Supreme Court No. _____
COA No. 43932-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW AHO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Beverly G. Grant

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Matthew Aho was the appellant in COA 43932-8-II.

B. COURT OF APPEALS DECISION

Mr. Aho seeks review of the Court of Appeals decision issued October 25, 2016. Appendix A; Appendix B.

C. ISSUES PRESENTED ON REVIEW

1(a) and (b). When the court does not instruct on unanimity, is it an **(a) adequate Petrich "election**" in closing for the prosecutor to merely refer to one of the acts of gun possession, by saying, "we are talking about exhibit 48," **(b) where** the entire case – before and after closing – clearly placed two different possession allegations - a 9mm (ex. 48) and an Enfield rifle (Ex. 49) - before the jury? Or does this fail to protect the right to unanimity?

2. As to counts 4 and 5, did the trial court err in denying the defense motion to dismiss after the close of the State's case, where the State had failed to prove that Mr. Aho stole and possessed a ".357" handgun, as specifically charged in the information?

3. Subsequently, when the trial court allowed amendment of the information to change it to a "10 mm" handgun, was this an amendment after resting that charge a "new or different crime," and thus per se prejudicial under State v. Pelkey?

4. Alternatively, was the amendment actually prejudicial, where defense counsel based his cross-examination of the complainant on the fact that the State's charge was that a .357 was stolen but the complainant was now claiming that it was a different handgun that was taken, similarly requiring a new trial?

5. As to the unanimity issue, was the supplemental jury instruction (to which the defense objected) a misstatement of the law when it stated that a "firearm" is simply a non-toy gun?

6. Was Mr. Aho's right to a public trial violated in *voir dire* when the trial court took for-cause juror challenges, but unlike in State v. Love, no record at all was made of the challenge process?

7. Was the evidence insufficient to prove unlawful firearm "possession or control," in count 8?

8. Was Mr. Aho erroneously sentenced consecutively for multiple firearm possession convictions?

D. STATEMENT OF THE CASE

1. Charging. The complainant homeowner Mr. Gambill reported a burglary to the Sheriff's Office approximately a month after the alleged incident, after using self-help to confront a believed female perpetrator. CP 1-5; 8/22/12RP at 271.

Matthew Aho was charged with burglary, theft of a firearm from the house, and unlawful possession of that firearm later that day. In the information, the gun was described as a ".357." CP 1-3, 4-5. When Mr. Aho was subsequently arrested where he lived on his girlfriend's property, he was charged with an unrelated unlawful possession charge, for a firearm located by sheriffs on the property. CP 4-5.

2. Counts 4 and 5. At trial, the burglary complainant testified that the gun taken and which he had previously test-fired was a 10mm. 8/20/12RP 81, 115; 8/21/12RP at 123; 8/22/12 RP at 189; 8/23/12RP at 377. He denied that he was trying to show that a firearm was taken which he actually never owned. 8/21/12RP at 119-20. Counsel cross-examined the complainant at length, eliciting that his definite claim, now, was that the gun stolen was a "10mm." 8/21/12RP at 115-20; 8/22/12RP at 191-94.

Before the State rested, all of its prosecution witnesses had been excused following their testimony. After the State rested its case, Mr. Aho moved to dismiss for failure to make out a *prima facie* case that the subject firearm was a .357 firearm, as stated in the information. The court rejected the motion, and also allowed the State to amend the information to change the named firearm

from a .357 to a "10mm" gun, over defense objection. 8/27/12RP at 477-81, 483-88; CP 55-57.

3. Count 8. Count 8 involved a charge that Mr. Aho unlawfully possessed a firearm which police located on the property of his girlfriend's father, where she and Mr. Aho lived. The prosecution introduced a 9mm pistol that was located in the defendant's girlfriend's truck, located when police came to the property to arrest Mr. Aho. Exhibit 48; 8/27/12RP at 470-72. Through the father, the State also introduced an Enfield rifle that the defendant had allegedly given to him as a rent payment. Exhibit 49; 8/27/12RP at 160-63. However, the father, Mr. Newkirk, a Coast Guard veteran with firearms training, admitted that the rifle was "inoperable." 8/27/12RP at 164-70. In re-direct examination by the State, he agreed the rifle was not a "toy." 8/22/12RP at 170.

The State's final witness, firearms expert Mr. Mason, testified that he had test-fired Exhibit 48, and that this, the 9mm, was operable. 8/27/12RP at 470-73. He revealed, however, that he did not test-fire Exhibit 49, the Enfield, because it had been drilled out and was not operable, and could neither be loaded nor fired. 8/27/12RP at 471-76. However, he also had to agree with the prosecutor that the device was not a toy. 8/27/12RP at 475.

The State stopped its direct examination at this juncture, the defense had no questions, and then the State immediately rested its case. 8/27/12RP at 476-77. Before closing argument, the defense noted its objection to a State's new proposed supplemental instruction which stated that a "firearm" is a firearm if it is not a toy gun. 8/27/12RP at 500-501. The State desired this instruction to supplement instruction 19, which defined a firearm as a device from which a projectile may be fired. CP 31 (Instruction 19). 8/27/12RP at 502-03. Defense counsel said that the issue was irrelevant because Mr. Aho had transferred the Enfield to his girlfriend's father, Mr. Newkirk, in the past, for rent, not on the charging date. 8/27/12RP at 501. The State responded that the defendant need only have possessed the Enfield rifle on or about the charging date, and argued that State v. Raleigh held that a "firearm" need only be a non-toy gun. 8/27/12RP at 501-04. The court stated it would give the Raleigh instruction. 8/27/12RP at 504. The supplemental non-toy instruction was given to the jury as instruction 25. CP 37. During closing argument the prosecutor told the jury regarding count 8, as follows:

> January 28, 2011, was the second date that we are talking about. In this case we are talking about Exhibit No. 48, the 9 millimeter firearm that was found inside of Jillian Newkirk's vehicle.

8/27/12RP at 533. The prosecutor did not refer to the Enfield rifle in closing argument, but did not tell the jury that it needed to be unanimous as to the 9mm to convict, or otherwise state the Enfield rifle was not a basis for a verdict. Regarding possession, the prosecutor argued that Mr. Aho possessed the 9mm in part because in the trailer where he lived with Ms. Newkirk there was a box from Cabela's hunting store, addressed to Mr. Aho, that had 9mm bullets and a cartridge in it, and Ms. Newkirk told Deputy Filing, "We went out shooting" with the 9mm. 8/27/12RP at 535-36. Defense counsel argued to the jury, *inter alia*, that Ms. Newkirk had previously testified that she had not given the gun to Mr. Aho yet and therefore she did not think he knew about it. 8/27/12RP at 558.

The deliberating jury indicated it could not agree on count 8, but the foreman indicated the jury could probably reach a decision if it deliberated further. 8/27/12RP at 571-73.

The next day, on August 29, the jury sent out its second inquiry regarding count 8, asking specifically about the 9mm handgun, and the Enfield rifle:

> Do both exhibits 48 and 49 (either/or) apply to count VIII?

CP 65; 8/29/12RP (supplemental volume) at 4. The prosecutor urged the court to answer yes, the defense argued that the answer should be no, and the court answered the jury inquiry by writing,

> You should follow the instructions as given to you along with your recollections of the testimony and your notes.

CP 65; 8/29/12RP (supplemental) at 4. Those instructions stated:

> In order to decide whether any proposition has been proved, you must consider all of the evidence that [the court has] admitted that relates to the proposition.

(Emphasis added.) CP 9-10 (Instr. no. 1). The to-convict instruction did not specify a firearm but merely stated the defendant was guilty if he possessed "a" firearm. CP 33 (Instruction 21). After the court's answer to its inquiry, the jury issued its verdict 6 minutes later. Minutes of 8/29/12, 9:44 a.m. and 9:50 a.m. minute entries.

E. ARGUMENT

1. (i) As to counts 4 and 5, the court erred in denying Mr. Aho's motion to dismiss for failure to make a prima facie case as to the .357 charged.

(ii) Further, the court erred by subsequently allowing amendment of the information to charge the 10mm.

a. Review of each the issues is warranted.

As to counts 4 and 5, the trial court erred in denying Mr. Aho's motion to dismiss for the State's failure to make out a *prima facie* case of the .357 named in the information. The court also

erred in allowing the amendment to change the .357 to a 10 mm, because this was a new or different crime, and the amendment caused actual prejudice. The Court of Appeals rejected these issues. Review is warranted under RAP 13.4(b)(3) on the denial of the motion to dismiss because proper *notice* to the accused and the right to not be tried for an offense not charged, is a constitutional issue under Wash. Const. art. 1, § 22 (amend. 10) and State v. Markle, 118 Wn.2d 424, 431-32, 823 P.2d 1101 (1992), and a court must grant a motion to dismiss based on the allegations in the existing charging document, under State v. Rhinehart, 92 Wn.2d 923, 927-28, 602 P.2d 1188 (1979).[1]

Review is warranted for a constitutional issue under RAP 13.4(b)(3), and under RAP 13.4(b)(1), on the amendment of the information, because the Court of Appeals decision incorrectly analogized the amendment to a mere change to the charging

[1] The Court of Appeals rejected the issue of the defense motion to dismiss for failure to make out a *prima facie* case, as inadequately argued, and denied the motion to reconsider on that issue. Decision, at p. 12, note 9. However, this issue was the subject of the case summary, an assignment of error, an issue pertaining to that assignment of error, and argument in the briefing. AOB, at pp. 1-2, 5-8, 12-13, 16. Because the appeal involved five different assignments of error as to counts 4 and 5 alone, all arising out of the variance in the proof compared to the express language of the charging document, the argument regarding the motion to dismiss was properly presented in the briefing in a consolidated manner with the arguments about the subsequent amendment of the information.

period, contrary to the new crime prohibition of State v. Pelkey, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987), and found no prejudice contrary to State v. Schaffer, 120 Wn.2d 616, 845 P.2d 281 (1993).

b. The motion to dismiss should have been granted. A motion to dismiss for failure of the State to have made out a *prima facie* case is determined by the allegations in the existing information. State v. Rhinehart, 92 Wn.2d 923, 927-28, 602 P.2d 1188 (1979) (citing, inter alia, State v. Dixon, 78 Wn.2d 796, 802, 479 P.2d 931 (1971)). The trial court erred in denying Mr. Aho's motion to dismiss for failure to make out a *prima facie* case.

c. The amendment of the information requires reversal because prejudice per se arises where the changed subject matter renders the amendment one to a new or different crime. CrR 2.1(d) always precludes the State from amending an information, at any time during trial, if doing so prejudices "substantial rights" of the accused. CrR 2.1 (d). Further, Pelkey imposes a rule of *per se* prejudice, applicable where the State seeks to amend the information after resting its case-in-chief and the amendment charges a new or different crime; technical, non-material amendments are not governed by the Pelkey rule. Wash. Const. art 1, § 22 (amend. 10); State v. Pelkey, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987). The Court of Appeals relied on the

case of State v. Goss, 189 Wn. App. 571, 576, 358 P.3d 436 (2015), aff'd, 378 P.3d 154 (2016), as support for its ruling rejecting the argument of per se prejudice, because the amendment was like one changing the charging period in a case where the period does not matter to any statute of limitations. Decision, at p. 13. But this amendment changed the very subject matter. State v. Phillips, 27 Wash. 364, 67 P. 608 (1902) (reversing conviction for stealing Canadian currency when defendant charged with stealing United States currency); State v. Van Cleve, 5 Wash. 642, 32 P. 461 (1893) (denying amendment changing name of larceny victim from Wm. Burkbank to Walter Burbank).

d. Alternatively, the amendment was improper because of actual prejudice.

Mr. Aho suffered actual, demonstrable prejudice to substantial rights of his, under CrR 2.1. CrR 2.1; Pelkey, supra, State v. Schaffer, 120 Wn.2d 616, 622-23, 845 P.2d 281 (1993). Mr. Aho was prejudiced, because he defended against Mr. Gambill's claim by employing the shift in claims as impeachment. When the State rested, and then changed the subject matter of the crime, counsel's prior examination turned out to have instead bolstered and *helped support* the counts involving theft and possession of that particular gun. This fundamentally prejudiced

Mr. Aho's substantial rights to be apprised of the factual allegations he was to meet at trial. This should be unacceptable prejudice. The notice requirement exists as a means to allow the defendant to "mount an adequate defense" in response to the charges laid. Schaffer, 120 Wn.2d at 620; State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (April 2, 2013). Mr. Aho argues that this shifting ground under his feet cannot be constitutional notice. Compare Schaffer, 120 Wn.2d at 617-18 (amendment during State's case to change subject matter of malicious mischief in terms of property destroyed caused no prejudice because its timing allowed the defendant to mount his defense based on the understood factual claims). The amendment was, instead, prejudicial to Aho's substantial rights, engendered by the withholding of constitutional notice until the relevant time for notice's utility had passed. Wash. Const. art. 1, §22; CrR 2.1. U.S. Const. amends. 6, 14. This Court should accept review.

2. The prosecutor did not adequately elect the 9mm as the firearm for count 8 (VUFA), considering that the entire circumstances of the trial placed both the 9mm and the Enfield rifle before the jury.

Count 8 must be reversed for lack of express assurances of factual unanimity under Petrich as to what gun – the 9 mm, or the inoperable Enfield, the jury found in satisfaction of the count, where

the evidence was not overwhelming and highly controverted, as to whether the Enfield was a firearm, or was possessed by Mr. Aho on or about January 28.

a. Review is warranted because the Court of Appeals decision is in conflict with Petrich.

In multiple acts cases, the jury must be given a unanimity instruction, or the prosecutor must elect an act in closing argument. State v. Petrich; State v. Kitchen; Wash. Const. art. 1, § 21. This issue involves the question of whether the entire circumstances of the case are relevant to unanimity, and the question of what constitutes an "election" for Petrich purposes.

As a general rule, when a defendant claims a denial of constitutional rights, appellate review is de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009); State v. Drum, 168 Wn.2d 23, 31, 225 P.3d 237 (2010).

b. The state constitution guarantees an expressly unanimous verdicts; in this case, under all the circumstances, multiple weapons were placed before the jury for count 8 and the Enfield rifle was never withdrawn from consideration.

A jury must unanimously agree on the act that underlies a conviction, and this act must be the same one as charged in the information. State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984). Where multiple facts are presented that might prove

the crime, the trial court should instruct the jury to be unanimous as to one act, or the prosecutor must elect one act. Wash. Const. art. 1, § 21; Petrich, 101 Wn.2d at 572; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Here, no unanimity instruction was given in Mr. Aho's case, and there are no express assurances of unanimity. CP 8-49. (Jury instructions). Quite to the contrary, the entire proceedings of Mr. Aho's criminal prosecution on count 8 resulted a verdict without the slightest assurances of unanimity whatsoever.

The Court of Appeals decision, deeming there to have been an election in the State's closing argument, is in conflict with the Petrich rule which requires a unanimity instruction or an adequate election in multiple acts cases. Crucially, in determining whether there are adequate assurances of unanimity, the reviewing court considers the whole record of trial, including the evidence, information, argument and instructions. State v. Bland, 71 Wn. App. 345, 351–52, 860 P.2d 1046 (1993); State v. Corbett, 158 Wn. App. 576, 593, 242 P.3d 52 (2010); State v. Moss, 73 Wash. 430, 432, 131 P. 1132 (1913).

In the circumstances of the entire case, both the 9 mm and the Enfield were both plainly offered in satisfaction of the charge,

and the Enfield was never adequately removed from the jury's consideration so as to prevent Petrich from being violated. None of what occurred below results in what Mr. Aho was entitled to, which is express assurances of jury unanimity, because a mere mention of one act, without disclaiming the other act after it was the subject of so much evidence in the trial phase, is not an adequate Petrich election. State v. Carson, 184 Wn.2d 207, 227-28, 357 P.3d 1064 (2015) (citing State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007)); State v. Heaven, 127 Wn. App. 156, 160, 110 P.3d 835 (2005); State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008).

Finally, the sharp controversion in the evidence of the charge of possession of a statutory firearm, as to the Enfield, or as to the 9mm, each independently render the Petrich error not harmless beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411. This Court should grant review.

3. The jury was erroneously instructed that a firearm need only be a non toy gun.

The issue of the jury instruction regarding firearms is relevant to the Petrich issue, because the definition of the crime affects the question of harmfulness of the unanimity error – in that unanimity error requires reversal if the evidence was controverted.

a. Review is warranted. The Court's decision below to give an instruction that told the jury that a firearm is any non-toy gun, is contrary to several decisions of the Court of Appeals. Review is warranted under RAP 13.4(b)(2).

b. The court improperly instructed the jury on the State's "Raleigh" non-toy definition, in conflict with the operability standard of RCW 9.41.010.

Immediately after Mr. Mason testified that the Enfield rifle was not operable, the State over defense objection successfully sought a supplemental "firearm" definition in the jury instructions, which it desired to be given to the jury in addition to the RCW 9.41.010(1) statutory definition, in the form of WPIC 2.10, which requires that the device in question must be able to fire a projectile. 8/27/12RP at 500-01; see CP 31 (Instruction 19, stating: "A 'firearm' is a weapon or device from which a projectile may be fired by an explosive such as gunpowder."); see Washington Pattern Jury Instructions, Criminal, 2.10 (2008); RCW 9.41.010(1).

The prosecutor claimed that this new additional instruction was based on this Court of Appeals' decision regarding "operability" in the case of State v. Raleigh, 157 Wn. App. 728, 238 P.3d 1211 (2010). 8/27/12RP at 500. However, this was error. The instruction read:

> A firearm need not be operable during the commission of a crime to constitute a "firearm" as defined in previous instructions. Instead, the relevant question is whether the firearm is a gun in fact rather than a toy gun or gun like object which is incapable of being fired.

CP 37 (Instruction 25). This instruction, as crafted, was wrong, as in conflict with State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113 (a permanently disabled device is not a firearm), review denied, 139 Wn.2d 1003 (1999); and State v. Pierce, 155 Wn. App. 701, 705, 230 P.3d 237 (2010) (there must be evidence of operability).

4. The public trial right was violated.

a. Review is warranted. Review is warranted under RAP 13.4(b)(3) and (1) because the issue of what the minimum protections of the public trial right is, presents a significant constitutional issue. Article I, § 22 guarantees the accused a public trial by an impartial jury. State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995). Additionally, article I, § 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly[.]"

Review is also warranted under RAP 13.4(b)(1), because the Court of Appeals decision is in conflict with this Court's decision in State v. Love, 183 Wn.2d 598, 607, 354 P.3d 841 (2015).

b. The minimum protections were not provided.

Voir dire is an aspect of trial that requires an open and public trial. Whether the trial court has violated a defendant's right to a public trial is a question of law reviewed de novo, State v. Smith, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014), and if the record shows juror challenges were taken out of sight of the public, the violation is clear. *Voir dire* at Mr. Aho's trial occurred in public and was recorded by a court reporter, but when it came time to exercise for-cause challenges, however, the court simply conferred off the record with counsel. 8/20-21/12RP. The parties apparently exercised a cause challenge to a prospective juror, excusing prospective juror 23, but no record was made of the challenge process. 8/20-21/12RP at 102-03.

Unlike Love, there was no transcript of this conference. But the court had not considered the Bone-Club factors. This case differs from the case of State v. Love which held that the existence of a reported transcript of the for-cause challenges prevented any public trial violation, because there, although the public could see but not hear the discussions between the court and counsel at the bench, this satisfied the "*minimum*" safeguards of the public trial

right because a transcript of the challenge discussions was later available as a public record:

> We hold the juror challenges in this case were exercised in a manner consistent with the minimum safeguards of the public trial right and affirm.. . . [O]bservers could . . . see counsel exercise challenges at the bench [and the] transcript of the discussion about for cause challenges [are] publicly available.. . . We hold the procedures used at Love's trial comport with the minimum guarantees of the public trial right and find no closure here.

(Emphasis added.) State v. Love, 183 Wn.2d at 601. In this appeal, the Supreme Court held that the procedure below in Mr. Aho's trial also satisfied the public trial right in accord with Love. Decision, Slip Op. at p. 5. However, the Love decision made clear that the safeguards provided in Love were the "minimum" acceptable safeguards, and therefore the absence in Mr. Aho's case, of a record -- the most important of those safeguards, in the form of a publicly available transcript of the for-cause juror challenges at the bench – cannot be consistent with Love and the public trial right. Cf. State v. Cox, (Court of Appeals, Division 2, November 8, 2016) (cited pursuant to GR 14) (holding that the existence of a transcript of the trial judge's *summary* of for-cause challenges taken at the bench during jury selection was equivalent to Love's actual transcript of the challenge process). This Court should accept review.

5. The evidence was insufficient to prove unlawful firearm possession.

a. Review is warranted. The evidence must be sufficient to convict. U.S. Const. amend. 14; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The sufficiency issue presents a significant constitutional question under RAP 13.4(b)(3).

b. The evidence was insufficient. A defendant has actual possession when he has physical custody of the item and constructive possession if he has dominion and control over the item. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Dominion and control over an object "means that the object may be reduced to actual possession immediately," Jones, 146 Wn.2d at 333, but dominion and control need not be exclusive. State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). However, mere proximity is not enough to establish possession. Jones, 146 Wn.2d at 333. Here, Jill Newkirk, the defendant's girlfriend, stated she had not ever seen Mr. Aho with guns before. The 9mm gun was a gift she had purchased for Mr. Aho. 8/22/12RP at 212. It was found by police in the cab of Ms. Newkirk's truck on her father's property where Mr. Aho lived with her. 8/22/12RP at 220-21. Ms. Newkirk stated she had not given him the gun yet and she did not think he knew about it. 8/22/12RP at 221. Although Ms. Newkirk admitted that she had told a Deputy that

the gun belonged to Matt, and that she and Mr. Aho went shooting with it, she meant that Matt planned to go shooting with it. 8/22/12RP at 233-4. Deputies found a box of bullets including 9 mm ammunition, and also found a 9mm magazine, in the trailer. RP 320-23. The box was from Cabela's, and according to Deputy Filing, was addressed to the "last name of Aho." 8/23/12RP at 323-35. There was mail found in the trailer addressed to "Matthew Aho," but the envelopes were dated several weeks earlier. 8/23/12RP at 330-35. The Deputy testified that the 9mm bullets found in the trailer could fit into the 9mm gun; the 9mm magazine could also be shoved in to the gun but only with effort, and no magazine definitely fitting the 9mm gun was ever found. 8/23/12RP at 360, 382, 394. The evidence was insufficient to show possession or control. CP 33 (Instr. no. 21).

6. <u>The consecutive firearm sentencing statutes are at least ambiguous as to Mr. Aho's consecutive terms</u>.

a. Review should be granted. Mr. Aho was sentenced to 210 months incarceration for complicity to burglary and for the other offenses. The bulk of the total prison term was comprised of 90 months for stealing a firearm, 60 months for being a felon possessing the firearm, and 60 months for being a felon possessing a different firearm on the later date of his arrest, the terms consecutively-run. CP 83-87. The question of the meaning of the

consecutive sentence statute regarding certain firearm offenses is a matter of substantial public interest that warrants review. RAP 13.4(b)(4).

b. The statute is ambiguous as to offenses to be served consecutively. The statutory language of RCW 9.94A.589 is, at least, ambiguous as it regards whether Mr. Aho may be sentenced consecutively for his convictions for theft, and also for VUFA unlawful possession of the 10mm devices and for his conviction for VUFA possession in count 8. The pertinent statute, RCW 9.94A.589, provides:

> If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

RCW 9.94A.589 subsection (1)(c). The provision addresses two different questions -- the offender scoring where the defendant is committed of these crimes, and the consecutive sentencing of certain of these crimes.

First, under the statutory language, it is plain that the offender scoring for VUFA possession, firearm theft, and/or possession of a stolen firearm is to be determined without considering the listed felony crimes of firearm theft, or possession of a stolen firearm, as prior convictions, as one would normally do with other current offenses. State v. Pineda–Guzman, 103 Wn. App. 759, 762, 14 P.3d 190 (2000) (plain language controls).

It is equally plain that a person with Mr. Aho's convictions (theft of a firearm, unlawful possession of that firearm, and unlawful possession of another firearm) shall be sentenced to consecutive sentences for each of the "felony crimes listed" -- i.e., "the felony crimes of theft of a firearm or possession of a stolen firearm," if he is also convicted for unlawful possession of a firearm. RCW 9.94A.589(1)(c). When the Legislature used the language "felony crimes listed," in the second sentence, this language can only refer to the "felony crimes" listed after this same language in the first sentence: "the felony crimes of theft of a firearm or possession of a stolen firearm." State v. Sullivan, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) (Legislature's use of same terms indicates the terms are intended to have the same meaning); cf. In re Det. of Swanson, 115 Wn.2d 21, 27, 804 P.2d 1 (1990). RCW 9.41.040(6) uses

similar language and is similarly ambiguous as to multiple firearm possession convictions, a matter not addressed in State v. McReynolds, 117 Wn. App. 309, 343, 71 P.3d 663 (2003).

Thus, Mr. Aho was improperly sentenced to a further consecutive term for a second unlawful possession, run consecutively. This is indicated by the plain language, but if the statute is ambiguous, fundamental fairness requires that a penal statute be strictly construed in favor of the accused although a possible interpretation in favor of the State might be found. State v. Wissing, 66 Wn. App. 745, 753, 833 P.2d 424 (1992). Any ambiguity in the statute in this regard must be resolved in Mr. Aho's favor. State v. Wissing, 66 Wn. App. at 753. Mr. Aho's sentence must be reversed.

E. CONCLUSION

Based on the foregoing, Mr. Aho respectfully requests that this Court accept review and reverse his judgment and sentence.

Respectfully submitted this 4th day of January, 2017.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MATTHEW DAVID AHO, Appellant,	No. 43932-8-II UNPUBLISHED OPINION

SUTTON, J — Matthew D. Aho appeals his convictions for theft of a firearm and two counts of unlawful possession of a firearm (counts V and VIII).[1] He also appeals his consecutive sentences for theft of a firearm, and the two counts of unlawful possession of a firearm. We hold that (1) Aho's right to a public trial and right to be present were not violated, (2) the trial court did not abuse its discretion in allowing the State to amend the charge for theft of a firearm, (3) he received proper notice of the amended theft of a firearm charge, (4) the State properly elected specific acts to assure unanimous verdicts for theft of a firearm charge and both charges of unlawful possession of a firearm (counts V and VIII), (5) his time for trial under CrR 3.3 was not violated, and (6) the trial court did not err in imposing consecuti[illegible] sentences. As to Aho's Statement of Additional Grounds (SAG) claims, we hold that (7) he received effective assistance

[1] Aho was charged with unlawful possession of a firearm on November 7, 2010 (count V), and unlawful possession of a firearm on January 28, 2011 (count VIII).

of counsel, (8) the prosecutor did not engage in prosecutorial misconduct, and (9) there was sufficient evidence to support Aho's conviction of unlawful possession of a firearm (count VIII).

We affirm Aho's convictions and sentence for theft of a firearm and both counts of unlawful possession of a firearm (counts V and VIII).

FACTS

I. BACKGROUND

On November 7, 2010, Jillian Newkirk and her then boyfriend, Matt Aho, together with Nathan Rolfe and Brandi Snow, lured Bruce Gambill out of his house with the intention of entering Gambill's home and stealing his property. Snow testified that she later saw Aho handling an "older western type" small gun that she had not seen before the group went to Gambill's. Verbatim Report of Proceedings (VRP) (Aug. 22, 2012) at 270.

In December, Gambill reported to police that the missing weapon was a .357 Ruger revolver. Later, Gambill called Deputy Tony Filing to tell him that he made a mistake, and that it was his 10 mm handgun that was missing.

On January 28, 2011, deputies searched the Newkirk residence, including the fifth-wheel trailer where Newkirk and Aho lived together, and Newkirk's vehicle. During the search, deputies found 22-caliber magazines, 9 mm magazines, 9 mm ammunition in a box addressed to Aho, and "several 9 [mm] rounds" in a military backpack. VRP (Aug. 23, 2012) at 328. Deputies also found a loaded 9 mm gun on the passenger's floorboard of Newkirk's vehicle. Newkirk testified that she purchased the gun for Aho as a gift, but did not purchase ammunition and had not yet given the gun to Aho.

II. Procedure and Motions to Continue

In January 2011, the State charged Aho with theft of a firearm and two counts of second degree unlawful possession of a firearm (counts V and VIII).[2] The charging information for theft of a firearm stated that the firearm was a .357 revolver handgun. Aho entered pleas of not guilty and, after the trial court granted several continuances, the case proceeded to a jury trial.

Between March 17, 2011 and February 29, 2012, the trial court granted eight motions to continue based upon the parties' written agreement.[3] Aho was represented at each hearing and did not object to these continuances. On February 29, Aho failed to appear for trial, and on March 5, a bench warrant was issued for his arrest. On May 10, Aho filed an affidavit of prejudice and the trial court granted a motion to continue until May 14, upon the parties' written agreement. Aho did not object to the continuance.

Between May 14 and August 2, the trial was continued due to a lack of available courtrooms, witness issues, and other scheduling issues; Aho did not object. On August 2, the case was reassigned to a new judge and trial began on August 6.

III. Peremptory and For Cause Challenges

On August 20, 2012, the parties conducted voir dire in open court. The following colloquy took place:

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[2] Aho was also charged and convicted of residential burglary, unlawful possession of a controlled substance, and unlawful use of drug paraphernalia, but he does not appeal these convictions.

[3] The trial court granted a third motion to continue on June 2, 2011, that does not state specifically whether it was made under written agreement of both parties. However, Aho did not object, and he does not raise this issue on appeal.

> [THE STATE]: Your Honor, I do have one challenge for cause.
>
> THE COURT: All right. Why don't we do this. I am going to have you come back to chambers. I don't whisper well. So [counsel for both parties], if you would come back briefly and then we'll put it on the record later.
>
> (WHEREUPON, sidebar was had.)[4]
>
> THE COURT: All right. Juror No. 23, we thank you and you are excused from this panel. Thank you and report downstairs. Thank you.
>
> (WHEREUPON, juror leaves the courtroom.)

VRP (Aug. 20 & 21, 2012) at 102-03.

The parties then exercised their peremptory challenges at sidebar by writing them on a pleading titled "Peremptory Challenges," which was filed with the trial court the same day. Clerk's Papers (CP) at 136.

> THE COURT: Counsel, if you would please approach.
>
> [DEFENSE COUNSEL]: The Court's numbering is off but we are in agreement.
>
> THE COURT: Okay. Let me see this. That's my copy and you're in agreement?
>
> [THE STATE]: Yes.

VRP (Aug. 20 & 21, 2012) at 103. Aho did not challenge this procedure.

IV. TRIAL TESTIMONY

At trial, Gambill testified that he was confused when he mistakenly reported to the police that the missing weapon was a .357 revolver when it was, in fact, a 10 mm handgun. Newkirk's father testified that while deputies searched the property, he gave them a 1917 Enfield rifle that Aho had given to him about a month earlier.

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[4] While the trial court invited counsel to chambers, there is no indication that the discussion was held in chambers and not in the courtroom. Additionally, Aho concedes that the discussion was held at sidebar and not in chambers noting, "[T]he holding of the for-cause challenge process at side-bar did *effectively* close that proceeding." Supp. Br. of Appellant at 3 (emphasis added).

A forensic investigator with the Pierce County Sherriff's office, testified that the 9 mm semi-automatic appeared to be a real gun upon visual inspection, fired as designed, and appeared to have all necessary components to fire a projectile such as a bullet. He also testified that the 1917 Enfield rifle was a "real weapon" but that it was not operable and would not be able to fire a projectile. VRP (Aug. 27, 2012) at 475.

V. Amendment of Charging Document and Motions to Dismiss

After the State rested, it immediately moved to re-open its case to allow the trial court to read into the record a stipulation that Aho had been convicted of previous felonies on November 7, 2010 and on January 28, 2011. Aho did not object. VRP (Aug. 27, 2012) at 480.

Aho moved to dismiss the theft of a firearm charge for insufficient evidence. VRP (Aug. 27, 2012) at 482-83. Aho argued that the original charging documents charged theft of a .357-caliber revolver but that the evidence at trial supports that "[n]o 357 was even taken" and that his "defense in cross-examination was developed and pursued based on" Aho being charged as an individual and not an accomplice. VRP (Aug. 27, 2012) at 483, 485. The trial court denied Aho's motion to dismiss.

The State then moved to amend the theft of a firearm charge to allege a 10 mm handgun, instead of a .357-caliber revolver, noting that there was no prejudice because the specific firearm would not have changed how that charge was defended at trial. Aho did not specifically object to this amendment but generally argued that an amendment to the charge would prejudice his defense. The trial court granted the State's motion to amend.

Aho then moved to dismiss the charge for second degree unlawful possession of a firearm (count VIII) for insufficient evidence. The trial court reserved ruling on Aho's motion to dismiss and he rested his case.

VI. Jury Instructions

Aho did not object to jury instruction 19, which instructed that "a 'firearm' is a weapon or device from which a projectile may be fired by an explosive such as gunpowder." CP at 31. Aho did, however, object to jury instruction 25 which stated,

> A firearm need not be operable during the commission of a crime to constitute a "firearm" as defined in previous instructions. Instead, the relevant question is whether the firearm is a gun in fact rather than a toy gun or gun like object which is incapable of being fired.

CP at 37. Finally, Aho did not object to the lack of a unanimity instruction for theft of a firearm or the two counts of unlawful possession of a firearm (counts V and VIII), nor did he propose one.

VII. Closing Arguments

During closing argument, the State addressed Gambill's mistake when initially reporting the missing weapon,

> You might hear some argument, and I anticipate you will probably hear a lot of argument from the defense attorney . . . about what about this firearm? It's a 357 revolver? It's a 10 [mm]? Is it both? Is it neither? Was there even a firearm that was taken? Mr. Gambill was very candid with you about the fact that when he was filling out that theft inventory report he made a mistake. He was very candid with you and he was very candid with Deputy Filing when he realized that what he had intended to write down, the firearm that had in fact been taken, was a 10 [mm] handgun. He let Deputy Filing know and Deputy Filing told you that. Mr. Gambill told you that.

VRP (Aug. 27, 2012) at 530.

The State also stated that, with regard to the charge of theft of a firearm, "the firearm that had in fact been taken, was a 10 [mm] handgun. . . . Clearly that firearm was taken. The individuals

intended to deprive that other person, Mr. Gambill, of that firearm. They took it. They took it permanently." VRP (Aug. 27, 2012) at 530.

With respect to the charges of unlawful possession of a firearm (counts V and VIII), the State stated in its closing,

> We have two counts, Counts V and VIII, unlawful possession of a firearm in the second degree. And we are talking about two separate dates, Count V talks about November 7, 2010, knowingly had a firearm in his possession or control. If you are going in and taking a firearm out of the residence you are stealing that firearm. If you believe that the defendant is guilty of theft of a firearm you can also, based on the testimony and the evidence you heard, find that that firearm is in his possession or control. . . . January 28, 2011, was the second date that we are talking about. In this case we are talking about Exhibit No. 48, the 9 [mm] firearm that was found inside of Jillian Newkirk's vehicle.

VRP (Aug. 27, 2012) at 531-33.

VIII. JURY DELIBERATIONS

During deliberations, the jury indicated that they could not reach unanimity on one count of unlawful possession of a firearm (count VIII). The trial court asked whether they needed additional time to reach a verdict. After additional deliberations, the jury then asked if "both [the 9 mm semi-automatic] and [the 1917 Enfield] (either/or) appl[ied] to count VIII." CP at 65. Outside the presence of the jury, the State replied that "they do relate to that same count," and Aho suggested that the trial court respond "by instructing the jury to refer to their instructions." VRP (Aug. 29, 2012) at 4. The trial court answered the jury and stated that they "should follow the instructions as given to [them] along with [their] recollections of the testimony and [their] notes." CP at 65.

H. VERDICT AND SENTENCING

The jury found Aho guilty of theft of a firearm, and two counts of unlawful possession of a firearm in the second degree (counts V and VIII). The trial court ordered that Aho serve consecutive sentences of 90 months for theft of a firearm, and 60 months for each of the two counts of unlawful possession of a firearm (counts V and VIII).[5] Aho appeals.

ANALYSIS

I. PUBLIC TRIAL

A. RIGHT TO A PUBLIC TRIAL

Aho argues that taking peremptory challenges at a sidebar constituted a closure of the courtroom, required a *Bone-Club*[6] analysis prior to its closure, and violated his constitutional right to a public trial under *State v. Anderson*.[7] We disagree.

Whether a defendant's constitutional right to a public trial has been violated is a question of law, and we review de novo. *State v. Love*, 183 Wn.2d 598, 604, 354 P.3d 841 (2015), *cert. denied*, 136 S. Ct. 2386 (2016). Both the federal and state constitutions provide a criminal

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[5] RCW 9.94A.589(1)(c) provides that

> if an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection [], as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection [], and for each firearm unlawfully possessed.

[6] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

[7] *State v. Anderson*, 187 Wn. App. 706, 350 P.3d 255 (2015), *remanded*, 194 Wn. App. 547 (2016).

defendant with a "public trial by an impartial jury." U.S. Const. amend. VI; Const. art. I § 22; *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). "[T]he right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *Sublett*, 176 Wn.2d at 72. "But, not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." *Sublett*, 176 Wn.2d at 71. "The public trial right is not absolute [and] may be overcome to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values." *Sublett*, 176 Wn.2d at 71.

Our Supreme Court recently held that

> [a] three-step framework guides [its] analysis in public trial cases. First, [it] ask[s] if the public trial right attaches to the proceeding at issue. Second, if the right attaches [it] ask[s] if the courtroom was closed. And third, [it] ask[s] if the closure was justified. The appellant carries the burden on the first two steps; the proponent of the closure carries the [burden with respect to the] third.

Love, 183 Wn.2d at 605 (citations omitted).

As to the first step, the parties do not dispute that Aho's public trial right attaches to jury selection. *Love*, 183 Wn.2d at 605. Next, the *Love* court analyzed whether the exercise of for cause challenges orally at the bench, peremptory challenges silently by exchanging a list of jurors, or alternatively exercising peremptory challenges by striking names constituted a closure of the courtroom and violated Love's right to a public trial. 183 Wn.2d at 607-08.

In *Love*, the court noted that the process was visible to observers in the courtroom, and no one was asked to leave the courtroom. 183 Wn.2d at 602. Observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel

exercise challenges for cause at the bench and on paper, and ultimately evaluate the empaneled jury. *Love*, 183 Wn.2d at 607. Additionally, the transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges were both publically available in *Love*. *Love*, 183 Wn.2d at 607 ("The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury [selection].").

Aho concedes and the record indicates that the for cause challenges were held at sidebar,[8] although the trial court had initially invited counsel into chambers. Thus, although there is no transcript of the sidebar conference, as there was in *Love*, the for cause challenges took place in open court, and all jurors, the public, and Aho could observe the proceedings, and the trial court immediately noted the results on the record.

Counsel also properly exercised peremptory challenges in a similar manner to the challenges in *Love*. In *Love*, peremptory challenges were exercised silently in the courtroom by exchanging a written list of jurors between counsel, the struck juror sheet was filed with the trial court and made available to the public, and there was no indication that observers were asked to leave the courtroom. 183 Wn.2d at 602-03. Here, Aho and the State both exercised peremptory challenges silently, the record does not indicate that anyone was asked to leave the courtroom, and the struck juror sheets were filed with the trial court and are available to the public.

We hold that the for cause challenges done orally at sidebar and the peremptory challenges taken at a sidebar did not constitute a courtroom closure requiring a *Bone-Club* analysis because

[8] Aho argues that the "holding of the for-cause challenge process at side-bar did *effectively* close that proceeding." Supp. Br. of Appellant at 3 (emphasis added).

the public could observe and scrutinize the voir dire process and, consistent with *Love*, this process afforded Aho the safeguards of the public trial right. *Love*, 183 Wn.2d at 607.

B. RIGHT TO BE PRESENT

Aho next argues that his absence from the bench and sidebar during for cause and peremptory challenges violated his right to be present at critical stages of trial. Again, we disagree.

A criminal defendant has a fundamental right to be present at all critical stages of a trial under the confrontation clause of the Sixth Amendment and the due process clause. U.S. Const. amend. VI, XIV; *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). "[A] defendant has a right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge.'" *Irby*, 170 Wn.2d at 881 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934). However, the right to be present is not absolute; rather "'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.'" *Irby*, 170 Wn.2d at 880 (quoting *Snyder*, 291 U.S. at 107-08). The due process right to be present extends to jury voir dire. *Irby*, 170 Wn.2d at 883.

Aho cites *Irby* and argues that where personal presence is necessary, the record must show that fact. However, *Irby* is factually different because the defendant was in his jail cell and not present when counsel conducted an email discussion with the trial court to empanel the jury. 170 Wn.2d at 884. The record in *Irby* did not indicate that defense counsel had time to confer with him before responding to the trial court's email. 170 Wn.2d at 884.

Aho did not object to the process for taking challenges at trial. Further, Aho was in the courtroom during the entire voir dire process, was present during the for cause and peremptory

challenges, and had the opportunity to confer with his defense counsel. There is no evidence that he was precluded from participating or could not confer with his counsel. We hold that Aho's right to be present was not violated.

II. Amendment to Theft of a Firearm Charge

Aho argues that the trial court erred in granting the State's motion to amend the charge of theft of a firearm to refer to the 10 mm handgun after the State rested its case because the amendment failed to provide proper notice of the crime charged and prejudiced him.[9] We disagree.

The State must allege in the charging document all essential elements of a crime to inform a defendant of the charges against him and to allow for preparation of his defense. U.S. Const. amend. VI; Const. art. I, § 22; *State v. Mason*, 170 Wn. App. 375, 378, 285 P.3d 154 (2012). "A charging document is constitutionally sufficient if the information states each essential element of the crime . . . even if it is vague as to some other matter significant to the defense." *Mason*, 170 Wn. App. at 378-79.

An information may "be amended at any time before verdict or finding if [the] substantial rights of the defendant are not prejudiced." CrR 2.1(d). The defendant has the burden of demonstrating prejudice under CrR 2.1(d). *State v. Ziegler*, 138 Wn. App. 804, 809, 158 P.3d 647 (2007).

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[9] Aho also assigns error to the trial court's denial of his motion to dismiss the charge of theft of a firearm and unlawful possession of a firearm (count V) for the State's failure to make a prima facie case which he brought after the State rested its case but fails to provide further argument on this issue. Passing treatment of an issue is insufficient to warrant appellate consideration. RAP 10.3(a)(6); *State v. Davis*, 174 Wn. App. 623, 641, 300 P.3d 465 (2013). Thus, to the extent that Aho argues that the trial court erred in denying his motion to dismiss as an issue independent of his argument against amending the charging documents, we do not address this issue.

We review a trial court's ruling to grant the State's motion to amend charges for an abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012). "A trial court abuses its discretion if its decision 'is manifestly unreasonable or based upon untenable grounds or reasons.'" *Lamb*, 175 Wn.2d 127 (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). "A court's decision 'is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.'" *Lamb*, 175 Wn.2d 127 (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). "'A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.'" *Lamb*, 175 Wn.2d 127 (quoting *Littlefield*, 133 Wn.2d at 47).

Aho argues that the amendment of the charge after the State has rested its case is reversible error per se and that he is not required to show prejudice. We disagree because the charge was amended only to conform to the evidence.

In *State v. Goss*, the amendment did not charge any new offenses or add additional counts and instead merely enlarged the time frame within which the crime was committed. 189 Wn. App. 571, 576, 358 P.3d 436 (2015), *aff'd*, 378 P.3d 154 (2016). The *Goss* court held that an "amendment of the charging period is usually not a material element of a crime and, thus, an 'amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant.'" *Goss*, 189 Wn. App. at 576 (quoting *State v. DeBolt*, 61 Wn. App. 58, 62, 808 P.2d 794 (1991)).

Here, the State's amendment to the theft of a firearm charge changed the type of weapon from "a .357 revolver" to "a 10 mm handgun." CP at 1-2, 55-56. The amendment did not charge a different or greater crime, nor did it change or add an essential element of the crime. Like the

amendment of the timeline in *Goss*, the amendment changing the type of handgun charged is not a material element of the crime charged. Thus, Aho must show prejudice under CrR 2.1(d).

Aho's argues that when a jury is involved and the amendment occurs late in the State's case, impermissible prejudice could be more likely, and he cites to *State v. Schaffer*, 120 Wn.2d 616, 621-23, 845 P.2d 281 (1993).[10] However, Aho merely objected generally at trial and did not specifically argue to the trial court how the amendment would prejudice his defense.

Additionally, *Shaffer* states that "impermissible prejudice is less likely 'where the amendment merely specif[ies] a different manner of committing the crime originally charged.'" *Schaffer*, 120 Wn.2d at 621 (alternation in original) (citations omitted) (quoting *State v. Pelkey*, 109 Wn.2d 484, 490-91, 745 P.2d 854 (1987). Here, the amendment specified a different means of committing the crime originally charged when one type of firearm was substituted for another. The amendment did not charge a different or greater crime, nor did it change or add an essential element of the crime.

Aho relies on RCW 10.61.006, 10.61.010, and [10.58].020. But each of these statutes simply provides that a defendant may only be found guilty of the crime charged or a lesser offense. Aho also argues that he was not able to rebut the subject matter of the amended charge of theft of a firearm. However, Aho had an opportunity to cross-examine Snow, the driver of the vehicle on November 7, 2010, about the type of firearm she saw in the trailer after the burglary, and she described the firearm as "an older western style gun." VRP (Aug. 22, 2012) at 270.

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[10] Aho also relies on *State v. Workman*, 66 Wn. 292, 119 P. 751 (1911), for the proposition that he may only be convicted for the crime specified in the charging document. Although *Workman* requires the State to elect which of two different acts is relied upon for a conviction, *Workman* does not provide any guidance in light of *State v. Schaffer*. 66 Wn. at 295.

Thus, because Aho was convicted of the original crime charged and he had an opportunity to rebut the specific subject matter in the amended charge, he received proper notice of the crime charged and fails to demonstrate prejudice under CrR 2.1(d). We hold that the trial court did not abuse its discretion when allowing the State's motion to amend the information.

III. JURY INSTRUCTIONS

Generally, we review a trial court's choice of jury instructions for an abuse of discretion. *State v. Fleming*, 155 Wn. App. 489, 503, 228 P.3d 804 (2010). Alleged errors of law in jury instructions are reviewed de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Jury instructions are proper when they allow the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Willis*, 153 Wn.2d at 370. A jury instruction that omits an element of the offense is subject to a harmless error analysis. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). We presume jurors follow the instructions given to them by the court. *State v. Paumier*, 176 Wn.2d 29, 55, 288 P.3d 1126 (2012). An error is harmless if the omitted element is supported by uncontroverted evidence. *Thomas*, 150 Wn.2d at 845.

Challenges to jury instructions are considered in the context of the jury instructions as a whole. *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014). "Specifically, the 'to convict [jury] instruction must contain all of the elements of the crime because it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence.'" *Johnson*, 180 Wn.2d at 306 (alteration in original) (internal quotation marks omitted) (quoting *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). "We will not look to other jury instructions to supplement a defective 'to convict' instruction." *Johnson*, 180 Wn.2d at 306.

A. JURY UNANIMITY

1. Theft of a Firearm and Unlawful Possession of a Firearm (count V)

Aho argues that he was entitled to express assurances of jury unanimity as to the theft of a firearm charge and the charge of unlawful possession of a firearm (count V).[11] We disagree and hold that the State properly elected which acts it relied on for the convictions.

The State must elect the act it relies on for a conviction, or the trial court must instruct the jury that all members must agree on the same underlying act when multiple acts relate to one charge. *State v. Bobenhouse*, 143 Wn. App. 315, 325, 177 P.3d 209 (2008) *aff'd*, 166 Wn.2d 881 (2009). The failure to give a *Petrich*[12] instruction violates a defendant's constitutional right to a unanimous jury verdict and may be raised for the first time on appeal. *Bobenhouse*, 143 Wn. App. at 325. The failure to instruct the jury on the required unanimity is reversible error unless the failure is harmless. *Bobenhouse*, 143 Wn. App. at 325. The fact that Aho did not object to the jury

[11] Aho also argues that the to convict instructions for the theft of a firearm and the unlawful possession of a firearm (count V) were improper because they both stated generically that he only need be proven to have stolen "any firearm," or "a firearm," and to have possessed "a firearm," and the instructions did not specify which firearm the State relied upon for the charges. Br. of Appellant at 14. To the extent that this argument is independent of Aho's argument that the State failed to elect which act it relied on for theft of a firearm and the unlawful possession of a firearm (count V), he fails to cite to authority that the instructions are otherwise improper. We do not consider conclusory arguments that are unsupported by citation to authority. RAP 10.3(a)(6); *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2014). Thus, we do not address this argument further.

[12] *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

instructions or propose a unanimity instruction himself does not preclude us from reaching the merits of these issues.[13]

During closing arguments, the State elected which acts it relied upon for theft of a firearm, because it stated that "the firearm that had in fact been taken, was a 10 [mm] handgun. . . . Clearly that firearm was taken. The individuals intended to deprive that other person, Mr. Gambill, of that firearm. They took it. They took it permanently." VRP (Aug. 27, 2012) at 530.

The State also elected which acts it relied upon for unlawful possession of a firearm (count V). It stated that "[i]f you believe that the defendant is guilty of theft of a firearm you can also, based on the testimony and the evidence you heard, find that that firearm is in his possession or control." VRP (Aug. 27, 2012) at 532. Thus, we hold that the State properly elected to rely on the 10 mm handgun to support the convictions for the theft of the firearm and unlawful possession of a firearm (count V).

[13] Under RAP 2.5(a) an error may not be raised for the first time on appeal unless it is a manifest constitutional error. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Instructional errors obviously affecting a defendant's constitutional rights, by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict, are manifest constitutional errors. *O'Hara*, 167 Wn.2d at 103.

2. Unlawful Possession of a Firearm (count VIII)[14]

Aho also argues that he was entitled to express assurances of jury unanimity as to the charge of unlawful possession of a firearm (count VIII). We disagree.

The to convict instructions for unlawful possession of a firearm (count VIII) required that the jury find beyond a reasonable doubt: "(1) [t]hat on or about the 28th day of January, 2011, the defendant knowingly had a firearm in his possession or control; (2) [t]hat the defendant had previously been convicted of a felony; and (3) [t]hat the possession or control of the firearm occurred in the State of Washington." CP at 34.

During closing arguments, the State elected the 9 mm firearm to support the charge of unlawful possession of a firearm (count VIII):

> January 28, 2011, was the second date that we are talking about. In this case we are talking about Exhibit No. 48, the 9 [mm] firearm that was found inside of Jillian Newkirk's vehicle.

VRP (Aug. 27, 2012) at 533.

However, during deliberations the jury asked whether "both [the 9 mm] and the [Enfield rifle] (either/or) apply to count VIII?" CP at 65. After conferring with counsel outside the presence

[14] Aho also argues that there was insufficient evidence to support the charge of unlawful possession of a firearm (count VIII) because the 1917 Enfield rifle was not owned or controlled by Aho on January 28, 2011, and it was not a firearm. However, the State properly elected the 9 mm firearm to support the charge of unlawful possession of a firearm (count VIII). To the extent that this argument is independent of his argument that he did not have express assurances of jury unanimity as to his conviction of unlawful possession of a firearm (count VIII), Aho fails to argue that there was insufficient evidence to support his conviction of unlawful possession of a firearm (count VIII) as it relates to the 9 mm firearm. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. RAP 10.3(a)(6); *Brownfield*, 178 Wn. App. at 876. Because we hold that the State properly elected the 9 mm firearm to support Aho's conviction for unlawful possession of a firearm (count VIII), we decline to address this argument.

of the jury, the trial court instructed the jury as follows, "You should follow the instructions . . . along with your recollections of the testimony and your notes." CP at 65. The jury then returned a unanimous verdict and found Aho guilty of unlawful possession of a firearm (count VIII). The State properly elected in closing to rely on the 9 mm firearm for count VIII. We presume the jury followed the court's instructions. *Paumier*, 176 Wn.2d at 55. Thus, we affirm Aho's conviction for unlawful possession of a firearm (count VIII).

III. TIME FOR TRIAL

Aho argues that his time for trial under CrR 3.3[15] was violated because he waited over 500 days for trial. We disagree.

We review a trial court's decision to grant a motion to continue the trial for an abuse of discretion. *State v. Saunders*, 153 Wn. App. 209, 216, 220 P.3d 1238 (2009). "'[I]n exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors.'" *State v. Flinn*, 154 Wn.2d 193, 199-200, 110 P.3d 748 (2005) (quoting *State v. Heredia-Juarez*, 119 Wn. App. 150, 155, 79 P.3d 987 (2003)).

Although Aho argues he waited over 500 days for trial, 483 days out of the 500 days are attributable in part to Aho. Here, there were 14 motions to continue in the case between the time it was filed and July 26, 2012. Aho also failed to appear for trial on February 29[16] and a bench

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[15] CrR 3.3(b)(2) provides in relevant part that "[a] defendant who is not detained in jail shall be brought to trial within the longer of . . . 90 days after the commencement date specified in this rule, or . . . the time specified in subsection (b)(5)." CrR 3.3(b)(2)(i),(ii).

[16] CrR 3.3(c)(2)(ii) provides in relevant part that "[t]he failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance."

warrant was issued for his arrest on March 5. On March 10, defendant next appeared and defense counsel filed an affidavit of prejudice, and trial was reset again. The trial court then granted another continuance on May 14 at the State's request. Aho either agreed to or did not object to the continuances, therefore, he cannot assign error to the trial court's decision to grant these continuances. On July 26, 2012, the trial court granted another continuance for seven days until August 2. Aho refused to sign the order of continuance. On August 2, the case was reassigned to another trial judge. After the reassignment on August 2, trial began on August 6, only four days later. Therefore, the continuance on July 26 resulted in an 11-day delay which does not violate Aho's time for trial right. Moreover, the trial court granted the continuance because the prosecutor was recovering from surgery and several witnesses were unavailable. Given the reasons for the continuance, the trial court did not abuse its discretion in granting the July 26 continuance.

Aho also argues that the trial court failed to provide adequate reasons for these continuances, as required under CrR 3.3(f)(2). However, Aho did not object to any of the continuances and therefore waives his objection on appeal. Because Aho waived any objection to the continuances, and the trial court properly considered all relevant factors in granting the continuances, Aho fails to show that the trial court abused its discretion.

IV. CONSECUTIVE SENTENCING

Aho argues that his sentences for his theft of a firearm and the two counts of unlawful possession of the firearm (counts V and VIII) should run concurrently, not consecutively as ordered by the trial court. We disagree.

Whether a sentence is legally erroneous is reviewed de novo. *State v. Dyson*, 189 Wn. App. 215, 224, 360 P.3d 25 (2015), *review denied*, 184 Wn.2d 1038 (2016). Statutory

interpretation is a question of law that we review de novo. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). An unambiguous statute is not subject to judicial construction and our Supreme Court has declined to insert words into a statute where the language, taken as a whole, is clear and unambiguous. *Watson*, 146 Wn.2d at 955.

In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the legislature in creating the statute. *Watson*, 146 Wn.2d at 954. We first look to the language of the statute; if a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. *Watson*, 146 Wn.2d at 954. A statute is unclear if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable. *Watson*, 146 Wn.2d at 954-55. "We are not 'obliged to discern any ambiguity by imagining a variety of alternative interpretations.'" *Watson*, 146 Wn.2d at 955 (quoting *State v. Keller*, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001)).

Aho argues that the statutory language of RCW 9.94A.589 is ambiguous as to whether he may be sentenced consecutively for his convictions for theft of a firearm and unlawful possession of a firearm.

> If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve *consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.*

RCW 9.94A.589(1)(c) (emphasis added).

Aho's argument fails to consider the sentencing statute read together with the statute under which he was convicted, which provides in relevant part,

> Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the *offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.*

RCW 9.41.040(6)[17] (emphasis added).

This provision clearly and unambiguously prohibits concurrent sentences for the listed firearms convictions. *State v. McReynolds*, 117 Wn. App. 309, 343, 71 P.3d 663 (2003). The trial court did not err in imposing consecutive sentences for Aho's convictions of theft of a firearm and the two counts of unlawful possession of a firearm (counts V and VIII). We affirm.

V. STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Aho claims ineffective assistance of counsel, prosecutorial misconduct, and that there is insufficient evidence to support his conviction of unlawful possession of a firearm (count VIII). His arguments fail.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Aho asserts that defense counsel failed to properly cite authority in a motion to dismiss some of the charges against him, failed to move for a mistrial, failed to ask the trial court for corrective jury instructions, failed to adequately investigate, and failed to call or interview potential witnesses. We disagree.

[17] RCW 9.41.040 has been amended several times since 2010. LAWS OF 2016, ch. 136 § 7; LAWS OF 2014, ch. 111 § 1; LAWS OF 2011, ch. 193 § 1. Because these amendments do not impact our analysis, we cite to the current version of the statute.

A claim that counsel was ineffective is a mixed question of law and fact that we review de novo. *State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015). "'A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct and (2) there is a probability that the outcome would be different but for the attorney's conduct.'" *Jones*, 183 Wn.2d at 339 (quoting *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993)). Thus, to prevail on a claim of ineffective assistance of trial counsel, an appellant must show both deficient performance and prejudice. *Jones*, 183 Wn.2d at 339. "To show prejudice, the appellant need not prove that the outcome would have been different but must show only a 'reasonable probability'—by less than a more likely than not standard—that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Jones*, 183 Wn.2d at 339 (quoting *Strickland v. Washington*, 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)).

Courts strongly presume that counsel's representation was effective. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). "To demonstrate deficient performance, a 'defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.'" *Emery*, 174 Wn.2d at 755 (quoting *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). However, this presumption can be overcome when the attorney failed to properly investigate or interview witnesses. *State v. Jones*, 183 Wn.2d at 339.

1. Motion to Dismiss

Although Aho claims that defense counsel failed to cite authority when presenting a motion to dismiss to the trial court, Aho provides no authority that counsel is required to cite case law nor does he show that he was prejudiced by counsel's failure to cite authority. Defense counsel made oral motions to dismiss the charges of residential burglary and unlawful possession of a firearm (count VIII), and argued both motions thoroughly. Aho cannot show deficient performance or demonstrate that but for any deficiencies in citation of authority, that the proceedings would have been different.

2. Motion for Mistrial and Limiting Instruction

Aho claims that he was prejudiced because defense counsel failed to move for a mistrial or request a limiting instruction after Gambill twice referred to death threats over defense counsel's objections. We disagree.

After Gambill's comments about death threats, the trial court conferred with counsel, and although defense counsel did not specifically request a limiting instruction, the trial court sua sponte instructed the jury as follows, "I am going to ask that you disregard any of the answers given by this witness before recess. You are not to consider them." VRP (Aug. 20 & 21, 2012) at 132. The trial court also stated if Gambill continued to make inappropriate comments, that "it would be grounds for a mistrial." VRP (Aug. 20 & 21, 2012) at 130.

Additionally, Gambill did not refer to death threats again and, thus, there was no basis for defense counsel to move for a mistrial. Any prejudice by Gambill's remarks about death threats was cured by the trial court's limiting instruction. Thus, Aho cannot show deficient performance or demonstrate that the proceedings would have been different but for any deficiencies.

3. Inadequate Investigation

Aho asserts that defense counsel's performance was deficient because he failed to investigate discovery and sufficiently prepare for trial, or he would have had knowledge of the death threats that Gambill testified about. However, as analyzed above, defense counsel objected to all testimony about the death threats and the trial court instructed the jury not to consider Gambill's statements regarding the death threats. Thus, Aho cannot show deficient performance or demonstrate that the proceedings would have been different but for defense counsel's knowledge of the death threats.

4. Co-defendant's Testimony

Aho claims that defense counsel's performance was deficient because he failed to call or interview Nathan Rolfe, a codefendant who was incarcerated at the time of trial. Aho argues that Rolfe would have been a favorable witness and that defense counsel could have requested transport to require that Rolfe testify. Again, we disagree.

We are highly deferential to counsel's decisions, and a strategic or tactical decision is not a basis to find deficient performance. *State v. Kloepper*, 179 Wn. App. 343, 354, 317 P.3d 1088 (2014). Although Aho claims that the State "clearly felt that Mr. Rolfe's testimony would have been favorable to the defense," he fails to consider that defense counsel may have had a legitimate strategic decision for not calling Rolfe to testify. Aho fails to show that defense counsel's decision not to interview Rolfe or call him to testify was not a legitimate strategic or tactical decision. Thus, this claim fails.

5. Interview Witnesses

Aho claims that defense counsel's performance was deficient because he failed to interview Snow and failed to allow himself enough time to reflect and prepare for trial. We disagree.

Although defense counsel stated that he never requested to speak with Snow before trial, defense counsel had received and reviewed Snow's report. Aho does not cite to any other place in the record to support his claim that defense counsel failed to allow himself enough time to reflect and prepare for trial. Thus, this claim fails.

B. PROSECUTOR'S CLOSING ARGUMENTS

Aho argues that during closing arguments, the Prosecutor made possible threats to witnesses that amount to prosecutorial misconduct. We disagree.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotations omitted) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). "The burden to establish prejudice requires the defendant to prove that 'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" *Thorgerson*, 172 Wn.2d at 442-43 (alteration in original) (quoting *Magers*, 164 Wn.2d at 191). When reviewing a claim of prosecutorial misconduct, we review the statements in the context of the entire case. *Thorgerson*, 172 Wn.2d 443.

Here, Aho argues that the prosecutor's improper remarks mislead the jury into believing that Gambill was telling the truth.

> You might hear some argument, and I anticipate you will probably hear a lot of argument from the defense attorney . . . about what about this firearm? It's a 357 revolver? It's a 10 [mm]? Is it both? Is it neither? Was there even a firearm that was taken? Mr. Gambill was very candid with you about the fact that when he was filling out that theft inventory report he made a mistake. He was very candid with you and he was very candid with Deputy Filing when he realized that what he had intended to write down, the firearm that had in fact been taken, was a 10 [mm] handgun. He let Deputy Filing know and Deputy Filing told you that. Mr. Gambill told you that.

SAG at 10, quoting VRP (Aug. 27, 2012) at 530. The prosecutor's statements in closing are simply a summary of the testimony and do not misstate the witness's testimony.

> GAMBILLL: Yes, I did. They were both silver, like stainless, in color and not dark like a lot of handguns are. But yeah, I called Deputy Filing right away and told him I made a mistake and it was the 10 [mm] that was taken.

VRP (Aug. 22, 2012) at 189. Aho fails to demonstrate the State's conduct was improper.

C. INSUFFICIENT EVIDENCE

Aho claims that that there is insufficient evidence to support the conviction of unlawful possession of a firearm (count VIII) because there was no indication that Aho had actual or constructive possession of the firearm on January 28, 2011.

In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). "These inferences 'must be drawn in favor of the State and interpreted most strongly against the defendant.'" *Homan*, 181 Wn.2d at 106 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *Homan*, 181 Wn.2d at 106.

Newkirk testified that Aho lived at her residence with her from May 2010 to January of 2011 and kept personal items there. She also testified that the handgun found on the passenger's floorboard of her vehicle was a gift she purchased for Aho, but that she had not yet given it to him. Deputies also found 9 mm magazines and ammunition in a box addressed to Aho and "several 9 [mm] rounds" in a military backpack. VRP (Aug. 23, 2012) at 329. Newkirk testified that she did not purchase ammunition.

Drawing all inferences in favor of the State, we hold that there was sufficient evidence to support Aho's conviction of unlawful possession of a firearm (count VIII).

CONCLUSION

We hold that (1) the trial court did not violate Aho's rights to a public trial and to be present, (2) the trial court did not abuse its discretion in allowing the State to amend the charge for theft of a firearm, (3) he received proper notice of the amended theft of a firearm charge, (4) the State properly elected specific acts to assure unanimous verdicts for theft of a firearm charge and both charges of unlawful possession of a firearm (counts V and VIII), (5) the trial court did not violate his time for trial under CrR 3.3, and (6) the trial court did not err in imposing consecutive sentences. As to Aho's SAG claims, we hold that (7) he received effective assistance of counsel, (8) the prosecutor did not engage in prosecutorial misconduct, and (9) there was sufficient evidence to support Aho's conviction of unlawful possession of a firearm (count VIII).

We affirm Aho's convictions and sentence for theft of a firearm and both counts of unlawful possession of a firearm.

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

Sutton, J.
SUTTON, J.

We concur:

Johanson, J.
JOHANSON, P.J.

Melnick, J.
MELNICK, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW DAVID AHO,

Appellant.

No. 43932-8-II

ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Matthew D. Aho moved this court to reconsider its October 25, 2016 unpublished opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Melnick, Sutton.

DATED this 6th day of December, 2016.

FOR THE COURT:

Sutton, J.
SUTTON, Judge

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