admit and explain or disavow the prior false statements, and had not presented a defense theory that justified impeachment with a prior false statement.

(c) It invaded the province of the jury when an officer opined as to the elements of burglary on the video and explained that a burglary had, in fact, occurred.

Exhibit P44 was also inadmissible because an officer could be heard on the video opining as to the elements of burglary and stating that a burglary had, in fact, occurred, and that evidence "came up that's leading us back to [Ms. McFarland]…", statements that impermissibly invaded the province of the jury and deprived Ms. McFarland of a fair jury trial.

As introduced in Issue Three above, ultimate guilt determinations are questions for the jury. *State v. Welchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); 5D WAPRAC ER 704(6), (9) and (11). Neither a lay nor expert witness can testify that a defendant is guilty. *State v. We*, 138 Wn. App. 716, 725, 158 P.3d 1238 (2007), *review denied*, 163 Wn.2d 1008 (2008) (citing *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)). "Improper opinion testimony violates a defendant's right to a jury trial and invades the fact-finding province of the jury." *We*, 138 Wn. App. at 730 (J. Schultheis dissenting).

A witness's opinion regarding the defendant's guilt "is irrelevant and invades the defendant's right to a jury trial and invades the jury's exclusive fact-finding province." *State v. Notaro*, 161 Wn. App. 654, 661, 255 P.3d 774 (2011). "To determine whether a statement is impermissible opinion testimony or a permissible opinion pertaining to an ultimate issue, courts must consider 'the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.'" *We*, 138 Wn. App. at 723 (quoting *Heatley*, 70 Wn. App. at 579).

"Opinions on guilt are improper whether made directly or by inference." *Quaale*, 182 Wn.2d at 199 (internal cites omitted). Opinions from law enforcement officers are especially problematic because it is

more likely to influence the jury. *State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); *King*, 167 Wn.2d at 331 (internal quotations omitted) ("A law enforcement officer's opinion testimony may be especially prejudicial because the officer's testimony often carries a special aura of reliability.")

In *State v. Quaale*, where the defendant was charged with driving under the influence, the trooper testified that he had no doubt the defendant was "impaired," which "parroted the legal standard contained in the jury instruction definition for 'under the influence.'" *Quaale*, 182 Wn.2d at 200. "[T]he trooper's opinion went to the core issue and the only disputed element: whether Quaale drove while under the influence of alcohol." *Id*. In other words, because the "trooper's inadmissible testimony went to the ultimate factual issue – the core issue of Quaale's impairment to drive— the testimony amounted to an improper opinion on guilt." *Id*. "This improper opinion on guilt violated Mr. Quaale's constitutional right to have a fact critical to his guilt determined by the jury…[,]" which resulted in reversal and retrial. *Id*. at 200-01.

Here, during her arrest, the officer told Ms. McFarland that a burglary had occurred the night before, and the officer explained to her what burglary was:

> [Officer]: Do you understand what burglary is?... You don't have to break in… it means being--being anyplace or entering or

> remaining unlawfully in a building while committing another crime… That's burglary.
>
> …As far as I know there was a burglary that occurred last night and apparently…something came up that's leading us back to you.

(Exhibit P44, 3:20-3:33, 5:23-5:34)

Defense counsel aptly objected that Exhibit P44, with the officer's inadmissible statements, invaded the province of the jury. (1RP 191-93, 201. The court erred by admitting the exhibit over the defendant's objection. The officer's opinions were entirely improper in this trial. The officer spoke to an ultimate guilt determination (that a burglary had, in fact, occurred). And, the officer impermissibly opined as to those elements that would satisfy a burglary, which is reversible error. *See Quaale*, 182 Wn.2d at 200-01.

The officer summarily informed the jury through the circumspect video that a burglary had occurred and that "something came up" that tied Ms. McFarland to that burglary. The officer would presumably not have been permitted to offer these same opinion statements through live testimony. Yet, the officer's statements carried that same aura of reliability and were just as invasive, if not more, where admitted through the video that was published to the jury. The officer's conclusory and opinion statements invaded the province of the jury. The statements denied Ms. McFarland her constitutional right to have an independent jury

determine her guilt or innocence based on admissible evidence and the court's instructions, rather than the officer's inadmissible opinions. The court abused its discretion by admitting this video exhibit.

(d) Admitting and publishing the video to the jury was unduly prejudicial, because it showed Ms. McFarland in handcuffs, cursing, arguing with an officer and in an impaired state, and it included the officer intimating that the defendant was a flight risk and referring to unproven "facts" not in evidence.

Finally, the video (Exhibit P44) should have been excluded because its probative value, if any, was significantly outweighed by its prejudicial effect. The video was unduly prejudicial where it showed Ms. McFarland in handcuffs, repeatedly using foul language, arguing with an officer, and appearing drug-impaired. The video was also unduly prejudicial and confusing to the jury, because the officer suggested that Ms. McFarland was a flight risk and said that video or fingerprint evidence had linked Ms. McFarland with the burglary, which was never proven.

Ms. McFarland's lies to the officer were prior misconduct that should have been excluded, as set forth above. But, even if there was some conceivable purpose for admitting this prior misconduct, which the defendant does not concede, the redacted video should still have been excluded because its probative value was significantly outweighed by its

undue prejudice, as defense counsel repeatedly argued below. (1RP 191, 194, 200, 213)

Even if questioning about prior misconduct is permissible, "the court should apply the overriding protection of ER 403 (excluding evidence if its probative value is outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury)." *Wilson*, 60 Wn. App. at 893. Even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Mee*, 168 Wn. App. at 157; ER 403. "The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response." *State v. McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013). A trial court's decision upon balancing probative value of evidence against its prejudicial capacity is reviewed for an abuse of discretion, which occurs where no reasonable person would take the view adopted by the trial court. *State v. Bell*, 60 Wn. App. 561, 565, 805 P.2d 815 (1991); *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

Here, there was little, if any, probative value to Exhibit P44. Ms. McFarland's statements that she had not left the Faircloth home did not

make it more or less likely that she committed burglary, theft of a firearm or unlawful possession of a firearm. And, Ms. McFarland admitted at trial that she was present at the Legault residence, so Exhibit P44 had no probative value for impeaching an alternate defense theory in the case. Given the slight or nonexistent probative value in this case, the resulting prejudice from Exhibit P44 takes on more significant impact.

First, Exhibit P44 was prejudicial because it showed Ms. McFarland in handcuffs for several minutes after her arrest. Many courts have found that a trial court abuses its discretion and reversible error occurs where a jury is allowed to see the defendant in physical restraints. *See e.g., State v. Finch*, 137 Wn.2d 792, 859, 975 P.2d 967 (1999) (citing cases). Ultimately, a jury's viewing of a defendant in restraints, inside or outside the courtroom, is not per se reversible error, but it could rise to the level of a due process violation where the defendant establishes actual prejudice from the viewing in handcuffs. *State v. Epplett*, 167 Wn. App. 660, 666, 274 P.3d 401 (2012).

Here, the jury's view of Ms. McFarland in handcuffs, when combined with the other prejudicial aspects of the video, prejudiced her right to a fair trial. The defendant was prejudiced, because the jury was more likely to focus on those emotional responses to the video rather than the permissible evidence in this trial.

Besides the prejudice from seeing Ms. McFarland in handcuffs, the deputy could be heard on the video saying that a burglary had occurred and that the investigation led to Ms. McFarland. Taken together, the view of the defendant in handcuffs combined with the officer's statements regarding her culpability created a great likelihood that the jury would convict based on Ms. McFarland's criminal appearance rather than simply based on the evidence admitted at trial.

Also, the video was likely to stimulate an emotional response in the jury and make it more likely to convict based on matters outside the evidence when the jury heard Ms. McFarland's cursing and displaying argumentative behavior with the officer. Ms. McFarland could be heard cursing about being restrained (Exhibit P44, :17, :27, :59, 1:11-1:27, 3:12-3:18, 5:36) and having to be told repeatedly to sit down so she wouldn't "get any brazen idea to take off running or anything like that." (Exhibit P44, 1:05-1:10) The officer essentially indicated on the video that Ms. McFarland was a flight risk. (Exhibit P44; 1RP 192) And, the court acknowledged that Ms. McFarland appeared to be "under the influence of something" during the video. (*Id*.) Ms. McFarland can also be heard on the video making irrelevant and prejudicial statements when she sarcastically repeats back her legal rights to the officer. While the officer

read the defendant her rights, Ms. McFarland recited along with the officer and repeatedly interrupted that she knew her rights. (Exhibit P44, 4:32)

Ms. McFarland's statements, behaviors and appearance, and the officer's implication that the defendant was a flight risk, had no probative value in this trial. Instead, these irrelevant matters effectively told the jury that Ms. McFarland is no stranger to the criminal justice system and tarnished her character along with her presumption of innocence.

Finally, the video was unduly prejudicial and highly likely to confuse the jury with unproven inferences. Specifically, the officer suggested that there was direct evidence that tied Ms. McFarland to the alleged crimes, which does not appear to actually exist. The officer stated, "As far as I know, there was a burglary that occurred last night and apparently somehow your name or some video or fingerprints or something, I don't know, something came up that's leading us back to you." (5:23-5:34) There is no known video or fingerprint evidence that directly connected Ms. McFarland with the charged crimes. The officer's statements would have simply confused and misled the jury by suggesting there was additional evidence of which the jury was not informed that supported a guilty verdict. This contributed to the prejudicial nature of Exhibit P44 so that, considering the overall impact on the jury, the trial court abused its discretion by admitting this highly prejudicial exhibit.

When these problems are all combined, the prejudice to Ms. McFarland so far outweighed any probative value of the evidence that the trial court should have excluded the exhibit. Exhibit P44 had little probative value, if any, and yet it was extremely prejudicial, designed to stimulate an emotional response in the jury and simply made the defendant appear criminally-inclined and foolish. Exhibit P44 likely clouded the issues, confused the jury, and led to an emotionally-based rather than factually-based jury verdict.

F. **CONCLUSION**

Based on the foregoing, Ms. McFarland requests that this Court reverse and remand for a new trial without reference to the Legault(s) as the "victim(s)" and without the admission of Exhibit P44 or Ms. McFarland's irrelevant prior false statements. Alternatively, Ms. McFarland requests that this Court remand for resentencing so that the trial court may correct her offender score and consider imposing an exceptional sentence downward.

Respectfully submitted this 5th day of June, 2015.

/s/ Kristina M. Nichols_____
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 32873-2-III
vs.	)	No. 14-1-00413-6
	)	
CECILY MCFARLAND	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
	)	

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 5, 2015, having obtained prior permission, I served a true and correct copy of the attached opening brief on the Respondent via email at kburns@grantcountywa.gov. I also mailed by first-class mail with the U.S. Postal Service, postage prepaid, a true and correct copy of the same to the Appellant at:

Cecily McFarland, DOC #320691
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

Dated this 5th day of June, 2015.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com